

1935

CANADA
LAW REPORTS

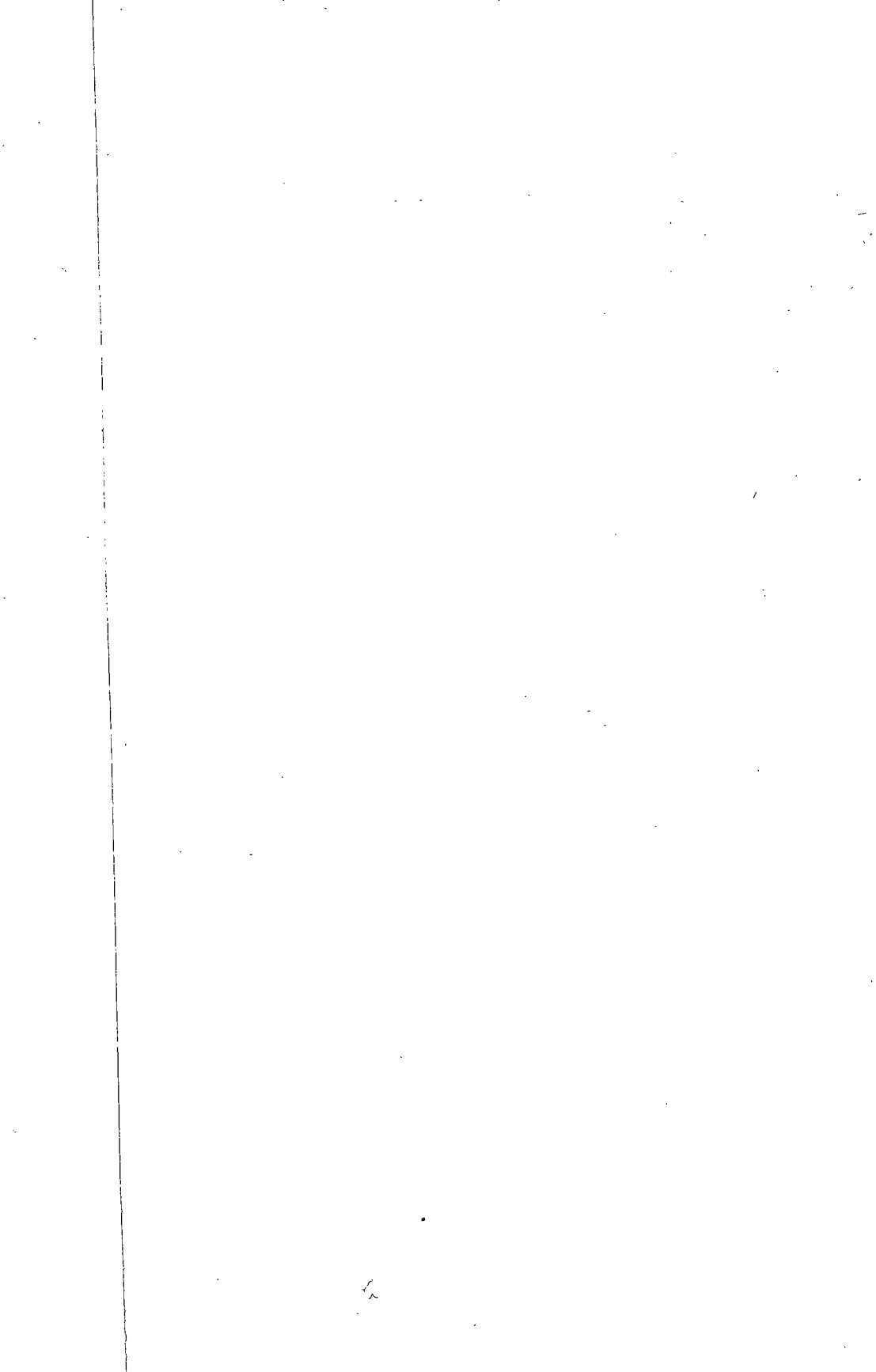
Exchequer Court of Canada

RALPH M. SPANKIE
OFFICIAL LAW REPORTER

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1936



JUDGES
OF THE
EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

THE HONOURABLE ALEXANDER K. MACLEAN
(Appointed 2nd November, 1923)

PUISNE JUDGE:

THE HONOURABLE EUGENE REAL ANGERS
(Appointed 1st February, 1932)

DISTRICT JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT
OF CANADA

- The Honourable ARCHER MARTIN, British Columbia Admiralty District—appointed
4th March, 1902.
- do CHARLES D. MACAULAY, Yukon Admiralty District—appointed 6th
January, 1916.
- do 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, Ontario Admiralty District—appointed 7th December,
1932.
- do DONALD MCKINNON, Prince Edward Island Admiralty District—appointed
20th July, 1935.
- do LEONARD PERCIVAL DEWOLFE TILLEY, New Brunswick Admiralty District—
appointed 14th August, 1935.

DEPUTY LOCAL JUDGE:

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

ATTORNEYS-GENERAL FOR THE DOMINION OF CANADA:

The Honourable HUGH GUTHRIE, K.C.,
and

The Honourable G. R. GEARY, K.C.,
and

The Honourable ERNEST LAPOINTE, K.C.,

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Honourable MAURICE DUPRÉ, K.C.

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2. *Waterous, David June v. Minister of National Revenue* (1931) Ex. C.R. 108. Appeal to Supreme Court of Canada dismissed. Leave to appeal to the Privy Council refused.

B. To the Supreme Court of Canada:

1. *Cords, William H. et al. v. Steelcraft Piston Ring Co. of Canada et al.* (1935) Ex. C.R. 38. Appeal dismissed.
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CASES
 DETERMINED BY THE
EXCHEQUER COURT OF CANADA
 AT FIRST INSTANCE

AND
 IN THE EXERCISE OF ITS APPELLATE
 JURISDICTION

BETWEEN:

SIEGEL KAHN COMPANY OF }
 CANADA LTD. } PETITIONER;
 AND
 PEGGY SAGE INC. RESPONDENT.

1934
 May 28.
 —
 June 29.
 —

Trade-Mark—Expunging—Calculated to deceive—Licensing of trade-mark.

The respondent, a United States corporation, in July, 1932, registered the trade-mark "Peggy Sage" in the United States, and in June, 1933, registered the same mark in Canada. The N.W. Corporation, a United States company, owns all the capital stock of the respondent as well as that of N.W. Limited, a Canadian corporation. In October, 1932, an agreement was entered into between N.W. Limited, the Canadian company, and the respondent, whereby the respondent appointed the company its exclusive manufacturer and selling agent for the manufacture and sale in Canada and Newfoundland of certain named products under the *Peggy Sage* name and trade-mark, for 20 years from November 1, 1932. The company by the agreement recognized that the respondent owned the trade-marks and good-will of the business associated with those marks and agreed not to claim any ownership of such trade-marks. The petitioner claims that by entering into the agreement, the respondent parted with its right to its trade-mark and the same thus became vitiated and that it had no longer the right to use or register the mark in Canada. The petitioner also claimed that the company manufactured and sold the goods in Canada for its own account and that they were not the goods of the respondent, thus misleading dealers and users. The petitioner asked that the trade-mark be expunged.

The Court found that *Peggy Sage* products are manufactured and sold in Canada by the company as the manufacturing and selling agent of the respondent, and not as the goods of the company; that the registered trade-mark is used on such goods to indicate they are the goods of the respondent and not those of the company; that the public is not deceived by the conduct of the respondent or of the company; that no retailer or user of the respondent's products is led to believe the goods marketed are those of any person or concern other than the respondent.

Held: That there is no confusion or deception in the use by the company of the trade-mark *Peggy Sage*.

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 INC.

2. That there was no licensing, by the respondent, of the registered trade-mark in gross, in fact or in law, to the Canadian company. *Bowden Wire Ltd. v. Bowden Brake Company Ltd.*, 30 R.P.C. 45, 580 and 31 R.P.C. 385, distinguished.

MOTION to have the trade-mark of the respondent expunged.

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

R. S. Smart, K.C., and *A. W. Langmuir, K.C.*, for the petitioner.

W. L. Scott, K.C., for the respondent.

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

THE PRESIDENT now, (June 29, 1934) delivered the following judgment:

There is pending in this Court an action between Peggy Sage Inc. and Northam-Warren Ltd. as plaintiffs, and Siegel, Kahn Company of Canada Ltd. as defendant, in which the plaintiffs seek to expunge from the registry the trade-mark "Peggy Royal" registered by the defendant, on the ground that it infringes the trade-mark "Peggy Sage," registered by the first named plaintiff. In that action certain officers of the plaintiff corporations were examined on discovery, when a certain agreement entered into between the two said plaintiffs was produced, and which agreement will be referred to with greater particularity, presently. The proceeding now to be considered is an originating notice of motion, supported by a petition intituled as above, in which the petitioner, Siegel, Kahn Company of Canada Ltd. asks for an order expunging the trade-mark "Peggy Sage," registered in Canada by Peggy Sage Inc. the respondent in this motion, and the grounds for the motion are based largely upon the terms of the agreement mentioned. The point for decision is an important one.

The petitioner, a body corporate duly incorporated under the laws of the Dominion of Canada, with its head office at the city of Toronto, Ontario, registered in June, 1932, in Canada, the trade-mark "Peggy Royal," to be applied to the sale of toilet articles and preparations. The respondent, Peggy Sage Inc. is a body corporate incorporated

under the laws of the State of New York, with its head office at the City of New York, U.S.A. In 1917, one Peggy Sage established in New York City the business of manufacturing and selling certain toilet articles, preparations for the treatment of the hair, and various manicure preparations, and this business she carried on until 1930, adopting her own name as a specific trade-mark to be applied to such goods, when the respondent company, Peggy Sage Inc., was incorporated to acquire that business together with the trade-mark "Peggy Sage," and "the right to use the name 'Peggy Sage' throughout the world, and the goodwill appertaining thereto and to said business." The trade-mark "Peggy Sage" was registered in the United States by the respondent, in July, 1932, and in Canada in June, 1933.

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It is disclosed in the material before me, that a United States corporation, known as Northam-Warren Corporation, with its head office in the City of New York, is the owner of all of the capital stock of Peggy Sage Inc., and that it promoted the incorporation of Peggy Sage Inc. for the purpose of acquiring the business of Peggy Sage and in order to preserve as far as possible the name of Peggy Sage in connection with the manufacture and sale of what is called Peggy Sage products; Northam-Warren Corporation, as a holding company, is similarly interested in various other business concerns. Northam-Warren Corporation is also the owner of all the capital stock of Northam-Warren Ltd., a Canadian corporation, one of the plaintiffs in the action already mentioned, and this corporation was created at the instance of Northam-Warren Corporation for the purpose, it is alleged, of handling the Canadian business of Peggy Sage Inc. In the result, the business of Peggy Sage Inc., and Northam-Warren Ltd., is controlled by Northam-Warren Corporation. We may now refer to the agreement which I have already mentioned and which is the foundation of the present motion.

In October, 1932, an agreement was entered into between Northam-Warren Ltd., the Canadian company, and Peggy Sage Inc. The agreement recites that Northam-Warren Ltd., referred to as Warren, is engaged in Canada in the manufacture of manicure and toilet preparations and the sale thereof throughout Canada; that Peggy Sage

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Inc., referred to as Sage, is the owner of certain trade-marks and formulae for Peggy Sage products; as well as being the owner of the goodwill of the business connected with such products; and that Peggy Sage Inc. desires the continued manufacture and sale of Peggy Sage products of a standard conforming to its present formulae and to arrange for the manufacture and sale of said Peggy Sage products in Canada. The agreement provides:

1. SAGE hereby appoints Warren its exclusive manufacturer and selling agent for the manufacture and sale in the Dominion of Canada only, of certain products which are named, under the PEGGY SAGE name and trade-mark for a period of twenty (20) years from November 1, 1932. (Then follows a list of the names of the Peggy Sage products).

2. Sage agrees to communicate its formulae.

3. Warren agrees to maintain the quality of the Peggy Sage products.

4. It is understood that this agreement shall cover the Dominion of Canada and Newfoundland only, and in this territory Warren is given the exclusive right for the manufacture and sale of SAGE products.

5. WARREN hereby recognizes that SAGE is the owner of all PEGGY SAGE trade-marks, trade-mark rights, trade names, brands, and the goodwill of the business associated with such marks, and WARREN hereby agrees not to claim any ownership of such trade-marks without the express written permission of SAGE.

6. This agreement is made in consideration of the payment of One Hundred (\$100) dollars by WARREN TO SAGE and for other valuable considerations, the receipt of which is hereby acknowledged, but it is understood that all expenses in connection with the manufacture of PEGGY SAGE products, including the examination and testing of such products by SAGE, shall be borne by the party WARREN.

7. This agreement shall supersede all other agreements between the parties and shall become effective and operative as of November 1, 1932.

For the purpose of convenience and clarity it will be convenient hereafter to refer to the parties to this agreement as Warren and Sage respectively, as in the agreement itself, and to Northam-Warren Corporation as the American Corporation.

Now, the gravamen of the contention put forward on behalf of the petitioner is that under the agreement, Sage has licensed Warren exclusively to manufacture and sell, Peggy Sage products, for Warren's account, and in that connection to use its trade-mark "Peggy Sage," while still being the registered owner thereof, and that in so doing it parted with its right to such trade-mark and the same thus became vitiated, and further, that Sage disqualified itself for applying for the registration in Canada of the trade-mark "Peggy Sage"—which application was subsequent to the date of the agreement—on the ground that after

the agreement was entered into it had no longer the right to use or register this mark in Canada because it had parted with any right in the same, for a time at least. It was also urged that while Sage remained the registered owner of the trade-mark in question, the goods to which in fact the mark was applied in Canada, were manufactured and sold by and for Warren's account, and were not the goods of Sage, thus leading dealers and users to believe that the goods made and sold by Warren were the goods of Sage. All this, it is claimed, vitiates the registered mark here in question, and that it should therefore be expunged.

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INC.
Maclean J.

Petitioner's counsel relies upon the English case of *Bowden Wire Ltd. v. Bowden Brake Co. Ltd.* (1) This case went to the Court of Appeal, and subsequently to the House of Lords (2). It becomes necessary to examine this case with some care so as to ascertain precisely what principle was ultimately therein decided, and as usual, it is of prime importance first to ascertain the actual facts disclosed in the case.

The facts, of the Bowden case, which are to be gathered from the reports of the several judgments rendered therein, are substantially as follows. Bowden Wire Ltd., the plaintiff company, were the proprietors of certain patents of invention for what was known as the "Bowden Wire" used in connection with the transmission of power for cycle and motor cycle brakes, and it carried on a manufacturing business, and also granted licences to numerous other persons or companies to manufacture on royalties. In 1901 it promoted the defendant company, the Brake Company, and by agreement between the two companies the plaintiff company agreed to sell, and the defendant company agreed to purchase, that portion of the plaintiff company's business which consisted of Bowden Cycle Brakes, with the goodwill thereof, and all trade-marks (if any) connected therewith. In August, 1901, the Wire Company licensed the Brake Company exclusively, except as to outstanding licences, to make and vend the said inventions but only as applied to cycle brakes. The agreement was that the Wire Company alone were to supply to the Brake Company the Bowden Wire, and the Brake

(1) (1913) 30 R.P.C. 45.

(2) (1913) 30 R.P.C. 580.
(1914) 31 R.P.C. 385.

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KAHN CO. OF
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Company were not to manufacture it, or obtain it from any other source. The Brake Company were to make other parts of the brake—to wit, the shoes, levers and fittings. The complete article was to be sold by the Brake Company only during the continuance of the patents. “Cycle” by a supplementary agreement made in April, 1903, was defined to mean cycles of any sort propelled wholly by the rider’s own physical power, and was not to include motor cycles or other vehicles propelled partially by the rider’s own physical force. The Wire Company accordingly, from this date, had the sole right during the licence, to supply patented brakes for motor cycles, whether or not these cycles were propelled partially by the rider, and the division was complete between motor cycle brakes supplied by the Wire Company, and pedal cycle brakes supplied by the Brake Company. Under the licence mentioned the Brake Company admittedly made and sold pedal cycle brakes from 1901 up to the date of the commencement of the litigation, which I think was 1912. In September, 1903, the Wire Company applied to register a trade-mark in Class 13 for brakes for velocipedes consisting of a picture of a coil of wire with the word “Bowden” enclosed therein, and the application was granted in January, 1904. In February the Wire Company granted a licence to the Brake Company, limited to the continuance of the letters patent, to use this trade-mark in connection with brakes for pedal cycles manufactured and sold by it in virtue of the licence to use the patents. It was conceded that, at least ever since that date, the pedal cycle brakes sold by the Brake Company had been stamped with the said trade-mark. Thus the Wire Company disposed of their Bowden pedal cycle brake business and the goodwill thereof, to the Brake Company, and licensed the latter to use the former’s own trade-mark during the existence of the licence. In January, 1904, the Wire Company made application for a registration of the very same mark in respect of a further description of the goods, also within Class 13. These goods are described as component parts, attachments, and accessories (other than brakes) of velocipedes, motor cycles, automobiles, and other road vehicles. * * * sold as separate articles. This application was granted on the 6th of May, 1904. Both companies con-

tinued to carry on business harmoniously for some years, the Wire Company's business being confined to brakes and other accessories for motor cycles, in respect of which they used the same mark. The directors of the two companies were, I think, the same until 1907 when the Brake Company acquired the business of another concern and a director of that concern then took his seat at the Board of the Brake Company. Subsequent to this date it would appear that attempts were made by the Brake Company to extend their user of the trade-mark beyond the terms of the licence of 1904. In March, 1912, the patents, and the licence to make pedal cycle brakes—whose term of duration synchronized with the duration of the patents—having by this time expired, the Brake Company, in advertising matter, clearly disclosed that they proposed to use the same mark which hitherto they had used only on pedal cycle brakes, on all sorts of accessories and fitments to motor cycles, and after the expiration of the letters patent, it would seem the Brake Company continued to use the mark not only on brakes for pedal cycles but also in respect of brakes for motor cycles which they then began to manufacture. Upon this the Wire Company raised an action to restrain the Brake Company from so using the mark. This was met by an application by the Brake Company to expunge both the first and the second registrations, on the ground that they were not distinctive and were calculated to deceive, and the two proceedings were conjoined. The learned trial Judge, on the motion to expunge, did not expunge, but altered the first registration by limiting it to brakes for road vehicles other than velocipedes, or cycles wholly propelled by the physical force of the rider, and he left the second registration as it stood. He held that the Brake Company had no general right to continue to use the trade-mark after the term of the licence had expired and no right to prevent the Wire Company from using the mark as they had used it since the registration; that the trade-mark was distinctive and not deceptive but on the ground of non-user, the entry of the first mark should be varied by restricting it to road vehicles other than pedal cycles. In the action he granted an injunction against the Brake Company using the mark, except in connection with pedal cycle brakes. On

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appeal, the Court of Appeal was of the opinion that both trade-marks should be removed from the register as not being distinctive and as being calculated to deceive. On appeal therefrom to the House of Lords, the appeal was dismissed, but as to the second trade-mark, on grounds not altogether those on which the Court of Appeal rested their judgment, namely, the similarity of the goods for which the marks were registered, but on the ground that the Wire Company obtained the second registration in the acknowledged capacity of exclusive owners of the mark under the first registration and which was merely an extension of their rights under the first, and the first mark being expunged it was held the second mark should also be expunged.

Turning now to the decision of the House of Lords, The Lord Chancellor, Earl Loreburn, agreeing with the opinion about to be expressed by Lord Dunedin, expressed his views in brief terms and as follows:

The appellants (Wire Company) have misconceived or at all events misused, the protection which the law gives to a trade-mark. The object of the law is to preserve for a trader the reputation he has made for himself, not to help him in disposing of that reputation as of itself a marketable commodity independent of his goodwill to some other trader. If that were allowed, the public would be misled, because they might buy something in the belief that it was the make of a man whose reputation they knew, whereas it was the make of someone else.

In this case the appellants parcelled out the right to use their trade-mark as if they had been dealing with a patent. The particulars of the distribution are not important. It is enough that they enabled or allowed people who were not registered for it, to use the trade mark on a substantial scale for their make of a description of goods dealt with habitually in the same class of business.

Lord Dunedin held that the Wire Company in licensing the Brake Company to use the first mark on all pedal cycle brakes made by it and which were stamped with such mark, was an attempt to assign a trade-mark in gross, a thing that could not be done, and this vitiated the Wire Company's trade-mark as registered. He stated that by registration the Wire Company affected to tell the public that goods in the class, and of the description specified, marked with the first registered mark, were their goods, that is to say, manufactured or at least put on the market by them, while in fact they were manufactured and put on the market by the Brake Company. His Lordship then proceeded to discuss the second registration upon the

hypothesis that the first was expunged, and he seems to have been of the opinion that the Wire Company got the second registration in the capacity of exclusive owners of the mark under the first registration, an assumption swept away by the fact that the first registration had become vitiated, but he did not decide that the second mark might not again be registered. I quote from Lord Dunedin's speech:—

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The view I take is that put before your Lordships by the Attorney-General, as representing the Registrar, and is really a corollary to what I have already said as to the matter of correcting the first registration. The Wire Company have got the second registration in the acknowledged capacity of exclusive owners of the mark under the first registration. It was the ordinary case of the proprietor of a mark extending the branches of his business. See per Lord Justice Cotton in *Edwards' Trade-Mark* (L.R. 30 C.D. at p. 475). But this is now known to be a false assumption. Therefore here again the Registrar ought to be in a position to reconsider the situation. The action of the Court of Appeal does not in any way preclude the Wire Company from applying de novo for a registration in terms of the second registration, and if in the whole circumstances of the case such a registration is in his judgment not calculated to mislead the public, and if the Brake Company do not successfully show that they have been in the field with articles falling within the description of goods in the second registration, and used in connection with the mark—a point as to which I think it much best to say nothing—then they will get the registration they wish. I say nothing as to the point on the evidence.

Lord Shaw observed that the entire law of trade-marks might be expressed in the one compendious phrase, that is to say, that a trade-mark is simply an intimation upon goods that they are the goods of the owner of the mark, and he dissented from the argument of counsel that the application for the second trade-mark put upon accessories as apart from the brakes themselves, was an application for a second trade-mark; it was, he said, an application for the same trade-mark which had already been convicted of confusing the public mind and applying it so as to extend the ambit and area of that confusion; and it was upon the ground of confusion that he held the second registration was invalid. He stated that while trade-marks may be split up and distinguishable in the skilled mind of one witness, yet the Registrar had to look to broader considerations and the interests of the public at large. Confusions and difficulties appeared to him to be especially probable if the splitting up—the different significations of ownership—were permitted in the same class of goods, made by the same class of makers, and disposed in the same class of

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warehouses and shops. He concluded his speech by saying:—

That this mark, confusing, troublesome, assigned contrary to law for a period of years, should stand on the Register I have no manner of doubt should not be allowed. It must go. That it should be preserved in existence for accessories, with regard to that—agreeing with the Registrar—I have also no doubt. A thing so confusing, productive of difficulty, and for years inconsistent with law, ought not to be allowed to stand upon the Register of Trade-Marks at least for any part of that class of goods.

The principle deducible from the decision of the House of Lords, applicable to the controversy here, is, in my opinion, that a licensing of a trade-mark in gross, as the phrase goes, and the use of that mark by an unregistered licensee, on goods manufactured and marketed by such licensee as his goods, and not those of the registered owner of the mark, vitiates the registered mark, in the Bowden case, the first registered mark. The pedal cycle brakes there were made and sold to the public by the Brake Company as its own goods. Further, that the use of the mark on pedal cycle brakes by the Brake Company, and the use of the same mark on related goods made and sold by the Wire Company, was calculated to confuse the public. The first mark registered in the name of the Wire Company was obviously bad, because either it of right should have been assigned to the Brake Company, under the agreement of sale of 1901, or, because it was licensed to be used by the Wire Company on goods made and sold by the Brake Company, and not on goods made or sold by the Wire Company, the registered owner of the mark. I have quoted from the speeches of their Lordships and from that will appear their respective reasons for holding the second mark invalid, and in effect they differ slightly. The second mark was ordered to be expunged but in reality that is not of importance here.

It will be appropriate now to enquire into the facts concerning the conduct and practice of Warren and Sage, in connection with the manufacture and distribution of Peggy Sage goods, in Canada. The date of the agreement between Warren and Sage, it will be remembered, was October, 1932. In September, 1933, Sage, under the Extra Provincial Licence Act of the Province of Quebec, was licensed to carry on its business in that province, and for a time at least it had an office in that province. The trade-

mark in question had been used by Sage on Peggy Sage products sold in Canada from the year 1920 down to the date of the incorporation of Warren, and since then, it is claimed, both in the United States and Canada. The sales manager and secretary of Warren, one Markley, gave evidence on discovery, and he stated that Warren acts as distributors for Peggy Sage products in Canada which would seem accurate as far as it goes, but it is presently also the manufacturer of such products. He stated that Warren has been putting on the market, in Canada, Peggy Sage products since 1930, but prior to that date Canadian requirements were supplied by Warren through importations from Sage in New York. From the evidence on discovery it would appear that, in January, 1931, Warren commenced the manufacture of Peggy Sage products, Sage shipping the raw material from New York to Warren, but now, since 1931 I should say, though it is not clear, most of the raw material is purchased in Canada. The cost accounting in connection with the production of Peggy Sage products in Canada is apparently carried on in New York by Sage; items of cost of labour, and invoices of raw material, are, in practice, forwarded by Warren to Sage or the American Corporation, in New York, and apparently paid for by either of them, although that is not quite clear. The cartons and bottles used in packing Peggy Sage goods are imported from New York from Sage, but it does not appear whether Warren or Sage pays for the same. In the case of shipments of goods from Warren to Canadian customers, the original invoice, which is in the name of Sage apparently, goes to the customer and a copy to Sage in New York. All remittances for goods sold by Warren to customers in Canada, are made payable to Sage—which is significant—and deposited to the credit of the account of Warren, or the American Corporation, it is not clear which, but I think the latter. Samples of all goods manufactured by Warren are forwarded to Sage, for inspection I assume. It would appear that a special allowance is made to Warren by Sage for advertising Peggy Sage products in Canada, that is, for co-operative advertising with particular customers who would themselves be advertising those goods. It seems that orders for Peggy Sage products are solicited by mail, by Sage, from New York.

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Further facts relating to the distribution, in Canada, of Peggy Sage products by Warren should be mentioned. Upon the motion there was produced the affidavit of R. F. Merkley, manager for both Warren and Sage, in Canada, and produced as an exhibit thereto was a printed inspection slip which is placed in each container of Peggy Sage products sold in Canada, since October, 1933. That inspection slip may usefully be reproduced:

Form 47 P.S.

Printed in Canada

INSPECTION SLIP

Packed by

Inspected by

No.

Every step in the making of my

PEGGY SAGE

Salon Manicure Preparations

is carefully supervised to maintain the high standard of excellence for which my Salon and Preparations are known.

In case of complaint, kindly return this slip to me for attention.

PEGGY SAGE

Incorporated

980 St. Antoine Street

Montreal,

Canada.

It appears that, in one instance at least, in the packing of Peggy Sage products by Warren, another printed inspection slip was used, produced as an exhibit in support of the petitioner's motion, and at the bottom of this inspection slip appears the printed words "Northam-Warren Limited, Montreal, P.Q., Canada." This inspection slip used in the packing of goods manufactured by Warren other than Peggy Sage goods, showing the name of Warren, etc., found in a container of Peggy Sage products purchased in the open market by the petitioner, is said to have been due to inadvertence and that by inadvertence the name of Warren was not cut off, as for a time was apparently the practice. That the inclusion of the name Warren on this inspection slip was due to inadvertence, seems to be satisfactorily established, in fact it was not contested, and

it may be accepted that this form of inspection slip was never used in the packing of Peggy Sage goods by Warren, in Canada, except by mistake. Therefore, in the packing of Peggy Sage goods in Canada by Warren, the inspection slip in full above set out, is always used, being placed within the container containing any particular Peggy Sage product. Then, any advertising leaflets, price lists, which are ordinarily placed in each container, bear the name of Peggy Sage Inc., and the name of Warren does not appear at all thereon. Exhibit F, being a bottle of liquid, has printed on the label attached thereto the following words: "Manicure Liquid Polish, Ex. Pale (below), Peggy Sage Inc. New York," and the carton containing the bottle has the words "Peggy Sage, New York," printed thereon.

Now, what conclusions are to be drawn from the facts which I have narrated in respect of the manufacture and sale of Peggy Sage products, and the use of the mark in question, in Canada, and also from the terms of the agreement? It seems to me that the facts establish that Peggy Sage products are manufactured and sold in Canada by Warren as the manufacturing and selling agent of Sage, and not as the goods of Warren; that the registered trademark is used on such goods to indicate the goods of Sage and not the goods of Warren; that there is no evidence of any confusion or deception on the part of the public flowing from the conduct of Warren or Sage; and that there is no evidence of any retailer or user of Peggy Sage products being led to believe that the goods marketed are those of any person or concern other than Sage. The manner of placing the Peggy Sage products on the market, as exemplified by the printed matter on the cartons, bottles, inspection slips, price lists, invoices and advertising matter, all negative the suggestion that the goods are marketed as the goods of Warren, or that there is any intent to represent the same to the public as the goods of any one else but that of Sage, or that the public regard them as anything but the goods of Sage. The fact that the petitioner herein only discovered upon the production of the agreement the suggestion that the Peggy Sage goods were those of Warren, though it was in much the same class of business, is rather a demonstration that, in fact, to retailers and users, and the public generally, the Peggy

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Sage goods, accompanied by the mark in question, are regarded as the goods of Sage, and that there is no ground for confusion or deception on the part of anybody. Then coming to the agreement itself. The agreement merely designates Warren as "its (Sage) exclusive manufacturer and selling agent for the manufacture and sale in the Dominion of Canada" of certain named products. That would seem plain. There is no assignment of the goodwill in Sage's business in Peggy Sage products; and in fact the agreement stipulates that there is not any such transfer, or of the mark associated with such goods. I think the agreement means that Sage contracted that Warren was to manufacture and distribute Peggy Sage products in Canada, for and on the account of Sage, and as its agent. And there cannot be any objection to this being done. The provisions of the agreement as to inspection, standard of goods, the examination and testing of such goods, by Sage, all seem consistent with that view. The clause in the agreement in reference to the expense of manufacturing Peggy Sage products being borne by Warren does not indicate to me that this was intended to mean that the goods so manufactured and sold by Warren, were to be considered the goods of Warren. The full facts as to the terms of manufacturing, and just how Warren was to be recompensed, are not, I think, fully disclosed, in fact there was no reason why in the circumstances they should be disclosed, if both parties saw fit not to do so. The consideration stated in the agreement is obviously nominal, and does not indicate the sale of the goodwill of the business of Sage to Warren, and what was meant by "other valuable considerations" is not disclosed. I think the true construction of the agreement is that Warren was to manufacture and distribute for Sage, the goods of Sage, and that the trade-mark of Sage was to be applied thereto to indicate the goods of Sage. In practice, that is what was done, and except in a very technical sense there would seem to be no reason for thinking otherwise. The whole agreement expresses a business arrangement for the conduct of Sage's business in Canada, by an agent, without transferring its registered mark or the goodwill in the business with which the mark was associated.

Nothing more, I think, can be usefully said, unless it be to refer briefly again to the Bowden case. The facts in the Bowden case, and in this, are quite dissimilar. I do not think any confusion or deception in the use of the trade-mark here arises. The mark is being used by one party only, and that, I think, is Sage, which was not the fact apparently in the Bowden case. In respect of the first registered mark in the Bowden case there was an assignment of the goodwill of the business with which the mark was associated, together with permission to thus use the mark; here there was no transfer or assignment of the goodwill of the business, or the mark; both were, I think, expressly retained by Sage, and in my view of the matter there was no licensing of the registered mark in gross, in fact or in law, to Warren. There can be no doubt, I think, that Sage had a goodwill in the Canadian business in Peggy Sage products. Any doubt as to the effect of the decision of the House of Lords in respect of the second registered mark in the Bowden case is not of importance here, and in fact here may be wholly disregarded. In the case under consideration the registered trade-mark applied to Peggy Sage goods was an intimation that the same were those of the registered owner of the mark, as I think in fact they were, whereas in the Bowden case, in respect of the first mark, the goods were clearly not those of the registered owner of the mark. The facts, and the arrangement reached between the parties in the Bowden case, differ altogether from the facts, and the manufacturing and selling arrangements, made between Warren and Sage.

The subject matter of this motion might probably have been more satisfactorily disposed of upon the trial of the action mentioned to expunge the trade-mark "Peggy Royal," and in that action the issue here is, at least for practical purposes, raised. However, the petitioner has seen fit to launch this motion in advance and independent of the trial of that action, and probably there is no serious objection to that. The motion fails, and the respondent is entitled to its costs of the same.

Judgment accordingly.

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BETWEEN:

CANADIAN GENERAL ELECTRIC } PLAINTIFF;
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AND

TORONTO ELECTRIC SUPPLY CO. } DEFENDANT.
LTD. }

Contempt of Court—Attachment—Limited Company—Penalty—Jurisdiction.

Held: That although the Court cannot order the issue of a writ of attachment against a limited company for contempt of court, it can, where it is satisfied that a contempt has been committed, inflict the appropriate punishment, namely, order the company to pay a fine.

APPLICATION for an order directing the issue of a writ of attachment against the defendant company for contempt in disobeying the terms of a judgment of this Court.

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

E. G. Gowling and H. K. Thompson for the plaintiff.

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

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

The PRESIDENT, now (November 15, 1934) delivered the following judgment:

This is a motion for an order that a writ of attachment be issued against the defendant company, its officers, directors or agents, for its contempt in disobeying the terms of a judgment of this Court rendered on the 30th day of September, 1932, restraining the defendant company, its officers, workmen, servants and agents, from infringing letters patent owned by the plaintiff, numbered 209,751 and 223,518, and which relate to Tipless Incandescent Lamps. This motion relates only to the last mentioned patent.

It would seem that any distinction that once prevailed between committal for contempt and attachment for contempt, is now abolished. Rule 193, of the Exchequer Court Rules, provides that a judgment requiring any person to abstain from doing anything, may be enforced either by writ of attachment or by committal.

In the case of a corporation, breach of an injunction cannot be done by the corporation itself, as the corporation can only act by its officers, agents or servants, but if the act is in fact done, it is no answer to say that, done, as it must be, by an officer or servant of the corporation, the corporation is not liable for it, even though it may have been done by the servant through carelessness, neglect, or even in dereliction of duty. See *Stancomb v. Trowbridge Urban Council* (1): Halsbury (Hailsham Edition) Vol. 7 p. 31. If an injunction is granted against a corporation which afterwards does or permits an act in breach of the injunction, in or upon its usual place of business, the onus rests, I think, upon the corporation to show any facts which would relieve it of the act of disobedience to the order of the Court, and particularly where such facts are or should be peculiarly within the knowledge of the officers or servants of the corporation. In such cases the burden of adducing evidence is shifted from the party on whom it would naturally fall, and where the truth of a party's allegation lies peculiarly within the knowledge of his opponent the burden of disproving it lies upon the latter. If the plaintiff here shows that there has been sold, in or upon the defendant's business premises, a patented article prohibited by an injunction, it makes out a prima facie case of breach of the injunction and throws the onus on the defendant to show that it was the licensee of the plaintiff, or that it bought the article from a person who was authorized by the plaintiff to manufacture the same.

It is correct, I think, to say that upon the hearing of an application of this nature, no new evidence can be received to vary the construction already given to the patent in question, nor can the defendant attack the validity of the injunction nor the correctness of its interpretation by the Court. The only point at issue, is the performance by the defendant of the alleged acts of breach of injunction.

With that brief statement of what I conceive to be the law I shall now state the facts of the case. In an undefended action between the parties hereto, the plaintiff recovered judgment against the defendant for infringement of letters patent no. 223,518, and as already stated, the defendant, its officers, servants and agents were restrained

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by an order of this Court from infringing the said letters patent. The defendant is engaged in the retail business of selling electric lamps, and electrical fixtures, on the ground floor of the building numbered 342-44 Queen Street West, in the City of Toronto. On September 4th, 1934, one Horner purchased in the ordinary way at the defendant's place of business, from one presumably in the employ of the defendant company, three 200 watt 120 volt incandescent electric lamps, contained in wrappers bearing the name "Supreme Incandescent Lamps," and at a cost of fifty cents each. The person actually selling those lamps to Horner is not identified. Two of the lamps so purchased were examined on behalf of the plaintiff by two persons experienced in such matters and in their several affidavits produced on the motion they swear that the lamps were made in accordance with the disclosures contained in patent no. 223,518; and I may here say that with that I agree. On the hearing of the motion the affidavit of one Bloodsworth was produced on behalf of the defendant, and therein the affiant is described as Office Manager of the Defendant company; the important paragraphs of that affidavit are the following:

3. That I have read the affidavit of Cyril F. Horner and I have made a careful search of the records and books of the Defendant Company and I can find no record that the Defendant Company ever purchased or sold lamps bearing the name of Supreme Incandescent Lamps.

4. In my capacity as Office Manager I have charge of the purchases made by the Defendant Company and of the stock on hand and the only lamps ever purchased by the Company so far as the books and records show and as far as I myself am aware of are licensed lamps known as Mazda, Solax and Sunbeam. These lamps are purchased from such firms as Superior Electric Company Limited, Regent Electric Company Limited and Community Electric which companies, I verily believe, are licensees or have the right to sell the said lamps. I am satisfied that no lamps have been kept in stock by the Company, except lamps so purchased from the said companies as aforesaid, and in particular I say the Defendant Company has never bought from any person any lamps marked "Supreme Incandescent Lamps" and has never had any lamps so marked in stock.

5. If the said Horner bought lamps bearing the name Supreme Incandescent Lamps on the premises of the Defendant Company, such purchase was not made from the Company, but must have been made from a person who had no authority from the Company and such lamps did not belong to the Company. If the said Horner had called the attention of the Company to such purchase at the time it was made, I could have caused investigations to be made and any misunderstanding cleared up, but under the circumstances I have not been able to ascertain anything concerning the said purchase and I have not been able to discover what employee, if any, made the alleged sale.

The material in this affidavit appearing to me to be evasive and generally unsatisfactory I directed that Bloodsworth be produced for cross-examination upon his affidavit, and the motion was adjourned to a subsequent date.

On the resumption of the hearing of the motion Bloodsworth was cross-examined by Mr. Gowling for the plaintiff, and the following facts were disclosed. Bloodsworth is but a part-time employee of the defendant, devoting only about one-third of a day on the average to the affairs of the defendant, and his duties relate only to book-keeping and accounting; he had nothing to do with the purchase or sale of the articles dealt in by the defendant. The defendant company seems to be a family corporation, or a so-called one man company. One Paul Kamin is president of the defendant company; a son and a daughter are employed about the business, the latter assisting Bloodsworth; two others, including Bloodsworth, are there employed. The building in which the defendant's business is conducted is apparently owned by the wife of the president of the defendant company, and the whole of the building is rented by her to that company. The three floors of the rented building are occupied more or less in the conduct of the defendant's business, but it is alleged that on the second floor there is space, three rooms, rented from the defendant by a concern known as the Premium Lamp Company, and the case now set up on behalf of the defendant is that it is this concern, and not the defendant company, that sells Supreme Incandescent Lamps in this building, and this lamp is apparently the only article sold by the Premium Lamp Company. One Edwards is said to be the manager of this concern. It is to be inferred from Bloodsworth's evidence that he had seen Edwards make sales of lamps, the offending lamps I assume, to customers, in the defendant's shop, presumably just as would any regular employee of the defendant company, but, he would suggest, they were not the lamps of the defendant; that the defendant's employees would sometimes assist in handling the goods of the Premium Lamp Company but just in what way is not quite clear; and Bloodsworth would not deny that the lamps in question were purchased in the shop of the defendant, in fact he would seem to concede this. And it would appear from Bloodsworth's evi-

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dence that Edwards spent most of his time in the defendant's shop. The evidence of Bloodsworth was of a negative character and I was left with the impression that he knew more than he disclosed concerning the matter in issue here. In order to reach the space said to be occupied by the Premium Lamp Company on the second floor it is necessary to pass through the shop of the defendant on the ground floor. An inconspicuous cardboard sign bearing the name of the "Premium Lamp Company" is affixed to one of two doors in the defendant's shop and fronting on the street, and this sign, as I understand it, does not indicate that the Premium Lamp Company's place of business is to be found on the second floor. The suggestion now is that in some way, Edwards of the Premium Lamp Company, must have sold the lamps in question to Horner on the first floor of the defendant's shop, but, it is said, they were the lamps of the Premium Lamp Company. No evidence of any kind was forthcoming from the president of the defendant company, or from any of its other officers or employees other than Bloodsworth its part-time employee, nor from any one representative of the Premium Lamp Company. It should not have been difficult for the defendant to have obtained from its sub-tenant, the Premium Lamp Company, or some of its employees, evidence if any were available, as to how the lamps in question came to be sold from its business premises, in order to lift the suspicion which at once occurs to anybody that the business of the Premium Lamp Company is only a cloak under cover of which the infringements were committed by the defendant. I should have mentioned the fact that the plaintiff caused to be paid to Paul Kamin, president of the defendant company, conduct money to attend upon the motion at Ottawa, but he did not attend; Kamin was not however served with a subpoena.

I think the plaintiff has made out that part of its case which deals with the breach of the injunction. The defendant has, in my opinion, failed to discharge the onus resting upon it to show that the lamps in question were not sold by its authorized servants. I do not think it would have been difficult for the defendant to exculpate itself of the charge of contempt, if it were genuinely possible to do so. The evidence of Bloodsworth alone, does not, in my

opinion, constitute an answer to the charge of a breach of the order of the Court, by the defendant. One cannot avoid the conviction that the introduction of the Premium Lamp Company into the picture is merely a cloak intended to hide contemplated infringements of the patent in question, by the defendant. But, in any event, the sale of the lamps in question from the defendant's shop, in the ordinary course of its retail business, and apparently by some one authorized to make such a sale, none of whom were heard from, has not been explained. If in the facts and circumstances disclosed here the plaintiff's motion would fail it is difficult to see just how the plaintiff could protect itself against infringements of its patent rights, or prevent continuing breaches of the outstanding injunction. Believing therefore that the Supreme Incandescent Lamps in question were sold by the defendant company, it follows that a breach of the injunction was committed by the defendant, and the plaintiff's motion must succeed.

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The plaintiff's counsel asks that a money penalty be imposed against the defendant for breach of the injunction. The Court cannot order a writ of attachment to issue against the defendant company and commit it to prison, for a reason which is obvious. A limited company cannot be committed for contempt of Court because it has no corporeal existence. See *Re Hooley* (1). But that does not prevent the Court from availing itself of the remedy which it possesses, as was held in *Rex v. J. G. Hammond & Co. Ltd.* (2). In that case it was held by Darling J., concurred in by Avory and Rowlett JJ., that the fact that a rule nisi called upon a limited company to shew cause why it should not be attached, did not prevent the Court from inflicting the appropriate punishment, namely, ordering the company to pay a fine and the costs of that application; this, I assume, on the principle that the greater includes the less. That is precisely this case. My conclusion is that there has been a breach of the order of the Court, which constitutes a contempt of Court, and that the Court has inherent jurisdiction to impose a fine against the defendant company therefor, and I do order that defendant company pay a fine of \$100—which in the circum-

(1) (1899) 79 L.T. 706.

(2) (1914) 2 K.B. 866.

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stances here I think is sufficient—and the costs of this motion, the fine and costs to be levied on the goods of the defendant company.

In a case of this kind I think costs ought to be given as between solicitor and client and I so direct. As was stated in the case of *Stancomb v. Trowbridge Urban Council*, already referred to, this is a case where the plaintiff should receive a complete indemnity so far as solicitor and client costs will give him one against the expenses of this proceeding.

Judgment accordingly.

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 Sep. 11.
 Sep. 13.

BETWEEN:
 A. C. COSSOR LIMITED..... APPELLANT;
 AND
 THE COMMISSIONER OF PATENTS RESPONDENT.

Patent Act—Patent Rules—Reference in one claim to a preceding claim in the same specification.

Held: That the inclusion by reference in one claim, of one or more preceding claims, in the specification accompanying an application for Letters Patent for an invention, is permissible under the Patent Act.

APPEAL by A. C. Cossor Limited from the refusal of the Commissioner of Patents to accept certain claims in the specification accompanying an application for Letters Patent for an invention relating to television systems.

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

O. M. Biggar, K.C., for the appellant.

E. G. Gowling for the respondent.

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

THE PRESIDENT, now (September 13, 1934) delivered the following judgment:

This is an appeal from the final rejection, by the Commissioner of Patents, of claims 8, 9, 11, 12, 13, and 15 to 20 inclusive, in the specification of one Bedford, accompanying an application for Letters Patent for an alleged invention relating to Television Systems; Bedford is the

assignor of A. C. Cossor Ltd., the appellant herein. The reason for rejecting such claims was that they did not meet the Patent Office requirement that a dependent claim refer only to one preceding claim by number, and which preceding claim must be complete in itself. The objection to these claims may be illustrated by saying that claim 8 refers to claim 7 which in turn refers to claim 1, the latter being a complete claim in itself. Apparently the Patent Office practice, which is not a statutory rule, requires that if the applicant, in a dependent claim, desires therein to refer to, or to incorporate, say two preceding claims, he must repeat the precise language of the next preceding claim and not refer to it by number, but he may refer to the first of such two preceding claims by its number, providing it is complete in itself. For example, in this particular case the contention is that claim 7 should have been incorporated textually into claim 8 because it was not complete in itself, but claim 1, which was complete in itself, might be referred to by number.

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The sole question involved in the appeal is whether the rejection of the claims in question, upon the ground mentioned, was authorized by the Patent Act, or the Patent Rules. No question arises here as to whether the claims might be rejected on other grounds, such as redundancy, insufficiency, ambiguity, want of subject matter, and objections of that character. The specification filed here, I might say, is in precisely the same form as that filed by the same patentee in the British Patent Office, and which latter specification was there allowed; apparently the practice in the British Patent Office is to permit, by numeral reference, the incorporation in one claim of alleged subject matter described and claimed in one or more preceding claims.

The provision of the Patent Act referable to the content of the claims of a specification is sec. 14 (c) which states: "The specification shall end with a claim or claims stating distinctly the things or combinations which the applicant regards as new and in which he claims an exclusive property and privilege." There is no specific Patent Rule bearing directly upon the subject matter of this controversy.

It was urged on behalf of the appellant that the rejected claims were in complete compliance with the Patent Act. The claims here number twenty-six, and it was urged by

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Mr. Biggar that the claims in question describe and claim as inventions, particular subordinate features or elements combined with the main invention, or, subordinate integers, and that it does not contravene the provisions of the Patent Act or any Patent Rules to incorporate in one claim one or more preceding claims by reference, as in this specification.

I do not think there was any authority for rejecting the claims in question upon the grounds taken by the Patent Office; I think these claims fully complied with the requirements of the statute. These claims were rejected not because they were improper or invalid on legal grounds, but because that in respect of form only, as explained, they were contrary to a practice prevailing in the Patent Office. I do not think the statute empowers the Patent Commissioner, or his Examiners, to reject a claim or claims upon the grounds stated. The practice of the Patent Office would seem to encourage prolixity in stating claims, which should always be discouraged; whereas the inclusion by reference in one claim, of one or more preceding claims, would, or should, tend toward brevity and clarity in stating the things or combinations in which an applicant claims an exclusive property or privilege; the latter practice would appear reasonable and logical, and if it have disadvantages they presently do not occur to me and there is no authority against such a practice; at any rate, if an applicant for a patent chose to state his claims in this manner, and to take the risk of so doing, I think he should be permitted to do so. It is my opinion therefore that the grounds stated for the rejection of the claims in question were not proper or valid grounds, and in my opinion the claims in question should be allowed. I am not deciding that these claims are valid, or that they may not be refused upon other grounds, for with that I am not presently concerned. The appeal is allowed.

Judgment accordingly.

BETWEEN:

FEDERAL DISTRICT COMMISSION,
 on the Information of the Attorney-
 General of Canada..... } PLAINTIFF;

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AND

HENRI DAGENAIS DEFENDANT.

Expropriation—Expropriation Act—Compensation money—Cost of plans and other expenditures included in award.

Plaintiff expropriated certain land in Ottawa, the property of defendant. Defendant claimed that the amount of compensation money to which he was entitled should include the cost of plans prepared for the erection of a building on the property, and other incidental expenditures made by him.

Held: That the owner of land compulsorily taken from him is entitled to receive as compensation the value of the land to him, not to the expropriating party.

2. That the price for which the land would sell in the open market is not necessarily the proper test.
3. That the Court must consider all the circumstances and ascertain what sum of money will place the party dispossessed in a position as nearly similar as possible to that which he was in before the land was expropriated, since the measure of compensation should be the loss which the owner has sustained in consequence of his land being taken from him.
4. That *compensation money* in s. 23 of the Expropriation Act, R.S.C. 1927, c. 64 should include any loss or damage suffered by the owner, and which was incidental to, or flowed from, the taking of land.
5. That the cost of the plans, and the other expenditures claimed, either made the lands that much more valuable to the defendant, or, they constitute a loss or damage arising directly from the taking of the land and for which compensation should be allowed.

INFORMATION by the Crown to have certain property expropriated, valued by the Court.

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

H. P. Hill, K.C. for plaintiff.

T. A. Beament, K.C. and *G. E. Beament* for defendant.

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

The PRESIDENT, now (January 22, 1935) delivered the following judgment:

This information relates to a parcel of vacant land expropriated, in May, 1934, by the Attorney-General of Canada, on behalf of the plaintiff, the Federal District Com-

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mission—hereafter to be referred to as the “Commission” —under the provisions of the Federal District Commission Act, 1927, and amendments thereto. The Commission, *inter alia*, is empowered to acquire by purchase, or by expropriation, lands in the City of Ottawa, for the purpose of public parks or squares, avenues, drives, etc., and the Expropriation Act, Chap. 64 R.S.C. 1927, is made applicable in the case of expropriation proceedings instituted by or on behalf of the Commission. The defendant is a building contractor, and, I understand, sometimes erects buildings on his own account.

The lands in question here are located in what is known as the New Edinburgh section of the City of Ottawa, on the north side of the Rideau river; they lie between the south side of Stanley avenue and the Rideau river, having a frontage of 61½ feet on Stanley avenue, and a depth back towards the Rideau river of 98 feet on one side, and 114 feet on the other side; on either side are relatively small parcels of land owned by the Commission, unimproved public park lands, and which, I understand, form part of a public improvement scheme not yet fully developed. The lands are therefore bounded on the front by Stanley avenue, on the rear by the Rideau river, and on either side by public park lands. The lands contain altogether 6,619 square feet.

By some error, the full width of the defendant's property between Stanley avenue and the Rideau river was not expropriated, there being left a fringe of land, nine inches wide, on either side of the expropriated lands; those fringes of land would of course be utterly valueless and useless to the defendant, and in his statement of defence he so pleads and claims damages on that account. It was, however, agreed between counsel that in determining the compensation payable to the defendant I should take into consideration the whole of the defendant's property, just as if it had been entirely included in the expropriation; so therefore whatever compensation I decide to allow the defendant, it will be understood as comprising the value of the unexpropriated fringes of land, and the defendant must convey to the Commission those remnants of his property. That would seem to be a sensible and satisfactory method of disposing of an otherwise awkward situation.

I am satisfied, as was claimed, that the defendant purchased the lands in question for the purpose, and with the intention of erecting thereon, sometime, a small apartment house; and he did not actually take over the lands until he had applied for and obtained a permit from the City of Ottawa authorities to erect thereon such a structure, and his application was accompanied by plans of the proposed structure; these plans were later discarded. Shortly before the expropriation, in May, 1934, the defendant had definitely decided to proceed with the construction of his proposed apartment house, which was to cost about \$40,000; earlier, in March, his architect, Morin, prepared the plans for such a building, at a cost to the defendant of \$1,000, this fee being two and one-half per cent of \$40,000. The defendant's construction plans had so far advanced that he had a building survey made of the land, and he had staked the bounds for the excavation of the foundation of the proposed building, and this at a cost of \$43; he had even approached one officer of the Commission to ascertain if it desired to purchase the excavated material, which, I understand, it frequently did; he had moved on the property a working office, and a lot of material, including a cement mixer, was made ready to move on the property, all preliminary to the commencement of construction, and in this connection he had spent about \$100. There can be no doubt, I think, but that the defendant, in good faith, had prepared the plans of his proposed apartment building, and had taken the other steps which I have mentioned, with the intention of proceeding actively to construction, when the lands were taken from him. He now claims that he should be compensated for the cost of the Morin plans, and for the two other items of expenditure which I have just mentioned, in addition to the value of the lands. It was contended on behalf of the Commission that the plans could be utilized in the construction of some similar building, somewhere, some time, and I may at once dispose of that point. There is no substance whatever, in my opinion, in such a contention. It cannot be reasonably contended that it was incumbent upon the defendant to proceed to construction elsewhere so that he might utilize his building plans and thus save or minimize his loss, or that he should go

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searching for a site that would suit these plans. Building plans are usually prepared for a selected site; the plans are made for the site and not the site for the plans, and the site itself is usually selected for business reasons. If sometime in the future it should transpire that the plans can be utilized, that would be a stroke of good fortune for the defendant, but with that we are not presently concerned. Whether the cost of the plans is recoverable as compensation is one of the questions to be determined, and it is not entirely free of difficulty.

Before proceeding to a consideration of the evidence regarding the value of the lands taken, it might be convenient here to state that some evidence was given regarding the defendant's proposed apartment house, to show, as I understood Mr. Beament, that the project was a sound one financially. It was not contended that the estimated profits of the project should be capitalized, or that damages for loss of estimated profits should be given, or anything of that sort, but it was contended that this was an element for consideration in calculating the value of the land to the defendant, and this would be in conformity with the decision of the Privy Council in the case of *Pastoral Finance Association v. The Minister*, (1). I might add that the defendant's building was to contain thirteen small apartments, and the total cost of the lands and building together with other necessary expenses, was estimated at \$51,000. The revenue from rentals was estimated at \$9,120 annually, and the annual expenses at \$3,910, leaving a net annual revenue of \$5,210, which, it was alleged, would yield a net return of over ten per cent on the investment of \$51,000. It will not be necessary or profitable to pursue further this phase of the case.

There is another matter which perhaps I should mention briefly. The defendant purchased the property in question from one Margaret Grant for the sum of \$3,000, in April, 1932; and it was contended that the vendor was obliged to sell the land below its real market value because, at the time, her husband was in financial straits, and to assist him it was necessary to realize upon these lands. It is quite true that the circumstances of the vendor's husband were then such that he urgently required

(1) (1914) A.C. 1083.

financial assistance, and it is probably true that the sale of this property was accelerated by this fact. However, the cost of lands does not determine their value, but may be a relevant consideration in the assessment of compensation; and so, too, may be money bona fide spent in improvements by the owner. *Streatham and General Estates Co. Ltd. v. Public Works Commissioners* (1). I might also here add that an option of purchase was given by the owner of these lands, in 1931, for \$6,000, but the option was never exercised.

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Coming now to a consideration of the value of the lands taken, and quite apart from any question concerning the building plans. The defendant claims the lands taken had a special value to him because of their special suitability as a site for an apartment house; it was claimed that this would be the best and most profitable use to which these lands could be put. Mr. Ross, an experienced real estate broker, gave evidence on behalf of the defendant; in his direct examination he arbitrarily valued the lands at \$4,900, being about \$80 per foot frontage on Stanley avenue, or 75 cents per square foot; later in his evidence he placed the value of the lands for private residential purposes at anywhere from \$3,250 to \$3,750, and he gave an additional value to the lands, ranging from twenty-five to thirty-five per cent, on account of their special suitability as a site for an apartment house. Another expert witness called on behalf of the defendant concurred generally in Mr. Ross's opinion as to the value of the lands. The Commission tendered \$3,690 as being sufficient compensation. The amount of this tender was reached on the advice of Mr. Fitzsimmons, another experienced real estate broker, called as a witness on behalf of the Commission, by treating the lands as private residential property and valuing the same at \$40 per foot frontage on Stanley avenue, amounting to \$2,460, to which he added fifty per cent on account of the special suitability of the lands as a site for an apartment house, making a total of \$3,690, or about 55 cents per square foot. So the expert witnesses on both sides appear to agree that on account of the suitability of the lands as an apartment house site, the same had some enhanced value to the defendant, over and above its mar-

(1) (1888) 52 J.P. 615.

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ket value for ordinary residential purposes. Mr. Fitzsimmons thought the property had advantages and disadvantages as an apartment house site, the latter being its exposure to winds, lack of shade, and generally the surroundings, the advantages being the uninterrupted light and air, and its future freedom from encroachment by other building construction. Mr. Ross thought the site a unique one for an apartment house, on account of its location beside the Rideau river, because it afforded an excellent outlook in every direction and which could never be obstructed by other buildings, and because of its proximity to two Dominion Government office buildings from which might be drawn tenants for the proposed apartment house.

Both Mr. Ross and Mr. Fitzsimmons left me with the impression that they found some difficulty in attaching positive values to the lands in question, though that perhaps might not appear from a reading of their evidence. In point of fact there was little in the way of prior sales in this vicinity to serve as a reliable guide to the value of the lands taken, particularly for the use to which the defendant was about to put it. The sale to Blackburn of a lot of land almost immediately across from the defendant's lands, on Stanley avenue, in 1931, for \$8,000, should be a fairly reliable indication of the trend of land values in that section of Ottawa. This property, a corner property, with an old wooden building upon it, but which did not enter into the selling price, had a frontage of 138 feet on Stanley avenue, and 115 feet on Charles street, comprising altogether 15,870 square feet. The price paid for this property would amount to \$58 per foot frontage on Stanley avenue or about 50 cents per square foot. The defendant paid for his lands at the rate of \$50 per foot frontage on Stanley avenue. Mr. Ross was of the opinion that the defendant's property was worth fifty per cent more, per square foot, than the same area in the Blackburn lot. Then the sale of certain vacant land to the Commission in 1930, by Craig et al, was mentioned. This land, located on Lorne avenue, about 800 feet east of the defendant's lands, had a total street frontage of 300 feet, and a depth of 99 feet, and the selling price was at the rate of \$25 per foot frontage. As I understand it, Commission park lands are on two sides of this property, a

spur line of the Canadian Pacific Railway on another side, and on the remaining side a row of unattractive buildings, which Mr. Ross described as "cheap." Mr. Ross was of the opinion that the defendant's lands were worth three times more than the Craig lands; other sales were referred to, but they are not helpful at all, and none could be more helpful than the two I have mentioned.

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We may now direct our attention to a brief discussion of the principles to be applied in ascertaining the compensation to be paid owners who have been dispossessed of their properties. It is a well settled principle that the owner of land compulsorily taken is entitled to receive as compensation the value of the land to him, not to the expropriating party, and the price for which it would sell in the open market is not necessarily the proper test. It might be well to refer briefly to a few of the well known authorities on this point. In *Stebbing v. The Metropolitan Board of Works*, (1) Cockburn C.J. said:—

When Parliament gives these compulsory powers, and provides that compensation shall be paid to a person from whom property is taken, for the loss which he sustains by reason of his property being taken, the sense of the matter is that he shall be compensated to the extent of his loss, and that his loss shall be tested by what was the value of the thing to him, not by what will be the value when the Board acquires it.

In *Eagle v. The Charing Cross Railway Company*, (2), Bovil C.J. said:

It cannot be said, to my mind, consistently with justice, that a man's damage is to be ascertained with reference to what he could sell his property for. He may say, 'I do not desire to part with it.'

In the well known case of *Pastoral Finance Association Ltd. v. The Minister* (3), Lord Moulton, who delivered the judgment of the Judicial Committee of the Privy Council, said:

The appellants were clearly entitled to receive compensation based on the value of the land to them. This proposition could not be contested. The land was their property and, on being dispossessed of it, the appellants were entitled to receive as compensation the value of the land to them, whatever that might be.

In the case of *Bailey v. Isle of Thanet Light Railways* (4), Channel J., in giving judgment stated:

I think our judgment must be for the claimants. The intention of the parties to use the land for a particular purpose may properly be taken into account. Compensation must always be assessed on the basis

(1) (1870) 40 L.J.Q.B. 1, 5.

(3) (1914) A.C. p. 1087.

(2) (1867) 36 L.J.C.P. 297, 303.

(4) (1900) 1 Q.B. 722.

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of value of the premises to the particular claimant. The matter may be tested in this way. Suppose the land taken consisted of trade premises to which a goodwill was attached. The question for the tribunal which had to assess the compensation would be, not what was the market value of the premises, but what was their value to the trader, including the goodwill.

The same principle has been affirmed in Canadian courts, on many occasions. That principle is therefore to be applied in this case, and it is the value of the lands to the defendant that must be considered, not its value to the Commission, nor necessarily the amount it would fetch in the market if the owner were desirous of selling it. In all such cases, if compensation is to be a reality, the Court must take into consideration all the circumstances and ascertain what sum of money will place the dispossessed man in a position as nearly similar as possible to that which he was in before. He should not be made poorer by the forcible taking of his property.

I come now to consider the matter of the cost of the building plans, and the other two small items of expenditure incurred by the defendant and which I have already mentioned and the question is whether the same should be considered in estimating the value of the lands taken, to the defendant, and whether they should enter into the amount of compensation to be allowed. It was contended by Mr. Hill that no compensation should be allowed on this account because such expenditures did not represent an estate or interest in the lands taken. In effect he urged that the only two things which are within the ambit and contemplation of the statute are the value of the lands taken, and such damages as may arise from other lands being injuriously affected by the construction of any public work. The point is an important one and requires consideration. If the provisions of the Expropriation Act are to be construed in the sense suggested by Mr. Hill, then I fear some of our courts in this country have been astray in their method of arriving at the amount of compensation payable in such cases, and the same would be true of other jurisdictions where the legislative authorization for the compulsory taking of lands are expressed in somewhat the same terms as here. Compensation has been allowed for loss of trade, loss of goodwill, disturbance of business, removal expenses, deterioration of movable personal property, the value of machinery in use upon ex-

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propriated premises but rendered unsuitable for use elsewhere, expenses incurred in seeking a new location for business, storage of furniture, and the cost of machinery purchased for a going concern upon lands taken but not yet installed; many other such claims have been allowed as compensation, but those mentioned will be sufficiently illustrative. The principle seemed to be followed in such case was that the displaced owner should be left as nearly as was possible in the same position financially as he was prior to the taking, provided that the damage, loss or expense, for which compensation was claimed, was directly attributable to the taking of the lands. This would seem to be founded on common sense and reason. The measure of compensation should, in justice, be the loss which the owner has sustained in consequence of his lands being taken, because it could never have been contemplated that the community should benefit at the expense of a few of its members. Compensation should be proportionate to the loss which the owner has sustained, an equivalent of what is taken from him or that which he has given up. The Expropriation Act, section 23, speaks of "the compensation money . . . adjudged for any land or property acquired or taken"; the "compensation money" does not appear to be limited by the statute to the "value" of the lands taken, in fact, I think, the word "value" is not once mentioned in the Act. The "compensation money," it seems to me, is to be the equivalent of the loss which the owner has suffered for any land "taken," and is not to be ascertained only by considering the "value" of the land. I think, it must have been within the contemplation of the Act, that "compensation money" should include any loss or damage suffered by the owner, and which was incidental to, or flowed from, the taking of lands. The word "land" is defined in the Act as including ". . . easements, servitudes and damages, and all other things done in pursuance of this Act for which compensation is to be paid by His Majesty under this Act." The true construction of the word "damages" in this interpretation clause is perhaps difficult to determine, and in the absence of argument by counsel upon the point, I hesitate to express any opinion as to its intended meaning.

I cannot see why any expenditure incurred by the defendant, in good faith, in preparing building plans, or in

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connection with any other step relating to the construction of his proposed building, should not be considered in ascertaining the compensation to be awarded him. The expenditures made here were lost because of the taking of the lands. I do not think it is going too far to say that the defendant has in effect, given up to the Commission compulsorily his building plans, just as much as he has given up his lands. By the taking of the defendant's lands, his plans have been rendered valueless, otherwise their cost would have entered into the capital structure of the land and the apartment house as a going concern and would have been gradually liquidated by the net rentals earned by the apartment house as a going business concern. The preparation of the plans was the first step in the construction of the proposed building, after the purchase of the lands. The cost of the plans, and the other small expenditures, either made the lands that much more valuable to the defendant, or, they constitute a loss or damage arising directly from the taking of the lands and for which compensation should be allowed. If the proposed building had been about one-third completed, I cannot think it would be contended that the defendant should be denied compensation for the cost of the plans, for the cost of any work done, and probably a reasonable profit in addition. The degree of the completion of the structure should not affect the principle if a commencement has been made; the preparation of the building plans, and the doing of the other things I have mentioned was the commencement of the construction here: I perhaps should add that as the defendant was to be his own builder there was no necessity for a building contract being entered into.

There is a New South Wales case, which, for more than one reason, is of some interest here. The case is *Scottish Halls Ltd. v. The Minister* (1). In this case, land was taken on which the plaintiff was about to erect a building, after plans had been prepared and a tender accepted. Before soliciting tenders, a quantity surveyor was employed for estimating the quantities of materials required for the building, which would serve as a guide to those wishing to tender for the erection of the building. The

(1) (1915) 15 New South Wales State Reports 81.

custom there was that a building or quantity surveyor was employed by the architect, and paid by the successful tenderer, the builder, out of the first moneys paid him by the owner. The plaintiff claimed, *inter alia*, as compensation, losses and expenses in respect of the demolition of the old building, architect's fees, surveyor's fees, and legal expenses, all of which it was conceded the plaintiff was entitled to receive, except the one item of £284, being the fees of the quantity surveyor. That the fees of the architect who prepared the plans of the proposed building was a proper claim for compensation was not apparently contested. It was held by the Supreme Court of New South Wales, an appellate Court of three, in an action for compensation, that the plaintiff was liable to the quantity surveyor for his fee and entitled to recover it from the defendant, notwithstanding that the expropriation rendered the customary method of payment impossible. The claim of the quantity surveyor was allowed in the first instance by a jury, from which there was an appeal.

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I have examined the Public Works Act of New South Wales and I find nothing in it which, for our purposes here, distinguishes it from our own Expropriation Act; the former Act employs the words "the value of the land to be purchased or taken." It is to be kept in mind that it was contended that because the quantity surveyor was employed by the owner's architect; there was no liability on the part of the owner; that point did not arise in the case of the architect's fees because he was employed by the owner. With this explanation of the facts of the case I may now quote from the judgment of the Court because it expresses a view I have already stated, that is, that the lands of the defendant in the case under discussion were more valuable in his hands by reason of the fact that he had made certain expenditures and incurred certain liabilities in connection with the construction of the building. The Chief Justice, who delivered the judgment of the court, said:

But the question for us is whether on the evidence in this case it was not open to the jury to find that as the building surveyor had been employed by the plaintiff's agent to do certain work, and had done that work before the stoppage of the building occurred, there was an implied condition in the bargain between them that the work done should be paid for whether the particular method of payment they had contemplated came about or not. I think it was so open, and therefore,

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if any of these items were recoverable by the plaintiffs in the present action that item was rightly included. There was no contest about the recoverability of the other items, and this was apparently on the principle that an owner who has entered into contracts and incurred expense for the purpose of building on his land has made it more valuable in his hands than it would otherwise have been. If, for instance, a certain amount of work has been done by the preparation of foundations, or the commencement of the building, the land is more valuable in his hands than if it were a mere vacant site, and other necessary expenses incurred in regard to his building contract have the same effect. That seems a very reasonable view, and as that was the principle on which the jury were invited to consider these items in general exception only being taken in Dunwoodie's case on the ground that no liability for his payment rested upon the plaintiffs, I think the verdict ought not to be disturbed on that ground.

I approach now the question of the amount of compensation which should be awarded the defendant. It is always difficult to ascertain the precise equivalent in money for land; it is a matter of bargaining. It has been truly said that land is usually cheap or dear, according to whether the seller is more anxious to sell or the buyer to purchase. In this case, I think it is probable that the lands in question were acquired by the defendant at a price below their normal market value for ordinary residential purposes, and I cannot but think that Mr. Fitzsimmons depressed unduly this value, that is, if I am to have regard to the evidence regarding the sale to Blackburn; due regard must be paid to the Blackburn transaction in approximating the normal value of vacant land in that vicinity. I am inclined to agree somewhat with the statement of Mr. Fitzsimmons that the lands had, as an apartment house site, advantages and disadvantages, but he gave them an added value of fifty per cent for such a use, over their value for other uses. I am not disposed to think the lands possessed all the superior advantages, that Mr. Ross attributed to them, as an apartment house site, still, for such a purpose, they doubtless possessed some attractive features; neither can I agree with the opinion of Mr. Ross that the lands taken, were so much more valuable—fifty per cent—than the Blackburn lot, as an apartment house site. But it is conceded that, as an apartment house site, the lands taken were more valuable, by anywhere from twenty-five to fifty per cent, than for purely residential purposes. Then the admitted suitability of the lands in question for the business to which they were to be devoted affected the value of the lands to the defendant, that is to say, the defendant is en-

titled to have that taken into consideration as far as it may fairly be said to have increased the value of the lands to him. That was one of the principles laid down in *Pastoral Finance Association v. The Minister*, supra; in the practical application of that principle much of course depends upon the facts and circumstances of the case.

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Taking into consideration all the facts disclosed in the evidence, all the elements of damage that ought to be taken into consideration including the forcible taking, and the principles of law to be applied in the case, I have concluded that a sum of \$5,850 will represent a just and sufficient compensation to the defendant. I perhaps should make it clear that I have included in this amount the sum of \$1,143, the amount of the three items of expenditure already mentioned, because, either the lands were that much more valuable in the hands of the defendant by reason of the expenditures made and liabilities incurred by him, in connection with the commencement of the construction of his apartment house, or, he would be entitled to be compensated in this amount as a loss or damage directly caused by the taking of his lands; I do not think it matters how this amount enters into the calculation of the compensation allowed. It perhaps should be mentioned that the defendant incurred some legal expenses in obtaining one of the two building permits, as I understand it, from the City of Ottawa. I have not been able to see my way clear to allow this item; I think it must be treated as an expense which the defendant himself must bear.

There will therefore be the judgment usual in expropriation cases. The defendant will be entitled to interest on the amount of compensation fixed from the date of the expropriation, together with his costs. I reserve until the settlement of the minutes the precise form the judgment should take in reference to the unexpropriated portions of the defendant's lands.

Judgment accordingly.

1934 BETWEEN:

Sept. 25 & 26
Oct. 1
Dec. 15

WILLIAM H. CORDS AND CORDS }
PISTON RING CO. OF CANADA }
LTD. }
AND

PLAINTIFFS;

STEELCRAFT PISTON RING CO. OF }
CANADA, MAX ESAR, doing busi- }
ness under the name of MONTREAL }
AUTO PARTS, and the said MONT- }
REAL AUTO PARTS. }

DEFENDANTS.

Patents—Subject matter—Anticipation—Proof—Prior user—Invention.

Held: That evidence of prior user in support of a plea of anticipation, depending upon the recollection of witnesses over a number of years, and implying fine distinctions or close diversities between two things, should be considered with great caution and should be disregarded unless established beyond a reasonable doubt, before it is accepted to defeat a patent under which a patented article is made, and particularly when it has gone into substantial use by the public.

- 2. That in order to establish that a patent has been anticipated, any information as to the alleged invention given by any prior publication must, for the purpose of practical utility, be equal to that given by the subsequent patent. The latter invention must be described in the earlier publication that is held to anticipate it, in order to sustain the defence of anticipation.
- 3. That where the question is solely one of prior publication it is not enough to prove that an apparatus described in an earlier specification, could have been used to produce this or that result. It must also be shown that the specifications contain clear and unmistakable directions so to use it. It must be shown that the public have been so presented with the invention, that it is out of the power of any subsequent person to claim the invention as his own. *Canadian General Electric Co. Ltd. v. Fada Radio Ltd.* (No. 7026) (1927) Ex. C.R. 134 followed.

ACTION by plaintiffs to restrain defendants from infringing a certain patent granted the plaintiff, William H. Cords, the plaintiff Cords Piston Ring Co. of Canada, Ltd. being the exclusive licensee in Canada under this patent. The patent in suit related to piston rings adapted particularly, though not exclusively, to motor car engines. The Court found that the patent in suit was not to be found in the prior art, was not anticipated and disclosed invention.

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

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

H. Gerin Lajoie, K.C. and Louis Diner, K.C. for defendants.

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

The PRESIDENT, now (December 15, 1934), delivered the following judgment:

This is an action for infringement of Canadian patent no. 340,505 granted to the plaintiff William H. Cords, of San Diego, California, U.S.A. It issued in April, 1934, upon an application made in March, 1933. The plaintiff, Cords Piston Ring Company of Canada Ltd., is the exclusive licensee in Canada under this patent. The alleged invention relates to packing rings and to methods of making them and applying them to reciprocating plungers and the like for sealing purposes. Cords piston rings are particularly, though not exclusively, adapted to motor car engines, and it is in connection with such engines that the use of his piston rings has developed.

The defendants carry on business at Montreal, and, *inter alia*, they sell and distribute piston rings which are manufactured in Detroit, U.S.A., by a concern known as Steelcraft Piston Rings Sales Company Inc., hereafter to be referred to as Steelcraft; these piston rings are imported into Canada, I think, only by the first named defendant, Steelcraft Piston Ring Company of Canada Ltd., and it is these rings that are said to infringe the piston rings described in the patent to Cords. The president of Steelcraft is one Carroll, who, prior to the organization of Steelcraft, was the selling agent for Cords rings, in Detroit.

The piston of an internal combustion engine moves in a cylinder and therefore the contact between the sides of the piston and the walls of the cylinder is necessarily a sliding one. Various methods have been adopted for closing any possible interval between the walls of the cylinder and the sides of the piston. The conventional practice was to construct the pistons with three grooves—there might be more, or less—around the exterior of the piston and into these grooves would be placed rings intended to have the effect of closing the interval between the sides of the piston and the cylinder walls, and such rings are called piston

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rings. The early piston rings were made of cast iron, later of steel, and were slipped over the head of the piston into the grooves; the rings would be split at some point. The top ring was usually referred to as the firing ring because it was the ring in an internal combustion engine that was exposed to the heat of the explosive material, and it was usually made of cast iron and of the full width of the groove. Next below the firing ring was what is known as a sealing or compression ring and differed from the firing ring generally in diameter, and sometimes in other respects; I understand it was usually slightly resilient, and would be susceptible of compression when in contact with the walls of the cylinder. The third and lowest ring, also slightly resilient, was called the oil ring, the same in construction as the second ring, except, as I understand it, there would be incorporated therein channels or means for the control or distribution of oil. The conventional practice, in the case of motor car engines, was to fill each groove with one ring, but in the case of other engines, it was frequently the practice, I understand, to assemble in each groove except the top one, more than one ring, according to the width of the groove. These piston rings would naturally suffer a great deal of wear themselves, and they would also wear the cylinder walls, and gradually the cylinder would acquire what is called a "taper," which would mean an extension of the diameter of the cylinder particularly at the bottom, and the correction of this condition required a re-boring of the cylinder so as to make the diameter the same throughout, and re-boring the cylinder, with the desired accuracy, was a difficult and expensive operation. The consequence of the tapering of the cylinder was that the oil would get past the piston into the firing chamber, resulting in a waste of oil or gas, the accumulation of carbon, and a loss of efficiency in the working of the engine.

In 1929, there came into this particular art, for the first time it is said, the alleged invention in question, the piston ring of Cords, who, it is said by Mr. Biggar, proposed a revolutionary change in piston rings, particularly in their application to motor car engines. Cords proposed that instead of using cast iron rings, or practically flat steel rings, that groups of thin steel rings of dish shape be used in the grooves, two, four, six, or more, according to the width of the groove, which would snugly but not solidly fill the

grooves; and these rings, it is claimed, possess such distinguishing characteristics, and disclosed such a new and useful improvement in the art, as to constitute invention. The rings are constructed by bending thin ribbon steel bands, and during the bending operation the band assumes a dished form, that is, the plane of the outer periphery of the rim is laterally offset from the plane of the inner circle of the ring; the dish is quite perceptible to the naked eye, in both the patented and infringing rings. One method of assembling the rings in a groove, and the specification of Cords so states, is by alternate pairs, so arranged that the dished sides of the rings of each are faced in opposite directions. In assembling the rings in the piston grooves in this fashion, V-shaped channels or intervals are formed between opposed pair of rings, throughout the outer circumference of the ring, and towards the wall of the cylinder; there would be formed a similar V-shaped channel of interval between each ring making up a pair, but on the inside. These channels or intervals are, I think, undoubtedly due to the dish formation of the rings, and their arrangement in the grooves, and the patent states they perform useful functions. These rings being susceptible of pressure downwards would therefore expand independently of one another, thus affording, it was said, packing rings much more satisfactory and efficient than anything that had been earlier known. The so-called "dish" in the Cords piston rings, and in the defendants' rings, was very frequently referred to at the trial as "cup." I think it preferable to continue the use of the word "dish" because the patentee, as will soon appear, uses that term, and it would seem to me the more correct term, having in mind the exact formation of the piston rings in question.

I think it is desirable to quote from the specification of Cords, so that the objects of the alleged invention, its construction, and its method of functioning, may appear in the language of the patentee. The objects of the invention are set forth as follows:

This invention aims to seal the joint, between a reciprocating plunger and the walls of the cylinder in which it moves, by the use of metallic seal rings that are extremely thin and highly flexible, and that are mounted in grooves in the plunger in such a way that each of the thin rings employed exerts a relatively light pressure against the walls of the cylinder substantially independently of other rings that may be disposed in the same groove in the plunger.

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A further object of the invention is to provide a packing ring that is normally dished in the process of its manufacture, and which may be substantially contracted in diameter in applying it to a piston so as to increase the dished effect of the ring, thus providing a line contact or contacts between the edge of the ring and the walls of the cylinder in which the piston moves, and at the same time produce a ring which will automatically adapt itself to the walls of the cylinder in which it is placed with great accuracy and a high degree of resilience.

Another object is to devise a method of bending a relatively wide strip of material edgewise in such manner as to distort said strip laterally and give it a greater over-all thickness than that of the material from which it is made.

A still further object of the invention is to provide a sealing arrangement for the piston, intended for reciprocatory motion in a cylinder, in which the grooves provided in said piston for the sealing rings are substantially filled with independent, or separate, thin metallic rings of dished form, the dishing of certain of said rings being disposed oppositely from that of other rings, whereby the normal reciprocation of the piston in the cylinder will have a tendency to flatten the dished rings and thus cause them to expand into firm sealing contact with the walls of the cylinder irrespective of minor variations from a regular contour in the walls of the cylinder.

Another object of the invention is to provide a novel packing ring having a width many times its thickness, and further having unusual flexibility and contractual yieldability, due to its formation from light and resilient steel ribbon or the like.

A further object is to provide a plunger packing in which a hydraulic oil seal will be maintained during operation. It is also an object to devise a packing which will have a peripheral oil channel provided at one or both of the edges of its sealing surface.

The specification then in part proceeds:

The packing rings of the present invention are formed of thin resilient metal having a width many times the thickness of the metal utilized in forming the rings. Preferably, the rings are constructed from oil-tempered ribbon steel bands having, for the average multi-cylinder engine piston, a width of about $\frac{3}{8}$ - $\frac{1}{2}$ of an inch and a thickness of approximately .020 inches. These flat bands may be obtained from elongated straight stock or from spools of steel ribbon. The rings are constructed by bending the bands into either approximately circular or exactly circular form from straight strips of metal of the character just stated out to the necessary length. Preferably the diameter of the bent ring before it is contracted in positioning it in the cylinder, exceeds by $\frac{1}{16}$ the diameter of the cylinder in which it is meant to be compressed and operated.

The ring is bent, while cold on lines transverse to the width of the band of metal from which the ring is formed, and use is made of the fact that the portions of the metal to the outside of the neutral axis are stretched or put under tension during the bending operation, while the portions of the metal to the inside of the neutral axis are compressed, to give to the completed ring the characteristic of conforming readily to the contour of the walls of the cylinder in which it is caused to operate. It will be found that if a thin band of metal having a width many times the thickness of the band is bent on lines normal to the width of the band, that it will have a tendency during the bending operation to assume a dished form—i.e., a form wherein the plane of the outer peri-

phery of the ring is laterally offset from the plane of the inner circle of the ring. By this invention, it is proposed to permit the rings to assume such form to a limited or slight degree during the bending operation. This tendency arises by virtue of the stretching of the portions of the metal beyond the neutral axis and the compression of the portions of the metal to the inside of the neutral axis just referred to. A strip may be bent in this way to form a piston ring that is capable of being readily contracted, when positioning it in the cylinder in which it is to operate, to a very substantial degree without setting up in the ring very substantial forces tending to expand it when in operation, which forces would manifest themselves by an excessive wear of the cylinder walls. On the other hand, due to the fact that the rings of the present invention may be contracted substantially in placing them in the cylinder, said rings have a distinct tendency to follow and conform accurately to the walls of the cylinder. Nevertheless the ring is highly flexible and does not apply a great degree of pressure against the walls of the cylinder with the result that wear is minimized, though an effective seal is provided.

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Preferably, the multiplicity of rings in the grooves 21 and 22 are so assembled that approximately half of the rings in each groove have their dished or concave faces turned in one direction, while approximately the other half of the rings in that groove have their concavities facing in the opposite direction. Three convenient ways, of thus arranging the multiplicity of rings 10 in the groove 21 of the piston 16, are illustrated in Figures 4, 5, and 6 of the drawings. In Figure 4, alternate pairs of rings 10 are arranged with the dished sides of the rings of each pair facing in opposite directions, all of said rings bearing against the walls 28 of the cylinder to provide spaced circular contact lines for sealing purposes.

* * * * *

As previously stated, the rings of this invention are designed to substantially completely fill a groove, leaving a lateral clearance of only about 0.005 inch. This ensures good sealing contacts between the rings themselves and between the rings and the groove walls. When reciprocation of the piston or fluid pressure acting laterally upon the packing, or both, causes compression of the ring assembly, the dished rings of the latter are flattened somewhat and their diameters slightly increased with the result that the ring peripheries are forced into correspondingly better sealing engagement with the cylinder bore. The improved rings thus provide not only an efficient oil seal but also a good compression packing. With reference to Figure 13 and 14, it should be observed that endless channels 34 are formed between the groove sides and the ring assembly. These channels serve to scrape and receive oil and thus prevent it escaping past the rings, and also serve to transmit working pressures against large lateral areas of the packing to compress the latter. Another endless channel 35, which is formed between the two opposed groups of each set of rings, provides an effective hydraulic seal for preventing the escape of fluid past the bottom of the groove. Channels of the nature of channels 34 and 35 are also present in the assemblies illustrated in figures 4, 5, 6, 8 and 9.

In addition to the advantages already pointed out, the ring assemblies of this invention have the further desirable characteristics of preventing carbon accumulation, due to the constant relative sliding and squeezing action of the laminations or convolutions; and of being able,

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due to the extreme flexibility of the individual convolutions and their ability to rapidly assume various distorted circular forms, to adapt themselves within reasonable limits for full uniform sealing contact at all times with a bore that is non-circular and of non-uniform cross-sectional shape.

The utility of Cords is not seriously attacked, if at all. Whether or not there is invention in Cords, it is not disputed that following the placing of Cords on the market the same quickly came into very wide use in Canada and the United States. The defendants' chief expert witness, Mr. Bell, testified that Cords represented an improvement of five hundred per cent over any thing of the kind that had preceded it. The real attack made on the patent is that of anticipation, by prior user and by prior publications, the particulars of which will be later discussed. The evidence given on behalf of the plaintiffs as to utility and novelty has, I think, some bearing upon the weight to be attributed to the evidence given on behalf of the defendants as to prior user, and prior publication, and it perhaps is desirable to review briefly portions of this evidence, although as to utility it would seem to be unnecessary.

I will refer first to the evidence of Mr. Porter, president of the plaintiff company, and for eighteen years engaged in the repair of motor cars. He testified that he had been selling Cords piston rings since August, 1932, either by himself or through the plaintiff company, and between that date and August, 1934, his total sales, calculated upon the retail prices to consumers, amounted to over \$250,000 throughout Canada, and this notwithstanding the fact that his selling organization had not been fully developed. The cost of fitting the pistons of the average car with piston rings is, I think, about six or seven dollars. Porter stated that prior to the time he first came to know of Cords rings, 1932, he had experienced great difficulty, in the repairing of motor cars, in preventing oil finding its way past the piston rings and being burned; it was his experience that the rings then used in pistons, whether of cast iron or steel, gradually tapered the cylinder; that re-boring the cylinder was an expensive job, and that it was difficult to ensure a workable degree of taper; he stated that with the use of Cords in motor car engines, he would be able, in any re-boring of the cylinder resulting in a diameter variation up to 15/1000ths of an inch, to guarantee satisfaction to his cus-

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tomers. He stated that with the old type of piston ring, in say a six cylinder car, the consumption of oil would be around three to six quarts per thousand miles under ordinary driving conditions, whereas with the use of Cords only a quart to a quart and a half would be used; this was in substance affirmed by other witnesses and was not denied by any. Again, he testified that with the use of the conventional piston rings, a car with 6/1000ths of an inch cylinder taper would give satisfaction for five thousand miles, while with Cords, thirty to thirty-five thousand miles would be obtainable, and this statement does not seem to have been questioned. Porter also testified that cast iron piston rings, apart from the wearing and tapering of the cylinder, would themselves become worn and loose in the grooves, and the oil would get past the compression rings, whereas by the use of Cords this would be avoided by reason of their compression or spring action, and this would also leave them tight and snug in the grooves. It is a fair inference from Porter's evidence that he had never before seen or heard of piston rings similar to Cords.

The plaintiff patentee, Cords, was a salesman of automobiles between 1917 and 1925, and later he worked as a mechanic with a marine engine construction company, at San Diego, and during such employments he became interested in the designing of engine piston rings. In 1927 he began experimental work on the dished type of piston rings, and in that year made a set from sheet tin but those he found short lived and unsatisfactory; he continued his experimental work, using more durable material. In the fall of 1929 he made his first satisfactory rings, a set of which he gave to a construction company operating a fleet of 250 motor trucks at San Diego, with the result that this concern equipped their entire fleet of motor trucks with Cords piston rings, and others in that city soon began the use of these piston rings with satisfactory results. Cords commenced selling his rings commercially early in 1930, and quickly there came a demand beyond his capacity to produce because he was unable to obtain raw material in sufficient quantities. When able to obtain raw material in the desired quantities he entered into contracts for the sale and delivery of rings, appointed distributors or selling agents in different sections of the United States, and pres-

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ently, he stated, there was hardly a city of any size in that country in which he had not a selling agent. His sales of rings grew rapidly, and apparently he has established a large and profitable business in the manufacture and sale of piston rings, which, he states, are used by millions of cars, in the United States; he stated however that the growth of his business has been impeded by numerous infringers, many of whom were at one time his selling agents. These rings are easily and cheaply manufactured once the idea or principle of construction is known, and little capital is required in the manufacture.

A witness named Jensen, presently in the automobile business in Washington, D.C. and a distributor there of Cords rings, testified that he first used Cords rings in California in 1930, and found them more satisfactory than any other type then known to him. These rings, he stated, will avoid the accumulation of carbon, cause less wear on the cylinder walls, and the rings themselves will last for thirty-five or forty thousand miles, whereas the conventional type of ring would last only about ten thousand miles. In Washington, he services a fleet of taxi-cabs and his experience in that connection is that with the taxi-cab fitted with the conventional piston ring there is a consumption of from two to five quarts of oil per twenty-four hours, whereas with those fitted with Cords rings the maximum consumption is about one quart every two days. This witness, I would infer, had never seen or heard of piston rings similar to Cords, prior to 1930. The witness Flaherty, a distributor of Cords rings in New York City came to know Cords rings through Jensen, in California, in 1930, and had not before then seen rings of that type, and he agrees with Jensen as to the comparative merits of Cords rings over the conventional type, particularly when used in motor cars.

In support of the defence of anticipation, the defendants rely upon five instances of alleged prior user, three of which go back to the period between 1913 and 1917, the remaining two relate to the years 1921 and 1931 respectively. It will be convenient now to mention these alleged prior users; the alleged anticipations by prior publication will be mentioned later. The first of the alleged prior users is the following: In 1914 the defendants'

witness Bell, who is now connected with Steellcraft, purchased from the Speedwell Motor Company of Dayton, Ohio, then in bankruptcy, a Speedwell motor car for \$75. Later, in overhauling the car, he states that he dismantled the motor and discovered that the piston rings were of a strange design, made of low carbon steel, and were dished even more than Cords rings, or the rings made by Steellcraft. He states also that he found that the rings had to be arranged, in the grooves, opposed to one another in order to furnish sufficient lateral tension to entirely close the grooves. The next instance of prior user is the following: In 1917, the Davis Ship Building Company of Levis, Quebec, built a number of submarine chasers for the British Government, the engines for which were built by the Standard Motor Construction Co. of New Jersey, U.S.A. There was produced in evidence, as exhibit E, one of the pistons of the motor engines installed in these subchasers, with the piston rings still in the grooves, and, as exhibit G, one single ring from another such piston. And it is contended by the defendants that these piston rings are dished, as in Cords. Lamonde, the master mechanic of the Davis Shipbuilding Company plant at the time, stated in evidence that such piston rings are dished, and were assembled in pairs in the piston grooves with the dish opposed, and if they were not assembled in this manner, in the grooves, they would be loose. Then there was produced as exhibit B, an air pump taken from a Cadillac car, purchased in Montreal in 1930, by one Shefler, such car being a 1929 model. The rings in the grooves of the piston forming part of the air pump were stated by Mr. Bell, for the defendants, to be dished, and he gave the measurement of the dish. Mr. Corbett, a trained mechanic, testified that he purchased, in 1931, a Cadillac car from the estate of one Dr. Garceau, and the piston of the air pump of this car, with the rings, was produced in evidence as exhibit C. Corbett stated that shortly before the trial he examined the piston of this air pump and found that it had but one groove with four steel rings, which rings he found, after measurement by a micrometer, to be "slightly cup shape," and he also stated that the rings had been assembled in the groove in pairs with the dish opposed. Corbett also stated that in 1921 he had re-

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paired another Cadillac car, 1921 model, belonging to one Dr. Garrow. This car met with an accident and Corbett, with an assistant, had to examine the piston of the tire pump and for the first time in his life he noticed that piston rings were made of steel. He and his assistant found the piston rings were dish shaped, and seemed to be loose; after measuring the rings, they found they had to be placed in the groove in pairs opposed to each other, in order to fill up the groove, and they obtained the proper fitting by putting them in the grooves in this way; I would infer from this witness that it was his opinion that the rings had been improperly assembled in the grooves in the first instance. This piston was not produced in evidence, but Corbett states that it was the same as exhibit C. No evidence was given by any one representing the manufacturers of Cadillac cars. The next alleged user related to piston rings made by the firm of White and Middleton, of Baltimore. Mr. Middleton, of this firm, gave evidence at the trial. He stated that this concern started the manufacture of flat steel piston rings in 1911. They shortly discovered that the piston rings were being slightly dished in the bending, which in fact they wished to avoid; later, they discovered that the dished piston ring possessed advantages and they proceeded thereafter to manufacture and sell them in this shape, and it was stated that they were assembled in piston grooves in pairs with the dish opposed. This would be in 1913. He gave the names of some of the purchasers of such rings, such as the Standard Motor Construction Company, the manufacturers of Cadillac, Buick, and Packard cars. There was produced by Middleton, as exhibit H, a length of bent ribbon steel, in spiral form, manufactured by the Baltimore concern, and from which the dished rings sold by them would be cut, and this he took from the factory to his home before he left this firm in 1915, and it has since been in his possession. This piston ring material, as found in exhibit H, is claimed to have a dish. These piston rings, it was stated, were made and sold by Mr. White after 1915, when Middleton left the firm, and down to 1919 when the former sold out his business, but there is no evidence as to whether or not the successors of White continued the manufacture and sale of such rings. Mr. Middleton stated,

that while he was associated with the manufacture of these rings, he did not use the term "dished" or "cupped" in describing them, and that the words "cup" or "cupped," used so much during the trial by mostly all the witnesses, only came into his vocabulary since the commencement of the trial; his former business concern called them "steel rings."

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Before proceeding to discuss the effect of the evidence as to anticipation by prior user, I should pause to consider briefly a point pressed strongly upon me by Mr. Smart. He urged that the evidence of Bell concerning the piston rings of the Speedwell car, the evidence of Middleton concerning the piston rings made in Baltimore, and the evidence of Corbett regarding the piston rings of the Garceau car, should be disregarded, and that the recollection of these witnesses regarding the formation of piston rings seen thirteen and twenty years ago should not be relied upon. Mr. Smart's submission was that any evidence of this character should be established beyond a reasonable doubt; I have no comment to make concerning that submission. When it is sought to strike down a patent by the recollection of witnesses as to things seen either thirteen or twenty years ago, and which the party being attacked has little or no opportunity of investigating or answering, I agree, that such evidence should be established beyond a reasonable doubt before it is accepted to defeat a patent under which a patented article is made, and particularly where it has gone into substantial use by the public. But that, I think, is altogether a matter of the appreciation of evidence, and I do not think any definite rule can be laid down concerning it; each case must, I think, be considered upon the particular facts and circumstances involved. Mr. Smart referred me to several American authorities, but in each case the Court declined to accept certain evidence intended to establish anticipation by prior user because the Court was of the opinion that a witness must have had something else in mind other than the particular thing mentioned, or because a witness must have been confounding one thing with another, or because it would be hazardous to rely upon the recollection of a witness who testified that he saw a machine similar to the one being attacked, twenty years ago. In all these cases, it was the

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particular facts and circumstances pertaining to each that influenced the Courts to reject certain evidence directed against the validity of a patent. The recollection of witnesses as to the details of a particular thing seen twenty years ago, particularly when it relates to the plea of anticipation of a patent by prior user, which, as so frequently happens, implies fine distinctions or close diversities, between two things, must of course be considered and weighed with very great caution, and should, I think, be disregarded unless established beyond a reasonable doubt; but much depends upon the nature of the subject matter in controversy, and all the facts and circumstances surrounding the case.

Coming now to a consideration of the evidence directed to the issue of anticipation by prior user. I will first refer to the evidence regarding the piston rings in the Speedwell car. It is strange, first, that Bell's recollection of the rings in the Speedwell car, twenty years ago, is so precise as to describe exactly the alleged invention of Cords; it is strange that he then should have made so close an examination of the Speedwell rings, as to find them individually dished and arranged in pairs with the dish opposed, and that the only way he could satisfactorily refill the grooves again with those rings was, by a similar assembly of them, in the grooves. He does not appear ever to have communicated the "queer design" of those rings, to any person, before this litigation started; he does not say whether they functioned more satisfactorily than the conventional rings; and, I think, it is probably correct to say that the Speedwell rings produced no particular impression on his mind at the time, as to construction or efficiency, else he would hardly say, twenty years after, that Cords were better than anything that had preceded it in the form of piston rings, by five hundred per cent. It appears strange that, for twenty years, apparently all knowledge of the strange Speedwell piston rings was forgotten, and only revived in this litigation. I do not think that the recollection of Bell as to the formation of those rings, which he saw twenty years ago, can be accepted as proof of the anticipation of the patent in suit, and I think his recollection is in error. The same may be said concerning the piston rings in the tire pump of the Garrow

car, which Corbett examined in 1921. Corbett states that they were only slightly dished; the difference between a perfectly flat ring and one slightly dished, would be but of the order of a few thousandths of an inch, so that Corbett's recollection of an examination of those rings, back thirteen years, should hardly be relied upon to establish the fact that they were dished and assembled in the sense described in Cords patent. In my opinion it is improbable that they were.

Then turning to the evidence in reference to the other alleged instances of prior user, and which are in a somewhat different position from those just above mentioned, because here the piston rings referred to were produced in evidence, or, as in the case of the Baltimore rings, a sample of the bent steel from which they were cut, was put in evidence. I will refer, first, to the rings used in the pistons of the engines that were installed in the submarine chasers. The rings in the piston taken from the submarine chaser, exhibit E, I could see and examine but partially, but the same ring, exhibit G, I have examined many times, and I should say they were all flat, though possibly they may have a very slight taper from edge to edge, one way or the other, only demonstrable by very precise measurements; I do not think such rings were ever manufactured or installed as dished rings in the sense understood and taught by Cords. There was a book of instruction furnished by the Standard Motor Construction Co. to the shipbuilding company at Levis, in connection with the installation of their engines in the submarine chasers. In this book, exhibit F, the piston is referred to in paragraph 3, page 85, and it states that the upper piston ring is of cast iron, all other grooves having four split steel rings in each, and there is no mention of their being dished. I cannot but think that these rings were made, practically speaking, as flat steel rings and were not intended to be anything else. The same thing may be said of the piston rings in the two air pumps, exhibits B and C, and the piece of spiral wire made in Baltimore by White and Middleton, exhibit G. They all appear to me to look flat, but there may possibly be found in them a very slight taper, or wedge shape formation, between the edges, a structural incident, but I doubt if they were designedly

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made with the dish that Cords speaks of in his specification. The dish in Cords and Steelcraft is obvious to the naked eye, and their contrast in this respect with the other rings in evidence is so evident, that one cannot but regard the latter as being practically flat rings. Mr. Mackey, called by the plaintiffs, gave evidence concerning the formation of the piston rings in evidence. Mackey spent a great part of his life in making scientific instruments of precision, and for many years was doing that work for the Dominion Observatory at Ottawa. He was cross-examined at length and with great care by Mr. Lajoie, and the impression left on me was that Mackey was very competent to express an opinion on the points for which he was called, capable of accurately making the tests and measurements which he did make, and, further, his evidence did not have any semblance of advocacy. And I feel I may be safely guided by his evidence. Mackey, after examining the rings said to anticipate Cords, and having measured them with the appropriate instruments, expressed the opinion, that the rings disclosed no dish, at least in a serious sense. As already stated, the rings in the piston from the submarine chaser, exhibit E, and the single ring of similar origin, exhibit G, were said by some of the defendants' witnesses to be dished and placed in opposed relation in pairs, in the grooves. Mr. Mackey, for the plaintiff, examined in Court, the rings in place in the piston exhibit E, particularly the bottom filled groove, with the aid of a "feeler," and he found their faces quite parallel and without any dish. With a micrometer he measured the rings in exhibits B and C in pairs with their alleged dish opposing each other, and in the reverse way, and he found them to measure the same, which would exclude the idea of any dish in the rings. With a measure or instrument known as "The Last Word Dial Indicator," handed him by Mr. Lajoie, he measured the rings in exhibits B and C, the pistons of the motor car air pumps, and the ring exhibit G, and he found no dish in any of them; this is to be qualified by saying that in one small section of exhibit C he found what might be called a dish, where there was a difference in the thickness of the outside edge and the inside edge, but not elsewhere in that ring. I accept the evidence of Mackey.

Two patents are cited by the defence, as anticipating Cords, and the first to be mentioned is the Canadian patent to Vivinis, which issued in October 1917. The piston ring there described, and however feasible, is, I think, clearly distinguishable from Cords. It appears to me to be a different conception altogether. It is true however that Vivinis is described as being substantially of cup-shape, and in a sense the complete piston ring has that formation. It was said by one of the defendants' expert witnesses that Vivinis was shaped like a pie plate with part of the centre and part of the remainder cut out, and this seems to me to be a quite accurate description of it. The inner side of the ring is held tightly in the groove but the ring projects outwardly beyond the groove with an inclined wall or flange bent up at one side; the flange, which is without the groove, is intended to wipe the wall of the cylinder; however arranged, the flanges would not seem to be subject to compression. I think the construction of Vivinis is altogether different from Cords and represents a different idea in the construction of piston rings. The next patent to be considered is that issued to Kitchen, in June, 1901, in the United States. The individual rings are said to be dished in the specification, but they are all assembled in the groove with the dish in the same direction and one ring will look like the others in any expansion from the axis of the piston towards the cylinder wall. Mr. Stevens, a witness for the plaintiff, stated that the piston rings described by Kitchen are intended to be stamped out; the patentee refers to them as plates, and this witness thought that the patentee would not apply the term "plate" to a light wire ring bent into shape. The rings are wide and are put into the grooves from the end of the piston which is there reduced in diameter, apparently, because the rings are so constructed that they would not stand expansion radially to bring the ring over the end of the piston to the groove. In Cords, the rings are flexible and may be put into the grooves without reducing the size of the end of the piston. The piston rings in Kitchen are locked in place on the end of the piston by a plate which jams the rings up against an aluminium boss and have substantially the effect of being a solid ring. I do not think that Kitchen can be held to be

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an anticipation of Cords. In this connection I might quote from my judgment in *Canadian General Electric Co. Ltd. v. Fada Radio Ltd.* 1927, Ex. C.R. p. 141. I said:

Any information as to the alleged invention given by any prior publication must be for the purpose of practical utility equal to that given by the subsequent patent. The latter invention must be described in the earlier publication that is held to anticipate it, in order to sustain the defence of anticipation. Where the question is solely one of prior publication, it is not enough to prove that an apparatus described in an earlier specification, could have been used to produce this or that result. It must also be shown that the specifications contain clear and unmistakable direction so to use it. It must be shown that the public have been so presented with the invention, that it is out of the power of any subsequent person to claim the invention as his own.

Now, is there subject matter, invention, in Cords? I think there is. It is not perhaps a great invention, it may be a very narrow one, but yet, I think, it contains sufficient novelty and utility to hold that Cords discloses invention. No question arises as to the utility of Cords. The defendants' expert witness Bell conceded that Cords was superior, by five hundred per cent, to any piston ring that had preceded it; this witness probably had in mind the use of piston rings in motor cars, and he must have meant that the improvement of Cords over other piston rings was very great or he would not thus have expressed himself. That of itself goes far to establish novelty. Events have shown that there was a public demand for improved piston rings, particularly in connection with motor cars; Cords was quickly and widely adopted by the public when it was put upon the market and there is no evidence of any abatement in its popularity by the interested public; it would appear to effect a substantial saving in oil and a material reduction in the wear of cylinder walls; it defers materially the necessity of re-boring the cylinders, and the rings themselves have a longer life as compared with the conventional piston rings. It may possibly possess other advantages.

It seems to have the merits attributed to it by the patentee in his specification, and tribute seems to be paid it by very numerous imitators. If Cords had been previously made, used, or described in any publication, I do not think the idea would have perished, or have become entirely forgotten until 1929, when Cords made public his invention. I think there is invention in Cords.

Now as to the question of infringement. It was contended that the piston ring sold by the defendants did not infringe Cords by reason of the contrast in construction. It is said on behalf of the defendants that Cords rings have double the dish of Steelcraft rings; that the latter is fashioned from oval shaped material while the former is formed from thin flat steel; that due to the formation of Cords from flat material there is a revolving motion on the inner edge of the rings, whereas in the rings of Steelcraft, which are said to be high in the centre, there is a rocking motion which has the effect of removing any carbon that may appear there and which is carried off by the oil flowing in the crevices or channels found in the arrangement of the rings in the grooves. And it is said further that the difference between Steelcraft and Cords represents an improvement of three hundred per cent in the former over the latter. In my opinion there is no distinction between the two rings. I suspect that if any slight structural variation is to be found between the rings of Steelcraft and the rings of Cords, it was designed to meet the possible charge of infringement, but there is really no distinction between them, and Steelcraft is the equivalent of Cords.

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I am therefore of the opinion that the defendants have infringed the claims in the patent to Cords which are mentioned in the plaintiffs' particulars of breaches. Costs will follow the event.

Judgment accordingly.

NOTE: In this case the following form of judgment, which is a departure from the previous forms, was approved, and may be followed:

IN THE EXCHEQUER COURT OF CANADA

the _____ day of _____ 19 .

PRESENT:

The Honourable

Between:

Style of Cause

Preamble

This Court doth order and adjudge that as between the plaintiffs and the defendants claims numbers of the letters patent of the plaintiff, No. _____ bearing date the day of _____ 19, , in the pleadings mentioned, are valid and have been infringed by the defendants

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And this Court doth further order and adjudge that the defendants, their servants, agents and workmen, be and they are hereby severally restrained during the continuance of the said letters patent from infringing the same and from making, constructing, using and/or vending to others to be used in Canada the invention described therein.

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And this Court doth declare that the plaintiffs are entitled to recover from the defendants the damages sustained by them by reason of the infringement of the letters patent aforesaid or the profits which the defendants have made by reason of the said infringement, as the plaintiffs may elect after the filing of the statements, records and accounts hereinafter referred to.

And this Court doth order that each of the defendants do within twenty days after the service of this judgment file with the Registrar of this Court statements duly verified on oath showing the numbers of articles made in infringement of the said patent, of the numbers of such articles sold from time to time by such defendants, of the prices at which the same were so sold and of the profit made by such defendants on such sale, together with the records and accounts kept by each of the defendants in accordance with the order made herein on the day of 19 , such records and accounts to be duly verified on oath.

And this Court doth further order that, after the plaintiffs have elected as aforesaid, inquiry be made by the Registrar of this Court as to the damages sustained by the plaintiffs or the profits made by the defendants as the case may be.

And this Court doth further order that each of the defendants do within ten days after the service of this judgment make and file a sufficient affidavit stating what articles were at the dates of this judgment and of the affidavit respectively in his or its possession or power made in infringement of the said letters patent and accounting for the said articles.

And this Court doth further order and adjudge that the defendants do within fourteen days after the filing of the said affidavit deliver up to the plaintiffs the articles which shall by such affidavit appear to be in his or its possession or power.

And this Court doth further order and adjudge that the defendants do pay to the plaintiffs their costs of this action forthwith after taxation thereof.

Costs of the reference are reserved.

By the Court,

Registrar.

BETWEEN:

A C SPARK PLUG COMPANY.....PLAINTIFF;

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 Sept. 27 & 28
 Dec. 5

AND

CANADIAN SPARK PLUG SERVICE,
 SUPER REFINED MOTOR OILS } DEFENDANTS.
 & TIMOTHY WILLIAM BRAZIL. }

Trade-marks—Spark plugs manufactured by plaintiff reconditioned and sold by defendants—Whether plaintiff's trade-mark infringed by defendants—Whether defendants' conduct an actionable wrong under Unfair Competition Act.

The plaintiff is a manufacturer of spark plugs for use in internal combustion engines and is the owner of a registered trade-mark consisting of the letters "A C". The defendants carry on the business of reconditioning several makes of spark plugs, including those manufactured by the plaintiff, and reselling them at reduced prices. The defendants do not purport to sell the reconditioned spark plugs as new ones, but place the various makes of spark plugs, after reconditioning, in individual cartons, and these into larger cartons in which they are sold. On the outside of all cartons are printed the words "Spark Plug—Reclaimed By—Canadian Spark Plug Service." The plaintiff brought action asking for an injunction restraining the defendants from reconditioning and reselling spark plugs manufactured by the plaintiff. The Court found that the defendants had always acted in good faith; that there was not at any time any attempt by defendants to pass off the spark plugs for anything else than second-hand spark plugs; that defendants never represented the spark plugs as new; that the spark plugs as reconditioned and resold by defendants were not new and could be described only as repaired spark plugs.

Held: That there is no prohibition on the resale of repaired articles to which the trade-mark of the original maker is applied, and for which he has been paid.

2. That there is a distinction between an article repaired and one really reconstructed, and here the defendants do not produce a new article but merely repair an old one and there is nothing in law to prevent them doing so.
3. That the business carried on by the defendants does not contravene s. 11 of the Unfair Competition Act, 1932, 22-23 Geo. V, c. 33, nor is it contrary to honest industrial and commercial usage, since there has been no infringement and no passing off.

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

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

W. J. Beaton, K.C. and *J. A. Wright* for plaintiff.

R. T. Harding, K.C. and *K. Koskey* for defendants.

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

The PRESIDENT, now (December 5, 1934) delivered the following judgment:

The plaintiff is the registered owner of a trade mark which may be described shortly as consisting of the letters "A C," and is used in connection with the sale of spark plugs and ignition apparatus for internal combustion engines. It is alleged that the defendants infringe this mark, and contravene sec. 11 of the Unfair Competition Act, in the manner I shall shortly describe. No question arises as to the validity of the plaintiff's trade mark, and it is not questioned that the plaintiff carries on a very extensive business in Canada in the manufacture and sale of spark plugs to which its mark is applied.

Broadly stated the controversy here relates to the matter of the re-sale of second-hand A C spark plugs, with the plaintiff's trade mark still thereon, and which, the defendants claim, have been merely repaired prior to their re-sale, the plaintiff claiming that they have been so reconstructed or altered as to become in reality spark plugs other than A C plugs, and the matter for determination is whether this constitutes infringement of the plaintiff's mark, or such unfair competition as to constitute an actionable wrong under the Unfair Competition Act. It becomes necessary therefore to narrate with some care the principal facts here disclosed. It will be convenient usually to refer to the first named defendant as "Overholt," and to the last two named defendants as "Brazil."

The defendant Brazil, besides dealing in automobile accessories and oils, buys and sells used spark plugs of different makes which have been discarded by motor car owners, and he buys and sells repaired or reclaimed spark plugs of different makes, among them the plaintiff's A C spark plug. The quantity of A C spark plugs so sold by Brazil, or the proportion it constitutes of his total sales, is not of importance. Brazil openly engages in the buying of used spark plugs from many sources; he has advertised in newspapers that he was a buyer of A C and other discarded spark plugs, and he has advertised the sale of A C and other spark plugs, at 29 cents, sometimes at 39 cents, guaranteed to function for 10,000 miles, but without stating in such ad-

vertisements that they were second-hand spark plugs. Prior to the commencement of this action Brazil displayed a sign in front of his business premises at Hamilton, advertising the sale of A C and other spark plugs, without mentioning in any way that they were second-hand plugs, but since that date the sign was so altered as to indicate that the spark plugs were "reclaimed" plugs. Brazil does not deal in new spark plugs.

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The evidence shows that Brazil buys from several sources discarded spark plugs for three cents each, which spark plugs he sells to Overholt at four cents each; the business of the latter seems to be that of buying and reclaiming discarded spark plugs and then selling them to garages and dealers. Brazil purchases reclaimed spark plugs, among them A C plugs, from Overholt at fourteen or fifteen cents, and in turn he sells them to owners of motor cars, at the prices already mentioned, and occasionally to dealers and garages in quantities when a discount is allowed. I do not understand it to be claimed that there is any offence in the mere buying of discarded spark plugs, by any person. Overholt and Brazil occupy different portions of the same building in the conduct of their respective businesses, yet I am satisfied they are not in any way associated together, but even if they were it would not seem to be of any importance here. I might observe that the class of business which I have just described as being carried on by Brazil and Overholt, in spark plugs, has been quite a common one throughout Canada and the United States, for several years past. At the inception of the business of selling reclaimed spark plugs, the plaintiff, in respect of its A C plugs, does not seem to have made any protest, and it was not till 1929, that it began efforts to prevent it, just how we need not delay to consider.

As already stated, it is the plaintiff's contention that the A C spark plugs sold by the defendants are not discarded plugs merely repaired, but that, it is claimed, they have been reconstructed, altered in character and diminished in efficiency, to such an extent, that they are no longer in fact A C plugs, but another spark plug altogether, and put on the market with the plaintiff's trade mark applied thereto. That is a question of fact, and the case was put to me on that footing; consequently it is necessary to inquire briefly

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into the original construction of the A C spark plug, and to ascertain precisely just what is done to the discarded A C spark plugs in the way of repairs, or in the process of reclaiming them, and their condition when re-sold.

The first part of a spark plug to be mentioned is the steel shell, or housing as it is sometimes called, and inside this shell and extending beyond it is a porcelain core insulator which extends from the top to the bottom of the plug; inside the insulator is an electrode wire, called the centre electrode, and that extends from the top to the bottom of the spark plug; on the side of the shell is another wire, called the side or shell electrode, the point of which at the top bends over about at right angles to the centre of the insulator just above the point of the centre electrode, and so positioned and adjusted that a very slight gap separates the points of the two electrodes. If one point is just above the other it is called an "end gap," if one point is on the side of the other it is called a "side gap." The spark plug functions in this way: The electric current comes from the top of the plug down the centre electrode, which is insulated from the shell by the porcelain core, and the spark is made by the electric current jumping from the centre electrode across the gap and over to the shell electrode; in that way the fuel charge in the combustion chamber is fired and the plug has then performed its function. That affords a sufficient outline of the construction and functioning of a spark plug. The plaintiff has designed a number of spark plugs, which are distinguished by a letter and a number, such as J-12, each having, it is claimed, definite heat characteristics, determined at the time of construction, but I do not think it necessary to take time to elaborate upon this feature of the A C spark plugs. The efficient life of a new spark plug is limited because of the accumulation of carbon, grease and dirt, and the deterioration of the points of the electrodes; the normal life of a spark plug is said to be 10,000 miles.

Now, what Overholt does to the plug is this: The plug is first put into a cleansing bath, and following that it is mechanically sand blasted. Sand blasting machines designed specially for this purpose, are freely offered for sale to the public, are easily made, and are very generally in use for such purposes by garages, and motor car repair

shops. Thus the rust, any accumulation of carbon, old oil, or dirt, are removed from the spark plug and the electrodes. Then the electrodes are straightened or adjusted, that is, the normal gap between the points of the electrodes is restored if through usage they, the points, have been disturbed or distorted; if the electrodes have been seriously damaged or burned the plug is thrown away, and Overholt states that about twenty-five per cent of the discarded spark plugs he buys are for this reason thrown away. New electrodes or insulators are never placed in old spark plugs by Overholt. In the course of cleaning or repairing spark plugs the position of the shell electrodes may be altered, for example, from the top to the side of the centre electrode, thus giving what is called a side spark instead of an end spark; this would be done in the case of an end gap where the underneath part of the shell electrode had been burned or damaged, but the normal gap between the electrodes is, of course, preserved. This particular operation is a very simple one, quickly performed, and an obvious one if the conditions I have mentioned are found to prevail. Then the points of the electrodes may be so damaged as to require a little filing to smooth them, or the extreme points of the electrodes may have to be clipped off. The proper gap between the points of the electrodes seems to be a matter easily determined, by appropriate measuring instruments, or by the practised eye of those who undertake to repair used spark plugs. After the shell of the spark plug has been lacquered, it is placed in small individual cartons, and these into larger cartons, and in such containers they are sold. On the cartons are printed the words "Spark Plug—Reclaimed By—Canadian Spark Plug Service." The cartons in which A C spark plugs are placed are of a particular colour to distinguish them from other spark plugs. And it is these reclaimed spark plugs that Overholt sells to Brazil, and which Brazil sells to the public. The words "Reclaimed By," appearing on the larger cartons, are in fairly large type and are quite conspicuous. The same words appearing on the cartons holding the individual spark plug are proportionately smaller, and are therefore not as conspicuous as perhaps they should be, but the words are legible, and I do not think bad faith can be imputed to Overholt on this account.

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Considerable evidence was given on behalf of the plaintiff for the purpose of showing that any shortening of the insulators or electrodes, any change in the shape of the lower end of the insulator, any alteration of the position of the points of the electrodes, or any set-back given the insulator, prevented a satisfactory or perfect functioning of the centre electrode, both as an electrical conductor and as a heat conductor. It was contended, as I understand it, that the reclaiming operations which I have described, diminished the length of the insulators and electrodes to such a degree that the spark plug was no longer able to accomplish that degree of efficiency intended by the plaintiff's engineers when designing each particular type of A C spark plugs. It seems to me that this point is much exaggerated and is not entitled here to the weight or importance which the plaintiff attempts to ascribe to it. Some of the insulators may be very slightly shortened owing to the removal, in the cleaning operations, of the accumulated coating thereon, caused by the heat and carbon; and the electrodes may be shortened sometimes but only in a very slight degree. All this goes to a comparison of the efficiency of a reclaimed plug and the theoretical efficiency of a new one. The fact is that used spark plugs are cleaned or reclaimed, in the manner described, by scores of persons, and are again used with considerable satisfaction; the fact that Brazil alone sells about 800 of repaired spark plugs per week and apparently with general satisfaction to his customers, with few replacements being necessary, is evidence that the cleaning and repairing operations extend very materially the useful life of such spark plugs. They may not be as efficient, particularly in the circumstances described by Mr. Gray, as new spark plugs, and I do not understand that this is claimed for them by the defendants. The plaintiff itself sells sand blasting machines for the same purpose for which Overholt and others use them. In an advertisement appearing in a journal called *Canadian Automotive Trade*, a picture of the plaintiff's machine appears and bears the caption "A C Spark Plug Cleaning and Re-Gapping Service," and the advertisement states that "cleaning and re-gapping sells more new plugs than any other sales activity." The method of cleaning and re-gapping spark plugs which

Overholt pursues must be practically the same, and practically as efficient, as the method pursued by Registered Cleaning Stations which the plaintiff so strongly recommends to its patrons in this advertisement, and the results must be much the same. I have no difficulty in concluding that what is called "reclaiming" of spark plugs, as practised by Overholt, and as exemplified by the spark plugs sold by the defendants, is merely a work of cleaning and repairing, and in no sense can it be fairly said that these spark plugs have been reconstructed; no new element has been added, none has been taken away, and there has been no substitution of new elements for old. I do not think it can be said that those plugs constitute a new plug, or another plug, or that they can be described as being anything else than a repaired spark plug.

Another question of fact is in dispute between the parties, and to this I should refer. Evidence was given by one McGillivray to the effect that he had purchased from Brazil a set of spark plugs, for the car of one Dr. Eaton, and that Brazil on that occasion represented to McGillivray that the insulators and electrodes in the spark plugs, which the latter examined, were new. McGillivray stated that he was aware that the shells of the spark plugs were old, and had been in use. The plugs so purchased from Brazil shortly turned out to be unsatisfactory and had to be replaced. Brazil denies that he made any such representation to McGillivray, and I accept his version of what occurred on that occasion. It is highly improbable that Brazil would make such a representation; Overholt never inserted new insulators or electrodes in the repair of discarded spark plugs, and it is improbable that he was equipped to do this, or that he would even know how to do it; and Brazil never dealt in spark plugs other than those that had been repaired in the manner I have described. Upon the evidence before me I cannot find that any of the defendants, at any time, made representations to any persons, that the A C spark plugs sold by them, were new ones, or that they contained new insulators or electrodes; and I think they were throughout acting in good faith, and under the belief that what they were doing was perfectly proper and lawful and not in contravention of the legal rights of any one. There was not, in my

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opinion, anything such as an attempt to pass off the spark plugs in question as being anything else than what they were, second-hand spark plugs; it was notorious that what the defendants were doing, was being done openly by many others, and the reduced prices at which the spark plugs in question were being sold, in comparison with new ones, would justify the inference that customers expected to receive second-hand spark plugs.

I apprehend it may be asserted safely that any article, the origin of which is indicated by a trade mark, may be lawfully sold, by the owner. That being so, I cannot think that if such article has been repaired that it is in a different position and cannot be sold without infringing. I do not think that trade mark legislation contemplates the prohibition of the re-sale of repaired articles to which the trade mark of the original maker is applied, and for which he has received his price. I am at a loss to discover any principle upon which such a prohibition could securely rest. It is well known that what is complained of here occurs daily in some form or other, and if it were necessary numerous illustrations might be mentioned. The plaintiff itself did not apparently, for a time, regard this practice as an actionable one, and it was only when the practice became widespread and reached large proportions that it commenced actions of the nature here. In a case of this kind, I think, the question always is: Has the article been repaired or has it been so reconstructed that it is in reason and in sense a new one?

Turning now to a consideration of the authorities upon the point under discussion. Practically all the authorities cited at the trial, or which I have been able to discover, are discussed by Kerwin J., of the Supreme Court of Ontario, in an action brought by the plaintiff here, against one Logan, (1). The facts in that case would appear to be practically the same as in this case. Apparently the authorities, in cases of this nature, lay down the principle, that if the trade-marked or patented article has been repaired only, and has not been materially re-built or reconstructed, it may be resold by the owner without infringing. What is a repair, is a question of fact, and may sometimes be difficult to determine. Now this is not a case of refilling trade-marked packages or containers with

goods similar to the goods originally there contained. It is probably correct to say that the trade mark, in such cases, should be completely obliterated or removed from the package or container in order to escape infringement. We may therefore disregard the authorities referable to that state of facts. The remark of Lord Halsbury during the argument in *Sirdar Rubber Co. Ltd., v. Wallington, Weston & Co.* (1) was mentioned. This was an action for infringement of a patent which related to a combination of rims and tires for vehicle wheels and it appears that the question raised was whether the defendants infringed by fitting new tires into the plaintiff's rims. It became unnecessary to decide this question because the patent was held invalid, but during the argument upon this point Lord Halsbury interjected this remark:

The principle is quite clear although its application is sometimes difficult; you may prolong the life of a licensed article but you must not make a new one under cover of repair:

In a somewhat similar state of facts, Kekewich J., in *Dunlop Pneumatic Tire Co. Ltd. v. Holborn Tire Co. Ltd.* (2), said the question there was whether the article was honestly a new article, or whether it was an old article repaired. In the case of *Dunlop Pneumatic Tire Co. Ltd., v. Neal* (3), another case of infringement of a patent, the invention related to rubber tires and metal rims of wheels for cycles. Mr. Fletcher Moulton, later Lord Justice Moulton, and who had a very wide experience in patent cases, argued, for the plaintiff, that what the defendant did there was not a mere repair but was equivalent to reconstruction because what the defendant did was to put in everything new except the wires, and he is reported as saying that the sale of a patented article gave a right to use it during its life and fair repairs were allowable. In that case Lord North said:

Any simple repairs, I think, may be done by a person without any licence from the manufacturer; but when he takes the whole thing and sells what is a new tire with merely the old wires in it, in my opinion there has been no licence to use those old wires for the purpose of putting them into and making up precisely the same combination which is the subject of the letters patent.

(1) (1907) 24 R.P.C. at p. 543. (2) (1901) 18 R.P.C. at p. 226.

(3) (1899) 16 R.P.C. p. 247.

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The case of *Richards v. Williamson* (1) was cited, but that, I think, was clearly not an instance of repair, but of reconstruction, and is not at all applicable here; and neither is the American case of *Edison Electric Light Co. v. Davis Electrical Works* (2). A careful examination of the case of *Gillette Safety Razor Co. v. Franks* (3) will at once reveal a distinction between that case and the one under discussion. The defendant advertised and sold as "genuine U.S.A. Gillette blades" blades of the plaintiff's manufacture which had been used and discarded, and put up such blades for sales in the plaintiff's distinctive wrappers and boxes. The defendant was restrained from selling or offering for sale such blades but it was an obvious case of fraud.

In the American case of *General Electric Co. v. Re-New Lamp Co.*, (4), a case of infringement of a trade mark, it was held that burned out electric lamps, manufactured by the General Electric Co., and bearing its trade mark "G.E.," and which were cleaned and repaired and supplied with new filaments and resold with the plaintiff's trade mark thereon, were not "G.E." lamps, but were a new construction, and became substantially new "G.E." lamps, and were not entitled to be resold under the plaintiff's trade mark. From the facts disclosed in this case I should say the lamps were substantially new lamps. A recent English case, *The General Electric Co. Ltd. v. Pryc's Stores*, (5) is of interest. Another action was brought against the same defendant by The British Thompson-Houston Co. Ltd., and the two causes were heard together. The two statements of claim were, except in details, the same, but I may be understood hereafter as referring only to the first mentioned case. The plaintiff sought to restrain the defendant from selling or offering for sale any "Osram" electric lamps other than new and unused lamps of the plaintiff's manufacture, and from passing off as or for new or unused lamps of the plaintiff's manufacture second-hand or used lamps of their manufacture. The plaintiff therefore according to the statement of claim, and it is so stated by the learned trial

(1) (1874) 30 L.T. 746.

(2) (1893) 58 Fed. Rep. 878.

(3) (1924) 40 T.L.R. p. 606.

(4) (1904) 128 Fed. Rep. p. 154,

(1903) 121 Fed. Rep. p. 164

(5) (1933) 50 R.P.C. p. 232.

Judge, objected altogether to the sale of second-hand lamps. The plaintiff was a large manufacturer of electric and incandescent lamps and they were sold under the trade mark name of "Osram," which mark it owned. A large quantity of second-hand Osram lamps came upon the market because some of the electric supply companies in London had to change over from one system of supply to another, which need not be explained, and accordingly they had to supply to users of electric current, lamps which were suitable for the altered system in exchange for the lamps which had been in use and which were no longer suitable for use, and this in particular seems to have happened to the Westminster Electric Supply Corporation, which sold thousands of lamps to dealers, one of whom seems to have cleaned the glasses and the brass caps and sold a small quantity thereof to the defendant. The defendant sold those lamps, at reduced prices, some of which were in cartons bearing the plaintiff's trade mark "Osram." The cartons were supplied, so far as I can learn from the report of the case, by the Westminster Electric Supply Corporation. It was held that the plaintiff failed to establish that the defendant had sold second-hand lamps as new lamps, but that, being a question of fact, is not of importance here. The important point is, that the Court refused to restrain the defendant from selling second-hand Osram lamps, and held that that sort of trade was quite legitimate, and apparently, notwithstanding the lamps were sold in cartons bearing the plaintiff's trade mark. It does not appear whether the lamps themselves carried the trade mark. I may quote from the judgment of the learned trial Judge, Maugham J., who said:

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The objection of the plaintiffs to the sale of second-hand or used lamps is very natural. It is in evidence before me that there are two objections to the sale of used lamps; first, that after use the filament becomes much more brittle and accordingly the lamp may become useless in the course of its being transported from the shop to the consumer's house or to the purchaser's premises, and secondly, that it is impossible for the ordinary purchaser to know how old the lamp is. Lamps are made with a certain guarantee that they have an average life of 1,000 hours and, of course, if they have been used for any substantial part of that life, they are almost useless to the purchaser. I can, therefore, well understand the objection of the plaintiffs in this case, or in any case, to the trade being carried on in second-hand lamps, but, on the other hand, they have no right to object to such a trade unless it is being carried on dishonestly. I have some sympathy for the very poor purchasers of lamps for lighting their homes, and I do not quite see why they

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should not buy cheaply used electric lamps, whether they come on to the market in the way I have described or through unfortunate people having their homes sold up or moving to other quarters where the old lamps are not suitable. It may very well be that for 9d. poor purchasers may get a lamp which will last more than twice as long as a new lamp and I can see no legal objection to that trading being carried on.

Apparently the learned trial Judge considered that the only possible offence that might emerge from this sort of trading would be in selling second-hand lamps as new lamps. Now, if the sale of second-hand lamps in cartons bearing the mark Osram did not constitute an infringement, or a passing off, still less could it be said of the case presently under discussion. The spark plugs were cleaned, very slightly repaired, and sold in cartons which indicated that they were spark plugs that had been "reclaimed" by Brazil. Further, it is to be remembered that the plaintiff's trade mark does not appear on the cartons in which the spark plugs are sold.

I see no distinction in principle between the patent cases and the trade mark cases. In patent cases, the plaintiff seeks to establish infringement by attempting to show that the thing in question was substantially a new thing, constructed without licence according to the specification of the plaintiff's patent, and the defendant seeks to show that the thing had been repaired only, and that he had a legal right to repair and sell it. It is much the same in trade mark cases. There the plaintiff seeks to establish that the thing in question has been so transformed or rebuilt as to constitute a new article, and that the owner, by selling it with the plaintiff's trade mark applied thereto, is really selling a new article under a trade mark which does not indicate its true origin and purports to represent that the article was one made by the plaintiff, and that therefore there is infringement. The defendant meets this by saying that the article has undergone repairs only, which he claims he has a right to make, and that the article is in fact just what it always was, and that it is not unlawful to sell the same with the plaintiff's trade mark retained thereon. I think the distinction which the authorities draw between an article repaired and one really reconstructed is sound, and it would seem to be a reasonable and practical rule to apply in such cases. In the English electric lamp case it may be said there were no repairs, and that the lamps were merely cleaned on the outside.

But they were second-hand lamps. I do not think that any real distinction can be drawn between second-hand electric lamps that have been cleaned only, and the spark plugs which have been cleaned and the electrode wires of which have undergone very slight readjustments and repairs.

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Mr. Beaton, for the plaintiff, stated that his client would not object to the sale of the A C spark plugs in question if its trade mark were removed before sale, and I am assuming that this could be done. The point is one of interest, as in fact is the whole case. I am not wholly satisfied that the practice of leaving the trade mark on the plug is not the better one if the trading is honestly done; to remove the mark might subject the defendants, and others, to many unfair passing off actions, and that practice might in the end prove more objectionable to all concerned than the present practice. It would still be necessary, I should think, to distinguish in some way, one particular plug from another, because spark plugs are not standardized so far as I know, though A C plugs are, I understand made to fit a number of motor cars.

As I have already stated, the plaintiff contends that the trading complained of here contravenes sec. 11 of the Unfair Competition Act, and this section reads as follows:

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.

This section virtually enacts one of the provisions of the Convention of the Union of Paris, referred to in sec. 2 (a) of the Act. Inasmuch as I find that there has been no infringement, and no passing off, I cannot see how it can be said that the business carried on by any one of the defendants, offends sec. 11 of the Act, or is contrary to honest industrial and commercial usage.

The plaintiff's action should therefore, in my opinion, be dismissed and costs will follow the event.

Judgment accordingly.

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BETWEEN:

PEGGY SAGE INC. AND NORTHAM-
 WARREN LIMITED

PLAINTIFFS;

(No. 15240)

AND

SIEGEL KAHN COMPANY OF CAN- }
 ADA LIMITED

DEFENDANT.

Trade Marks—Petition to expunge—Calculated to deceive—Isolated cases of confusion not sufficient to warrant direction that trade mark be expunged—Evidence.

Peggy Sage Inc., owner of the trade-mark "Peggy Sage," whose goods had been sold in Canada since 1920, though the trade-mark had not been registered in Canada until June, 1933, sought to have expunged from the register the trade-mark "Peggy Royal," registered by the defendant in June, 1932, on the ground that at the time of registration it was calculated to deceive or mislead the public.

Held: That the trade-marks in question are not so similar as to be likely to cause confusion.

2. That there must be a reasonable probability of deception or confusion, and that isolated cases of confusion are not in themselves sufficient to warrant the direction that a registered trade-mark, in substantial use, be expunged.
3. That evidence of witnesses purporting to give their opinions as to whether deception or confusion was calculated to occur by reason of the concurrent use of the names as trade-marks in connection with the goods in question is not permissible and must be rejected, since such evidence involves the precise point which the Court has to decide.

ACTION by the plaintiffs asking that defendant's trade mark be expunged from the register of Trade Marks.

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

W. L. Scott, K.C. and *Cuthbert Scott* for plaintiffs.

R. S. Smart, K.C. for defendant.

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

The PRESIDENT, now (November 21, 1934) delivered the following judgment:

This proceeding is taken by the plaintiffs, the first named of which is the registered owner of the trade mark "Peggy Sage," to expunge from the register the trade mark "Peggy Royal," registered by the defendant, on the ground that at the time of its registration it was calculated to deceive or mislead the public, which was a ground for the refusal

of registration of a trade mark under sec. 11 (c) of the Trade Mark and Design Act, Chap. 201, R.S.C. 1927.

In 1917, one Peggy Sage established in New York City what is described, in an exhibit, as a "beauty parlour business," which business she conducted under the name of "Peggy Sage" and concurrently, it would appear, she commenced the manufacture of and sale of manicure preparations and specialties, and other toilet and pharmaceutical preparations and specialties. This business Peggy Sage carried on under her own name until 1930 when the same was acquired by the plaintiff, Peggy Sage Inc. It is pleaded that at the inception of this business Peggy Sage adopted as a specific trade mark her own name, and that she applied her name as a trade mark to the articles manufactured and sold by her, by applying the same to the goods themselves, or their containers. The trade mark Peggy Sage was not registered in the United States until July, 1932, and not in Canada till June, 1933, but the goods manufactured by Peggy Sage have been sold in Canada, since 1920, and my recollection is that such goods were first advertised in Canada in 1920. The invented mark "Peggy Royal" was registered by the defendant in Canada, in June, 1932, as a specific trade mark to be applied to the sale of toilet articles other than brushes and soap. So in point of fact the defendant was the first to register in Canada, but the Peggy Sage goods were the first to be put on the Canadian market.

There is a preliminary observation which I cannot avoid making, though it is not quite relevant in view of my intended disposition of the case. Under sec. 26 of the Unfair Competition Act, the name of a person, firm or corporation is not registrable, though by sec. 29 (1) such a mark, may, in certain circumstances, be registered upon order of the Court. The repealed Trade Mark and Design Act contained no specific prohibition of such a registration, though applications for such registration might of course be refused; probably there have been few such registrations in the history of trade mark law in Canada, and I think such applications should always be refused except when accompanied by an unusual state of facts. Names of persons have not been registrable in England since 1875, except in the special circumstances provided by the trade

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mark legislation there. It follows, I think, that an invented name of a person should be refused registration on any ground justifying a refusal of registration of the name of any actual person. While it has been pleaded that the name Peggy Sage had been used in Canada prior to its registration as a trade mark, still there is no evidentiary proof of this. The agreement of sale between Peggy Sage and Peggy Sage Inc. states that the vendor, Peggy Sage, had adopted her name as a trade mark, yet I doubt if that is proof of the fact. The name of Peggy Sage, as the manufacturer of the goods mentioned, no doubt appeared on all containers in which her goods were sold, but it is, I should think, open to doubt if such a use of the name of a manufacturer of goods is sufficient of itself to constitute its adoption as a trade mark. The name of Peggy Sage is not now the name of a person carrying on business in connection with the class of goods in question; that name as a trade mark is now used to denote the goods of the first named plaintiff and not that of Peggy Sage. However, the two marks here in question were registered before the coming into force of the Unfair Competition Act, and whether or not either or both of such marks should have been refused registration on the ground just suggested, was not raised at the trial, and I do not therefore propose pronouncing any opinion upon the point.

Another preliminary point is this: To three of the plaintiffs' witnesses, Mr. Scott, their counsel, directed the question as to whether or not in their opinion deception or confusion was calculated to occur by reason of the concurrent use of Peggy Sage and Peggy Royal as trade marks, in connection with the goods in question. This question was objected to by Mr. Smart on the ground that the answers to the questions involved the precise point which the Court had to decide, but I allowed the same subject to objection, and reserved the right of striking out such questions and answers if I later concluded to do so. I am under the impression that questions of this character have been allowed in similar cases in this Court, but possibly without objection being taken. The point is one of general importance and I may be pardoned a brief reference to it. The exact point is concisely discussed by Kerley in his text book on Trade Marks, 6th

Edition, at page 290 *et seq.* The author there points out that the evidence of persons who were well acquainted with the trade concerned was formerly constantly, that is in England, tendered by the parties to show that in the opinion of such persons, as experts, the alleged resemblance between the conflicting marks was or was not, calculated to deceive, and such evidence was formerly constantly admitted, although Judges often expressed much impatience of evidence of this class. He points out that this class of evidence is subject to objection because in general it consists of opinions formed after the dispute has arisen; not upon any judicial balance of the opposing contentions, but upon a scrutiny of the subject directed to discover what can be said in favour of one side only. And, he observes, where the question is directed as to the degree of resemblance between two words or designs, or as to whether a difference in particular parts of two contrasted labels is substantial or immaterial, reasons can rarely be found by the witnesses to recommend an opinion to anyone who has not conceived it for himself without their assistance. Since the decision of the House of Lords in *North Cheshire Brewery Co. v. Manchester Brewery Co.*, (1) Kerley states that Judges in England have in many cases refused to allow to be put to a witness or have disapproved the question whether the public would be, or would not be, likely to be deceived. In that case Lord Halsbury said:

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Is this name so nearly resembling the name of another firm as to be likely to deceive? That is a question upon which evidence of course, might be given as to whether or not there was another brewery either in one place or in the other, or whether there were several breweries nearly resembling it in name; what the state of the trade was and whether there was any trade name. All those are matters which are proper to be dealt with upon evidence; but upon the one question which your Lordships have to decide, whether the one name is so nearly resembling another as to be calculated to deceive, I am of the opinion that no witness would be entitled to say that, and for this reason: that that is the very question which your Lordships have to try.

But it appears to be permissible from the authorities assembled by Kerley, to ask a witness whether he himself would be deceived, but as pointed out by Farwell J., in *Bourne v. Swan and Edgar Ltd.* (2), it is extremely difficult to get any such evidence on behalf of a plaintiff. Trade witnesses would not usually be deceived except in

(1) (1899) A.C. p. 83.

(2) (1903) 1 Ch. 211; 20 R.P.C. 105.

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a case of grossly fraudulent imitation. Evidence of ordinary members of the public who are not acquainted with the usages of the trade involved, that they think they would or would not be deceived by the resemblance of one mark to another, is of little assistance in the determination of questions of alleged deceptive similarity.

Once objection is taken to questions of the nature mentioned, one is at once impressed with the difficulty of confuting it. The reasoning of Lord Halsbury in the case mentioned is I think conclusive upon the point, and expresses, I think, the proper rule in such cases. I therefore am of the opinion that the questions which I have mentioned as having been put to the plaintiffs' witnesses were not permissible, and they along with the answers given there-to are rejected.

Coming now to the precise question for decision. The evidence in the case is very meagre indeed. There is no evidence of any person ever having purchased Peggy Royal when the intended purchase was Peggy Sage. No witness has said that he has been deceived, and no witness has gone so far as to say that he or she would be deceived. The plaintiffs' witnesses were of the opinion that the word "Peggy" was the dominant word in both marks, the one most easily remembered, and that therefore the public was liable to be deceived or confused by reason of the fact that the first word in both marks is the same. Mrs. Kennedy, proprietor of Kennedy's Beauty Salon, Toronto, who since 1931 has been using and selling Peggy Sage goods, testified that prior to 1931 she had had customers mention to her that Peggy Sage goods were being sold at Eaton's Departmental Store, and wishing on one occasion to recall the full name under which such goods were sold she found she could not remember the last word, "Sage," and was obliged to telephone a particular person at Eaton's to ascertain the same. Mrs. Kennedy also testified that occasionally customers would inquire, usually by telephone, for the complete name "Peggy Sage" remembering only the first word. Another of the plaintiffs' witnesses, Arbuckle, who sells Peggy Sage goods, stated Peggy Sage goods were usually asked for by customers by that name, and it was only "the odd time" the word Peggy alone would be used. Another witness, Horlick, testified to the same effect as Arbuckle. I am not inclined

to attach any particular weight to this contention, or to the evidence given in support of it. I think this is a case where we must consider whether the totality of the marks in question, and not a portion of the same, are likely to result in confusion. Had the defendant adopted the mark "Dorothy Sage" I fancy that the plaintiffs would be just as insistent that it be expunged. At any rate, according to the plaintiffs' witnesses it was only the odd persons who asked for Peggy Sage goods by the name of "Peggy." There is nothing peculiar about persons forgetting, partially or wholly, the trade name of an article they require but that does not mean that they are confusing what they want with another article of the same character, and also sold under a trade mark name. Then it was urged upon me that the Peggy Sage goods are very much more expensive than Peggy Royal goods, the latter being sold largely, if not entirely, as I understand it, in so-called chain stores, at prices ranging from ten cents to twenty-five cents, while the price of Peggy Sage goods generally runs from seventy-five cents to two dollars, and that therefore this contrast in prices precluded the probability of confusion; this fact possibly accounts for the absence of concrete evidence of confusion, but I do not think, that by itself, much weight can be attached to this contention. However, the proprietors of the marks are apparently appealing for patronage to different sections of the purchasing public, presently at least, and this is quite obvious from an examination of the cartons and labels used by each, along with the prices charged by each. I should point out that the labels on the bottles or containers of Peggy Royal goods are of quite a different colour from the labels used in the case of Peggy Sage goods, and the former labels contain the printed name of the defendant company as well. The get-up of the cartons and labels used by each, and even the bottles, are considerably in contrast. It is also to be mentioned that there is no evidence before me suggesting that the defendant acted in bad faith in adopting its mark.

The assistance to be derived from the evidence, in reaching a conclusion in this matter, is slight. In the conclusion which I am about to express it would be but pure affection to say that I am absolutely free from doubt as to its correctness. My conclusion is that the plaintiffs

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have not made out a case to expunge the defendant's mark and must fail. I cannot upon the facts before me hold the marks in question here are so similar as to be likely to cause confusion. I am inclined to think that there is not a reasonable probability of any considerable section of the purchasing public—a discriminating public in this case, young girls and women—being deceived; I should think if there were any probability of this occurring there would have been some concrete evidence of it by this time. There must be a reasonable probability of deception or confusion, and isolated instances of confusion are not in themselves, I think, sufficient to warrant the direction that a registered trade mark, in substantial use, be expunged. In this case, each mark produces I think a different impression on any person who has seen both at different times. It is not the proper rule to compare the two marks from the point of view of a person looking at the marks side by side, but from the standpoint of one who sees one mark in the absence of the other and who has only a general recollection of what the nature of the other mark was. Looking at the totality of each of the two marks in question, and taking the evidence before me, I cannot hold that there is such a reasonable probability of the interested public being confused as would justify interference with a mark that has had a very considerable public use for nearly two years. Any doubt in the matter should, I think, at this stage, be resolved in favour of the defendant.

Marks which are registered without limitation of colour are deemed to be registered for all colours. If I have power to direct a limitation as to colour, or as to the formation of the letters of the words of the respective marks, I shall be pleased to hear counsel for either party on the point, on the settlement of the minutes, that is, if they or either of them so desire. The possible liability of confusion arising between the two marks might be minimized or eliminated in some such way. I would observe that the lettering of the word "Peggy," in the defendant's mark, does not appear to correspond with the formation of the letters of that word supplied to the Commissioner of Patents in its application for registration.

The defendant will have its costs of the action.

Judgment accordingly.

BETWEEN :

DUFRESNE CONSTRUCTION CO. }
 LTD. }

SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1933
 June 5, 6,
 7 & 8.
 1934
 June 26.

Crown—Public works—Contrat à forfait—Civil Code—Extra work—Engineer's certificate—Condition precedent—Fortuitous event—"Uncontrollable action of nature which it would have been impossible to guard against"—Privileged documents.

By an agreement in writing suppliant contracted with Respondent to construct a pier and quay at Sorel, Quebec, in accordance with certain plans and specifications attached to the agreement. Suppliant was to be paid for the work according to certain unit prices and it was stipulated that "for any work or additional work done, or materials or things provided, under the written orders of the Engineer, for which no price or prices are named herein, His Majesty the King, in consideration and subject as aforesaid, will pay to the contractor the actual and reasonable cost, as determined by the engineer, of such work, materials and things, with an additional ten per cent thereon for the use of tools, contractor's plant, superintendence and profits."

Work was commenced in November, 1927, and by November 20, 1928, most of the piles required for the work had been driven into position. On the latter date suppliant was instructed by the district engineer to stop work because of water having risen in the forms in which concrete was to be deposited and the piles were left unprotected. Due to the pressure of ice in the spring of 1929 certain sections of the piles were broken and rendered unserviceable. Suppliant was instructed by Respondent's engineer to remove the damaged piles. This proved very difficult and suppliant was authorized to shift the outer face of the quay five feet outside its original alignment. Suppliant's claim is for the cost of removing and replacing the broken piles.

Held: That the contract entered into by the parties is not a *contrat à forfait*, according to the terms of the Article 1683 C.C.

2. That the engineer's certificate, required for the payment of works specified in the contract and of additional work not covered by the contract but ordered by the engineer, is not a condition precedent to the right of the contractor to be paid for work done to replace works executed in virtue of the contract which have been destroyed or damaged by an act of nature.
3. That certain memoranda, prepared for the guidance of the Minister of Public Works in determining whether suppliant's claim should be entertained or not, were privileged, on the ground that they were confidential reports, and not on the ground that their production would be prejudicial to the public interest. The privilege of exclusion of documents as evidence at the request of the Crown must not be extended beyond the requirements of public safety or convenience.

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PETITION OF RIGHT by the suppliant claiming the value and cost of work done under a contract entered into with Respondent.

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

L. E. Beaulieu, K.C. for the suppliant.

J. C. Lamothe, K.C. for the respondent.

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

ANGERS, J., now (June 26, 1934) delivered the following judgment:

This is a petition of right by which the suppliant, Dufresne Construction Company Limited, is claiming from His Majesty the King the sum of \$175,563.63, the alleged value and cost of works done (including labour and materials) in connection with the construction of a pier and quay at Sorel, County of Richelieu, Province of Quebec, in virtue of an indenture made on December 15, 1927.

The pier and quay were to be constructed according to plans and specifications attached to the indenture.

Under the indenture His Majesty was to pay for the works according to certain unit prices stated therein: see clause 36 (which clause also contained the stipulation quoted in paragraph one of the above headnote).

[The learned Judge discussed the pleadings and evidence adduced at trial and continued.]

Counsel for suppliant submitted, during the argument, that the contract entered into by the parties herein is not a *contrat à forfait*, i.e. a contract according to plans and specifications at a fixed price, but one of lease or hire of work carrying a remuneration to be reckoned on a series of unit prices provided in the indenture, and that the contractor is accordingly not subject to the provisions of article 1690 C.C.; in support of his contention counsel for suppliant cited the following authorities: Baudry-Lacantinerie, 3ème édition, vol. 22, n° 4005; Frémy-Ligneville, *Traité de la Législation des Bâtiments et Constructions*, vol. 1, n° 3 et 28; *Jalbert v. Cardinal* (1); *Renaud v. Bernier* (2).

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I am inclined to think that the contention of suppliant's counsel on this point is well founded; I do not believe that the contract with which we are concerned is a *contrat à forfait* according to the terms of article 1683 C.C. This does not mean that the contractor, i.e. the suppliant, is *ipso facto* entitled to claim from His Majesty the cost of any additional work, not provided for in the contract or the specifications, which it may have performed. The relations of the parties are primarily governed by the contract, and, unless it be silent or ambiguous on any point involved, one must be guided solely by its provisions.

The first question which logically presents itself to one's mind is whether the district engineer, Lucien Dansereau, was justified in stopping the work as he did.

The respondent contends that the district engineer had the right to stop the work seeing that there was water in the forms; he relies on the sixth paragraph of section 16 of the specifications and paragraph (e) of part (V) of the standard specification for concrete and concrete materials; they read as follows:

16. Concrete.—

.....

Samples of the concrete taken as deposited during the progress of the work shall show a compressive strength for standard cylinders of 3,000 pounds per square inch.

(V) *Handling and placing Concrete.*—

- (a)
- (b)
- (c)
- (d)

(e) *Depositing under Water.*—Concrete shall not be deposited under water unless distinctly called for by the specification or the works. When permitted by the specification, still water shall be maintained at the place of deposit. When concrete is placed under water, the coarse aggregates shall not be larger than 1-inch in any direction. In no case shall large stones or plums be placed in concrete deposited under water.

The respondent also invokes paragraph (d) of said part (V), which is in the following terms:

(d) *Freezing Weather.*—Concrete shall not be mixed or deposited at a freezing temperature, except on the written authority of the Engineer, and then special precautions must be taken to avoid the use of materials covered with ice crystals or containing frost, and to provide means for preventing the concrete from freezing after being placed in position and until it has thoroughly hardened. The water and all aggregates shall be heated to well above the freezing point before mixing.

No evidence was adduced showing that there was any likelihood of frost on the two occasions on which the work

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was ordered stopped by the local engineer in October and November, 1928; this motive, alleged in the defence in support of the local engineer's action in suspending the work, was, if not expressly at least tacitly, abandoned on the trial; the only reason held out to justify the cessation of the work, and in connection with which proof was made, was the rise of the water in the forms. The evidence shows that this rise was not considerable.

[The learned Judge here referred to a distinction made at trial between concrete deposited under water and deposited in water, and continued.]

I am inclined to believe that, with the small quantity of water in the forms on October 18 as well as on November 20, the work could have been proceeded with and the concrete poured into the forms without any risk, provided the necessary precautions were taken and an additional proportion of cement added to the concrete, as indicated by suppliant's experts. However in view of the divergence of opinion of the engineers as to the degree of strength and solidity of concrete deposited in water as compared with concrete poured in dry forms, I do not think that the respondent's engineer acted arbitrarily in suspending the work and that his action was tantamount to a tort; seeing the provisions of paragraph (e) of part (V) aforesaid, I am satisfied that he acted strictly within his right.

I may note that in a letter to the Minister of Public Works, dated February 28, 1930, submitting a detailed estimate of the work done by it at Sorel, the suppliant says (p. 2 of letter, exhibit 1):

We do not claim that your engineers had not apparent reasons to stop us working; on the contrary, on account of the fact that they thought it was paramount to the success of this wharf that a concrete having a compression of 3,000 pounds per square inch should be obtained, and in view of the level of the water they presumed that this high compressive strength could not be obtained.

Adolphe Dansereau says that on both occasions, namely on October 17 or 18 and on November 20 he protested verbally to the respondent's engineer against the latter's instructions to stop the work; Adolphe Dansereau is corroborated on this point by Dufresne; the alleged protest is denied and the evidence referring thereto is not on the whole very satisfactory. Be that as it may, since I have reached the conclusion that the respondent's engineer had

the right to stop the work, the protest is, in my opinion, immaterial. The instructions had to be obeyed.

As already stated, a large number of the piles which had been driven prior to November 20, 1928, date on which the work was stopped for the winter, were damaged during the ice break-up in the spring of 1929 and had to be replaced.

It was urged on behalf of the respondent that, under sections 21 and 38 of the contract and clause 10 of the general conditions forming part of the specifications, the suppliant was obliged to replace the damaged piles at its own cost; sections 21 and 38 and clause 10 contain respectively the following stipulations:

21. The Contractor shall be at the risk of, and shall bear all loss or damage whatsoever, from whatsoever cause arising, which may occur to the works, or any part thereof, until the same be finally accepted by the Minister, and if any such loss or damage occur before such final acceptance, the Contractor shall immediately, at his own expense, repair, restore and re-execute the work so damaged, so that the whole works, or the respective portions thereof, shall be completed within the time limited for completion thereof, and any delay occasioned by the Contractor to the other contractors on the work or any interference by the Contractor with the operation which may be a cause of delay or damage shall be rectified at the cost of, and the claim for damage or delay (if any) shall be at the charge of the Contractor.

38. The said price or prices shall be accepted by the Contractor as full compensation for everything furnished and done by the Contractor under this contract, including all work required but not included in the items hereinabove mentioned, and also for all loss or damage arising out of the nature of the works or the action of the weather, tides, elements, or any unforeseen obstruction or difficulty encountered in the prosecution of the work, and for all risks of every description connected with the works, and for all expenses incurred by or in connection with the works, and for all works, and for all expenses incurred by or in consequence of any delay or suspension or discontinuance of the work as herein specified, and for well and faithfully completing the works as in this contract provided.

10. *Prices.*—The prices mentioned by the Contractor in his tender are to be taken as those upon which he agrees to be paid for all the works embraced in this specification and accompanying plans, and also for all extra works which may be required for the proper execution of the contract. The prices will be held as rigidly inclusive, and to cover all failures, accidents, contingencies, plant, labour and materials, and all damage that may happen or occur to the works, or any portion of them, or to the plant or tools provided and employed, arising from the action of the elements, either from gales, storms, flood, ice, fire or any other cause whatever, up to their completion and final acceptance by the Department, excepting in such cases of uncontrollable action of nature which it would have been impossible to guard against.

Clause 9 of the general specifications, entitled "Broken, Shattered or Misplaced Piles," upon which counsel for

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respondent also relied, has, in my opinion, nothing to do with the present case. I may add that clauses 32 and 33 of the general conditions, also relied upon by counsel for respondent, appear to me to have no application whatever herein.

There would be no doubt as to the responsibility of the suppliant for the replacement of the broken piles if it were not for the exception contained in clause 10: "excepting in such cases of uncontrollable action of nature which it would have been impossible to guard against."

Let us try to determine what is the meaning of this exception, which is not included in either section 21 or section 38 of the contract.

Counsel for suppliant argues that the limitation of the responsibility of the contractor by the exception contained in clause 10 aforesaid extends to sections 21 and 38 of the contract, because, if it is true that, "in cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation" (art. 1019 C.C. P.Q.), *a fortiori* the same doctrine applies, when the contract contains a clause which palliates explicitly the strictness of other clauses dealing with the same subject; and counsel refers to section 6 of the contract. Section 6 contains *inter alia* the following stipulation: "the several parts of this contract shall be taken together, to explain each other and to make the whole consistent." The above stipulation merely expresses the substance of the law on the question: see article 1018 C.C.P.Q.; Pollock, Principles of Contract, 9th Ed., p. 274. The learned counsel's conclusion is that the contractor should not be held responsible for the loss, if it be attributable to an "uncontrollable action of nature, which it would have been impossible to guard against." Section 4 of the contract says that the specifications, special specifications, plans and drawings are to be part of the contract; it is interesting to note that section 57 of the contract stipulates that "in the event of any inconsistency between the provisions of this contract and the provisions of the specifications forming part hereof, *the provisions of the specifications shall prevail.*"

This is quite logical and reasonable when one considers that the printed clauses of the contract are general in their

terms and made to apply to any kind of work or construction, whilst the specifications are drafted for the particular work or construction which they are intended to cover: see *Desrosiers v. Lamb* (1).

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Counsel for suppliant then observes that the exonerating clause does not deal with fortuitous event, inasmuch as it does not require that the uncontrollable action of nature be one which could not be foreseen. Paragraph 24 of article 17 of the Civil Code defines the fortuitous event as follows:

A "fortuitous event" is one which is unforeseen, and caused by superior force which it was impossible to resist.

Counsel's observation on this point is, to my mind, well founded: the exception states that the act of nature must be uncontrollable, which is not synonymous to and does not necessarily imply unforeseen; the distinction however seems to me, in the present case, idle and immaterial.

What I have to determine is the purport or the intended significance of the exception contained in clause 10. Does it apply to the contingencies enumerated in the preceding phrase, namely to gales, storms, flood, ice and fire or does it deal exclusively with other contingencies not mentioned therein, as, for instance, lightning, volcanic eruptions, earthquakes, landslides, avalanches, against which it is impossible, even in the least measure, to guard? If the exception applies to gales, storms, flood, ice and fire, it narrows down to a great extent the import or bearing of the clause: gales and storms are uncontrollable and cannot, in most instances, be guarded against, if, on the other hand, there may perhaps be protection, to a certain degree, against floods, ice and fire; the exception would almost become broader than the rule. On the other hand, the clause, after mentioning gales, storms, flood, ice and fire, adds: "any other cause whatever," which would seem to include every possible contingency—including those I have indicated as well as others I may have overlooked—which are not nominally referred to in the clause.

Of the contingencies I have mentioned, which are not included in clause 10, volcanic eruptions, landslides and avalanches are, considering the site of the work, absolutely out of question in the present case; lightning is not likely

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to cause appreciable damage to a concrete pier and quay; it is even doubtful to me whether an earthquake, unless of an exceptional severity, could do much harm to such a structure. I do not pretend to have given a complete list of all possible contingencies liable to cause damage to the pier and quay with which we are concerned; I think however that, with those enumerated in the contract and the specifications, we have a fairly exhaustive enumeration of the contingencies which could possibly be anticipated. If the exception cannot reasonably deal with the contingencies to which I have alluded, and I believe it cannot, it must apply and can only apply to the contingencies enumerated in clause 10, namely gales, storms, flood, ice and fire and to any other "action of the elements," and to "any other cause whatever," provided it be one that could damage a concrete pier and quay; otherwise this exception would have no meaning whatever.

Having reached the conclusion that the exception in clause 10 applies to the contingencies nominally indicated therein as well as to others liable to cause damage to a work of the nature of the pier and quay which the suppliant undertook to build, the question for me to decide is whether the destruction of part of the piles by the ice break-up in the spring of 1929 was caused by "an uncontrollable action of nature which it would have been impossible to guard against."

The suppliant contends that he could have built the superstructure within a delay of three or four weeks at the utmost from the time the work was ordered stopped and that the superstructure would have protected the piles and prevented their destruction. This contention was not challenged and I believe it well founded. The construction of the superstructure was a means at the suppliant's disposal to protect the piles. The respondent however, wrongly or rightly, which appears to me immaterial, prevented the suppliant from using it and from the moment the respondent's engineer gave instructions to suspend the work for the balance of the season, this means of protection ceased to be available. Perhaps the suppliant could have continued the work at its own risk and thus saved the piles; I do not think however that it was bound to do it in view of the formal orders it had received and

there is nothing to indicate that it would have been allowed to do it.

Some of the respondent's witnesses suggested that the contractor could have erected a concrete crib which would have protected the piles from the ice shove during the break-up period. The evidence discloses that the erection of a crib would have cost from \$60 to \$80: see depositions Marien and Clarke. Landry, an engineer called as witness by the respondent, said (at p. 11 of his deposition) that the crib would have cost nearly as much as the structure itself. According to Landry, apart from the superstructure or the crib, there were no means to effectively protect the piles (dep. Landry, pp. 11 and 12).

The time required for the construction of a crib and the outlay entailed thereby rendered, in my opinion, the project impracticable.

It was contended that the ice break-up in 1929 occurred earlier than usual and at a time when the water was very low; it was further stated that, had the break-up happened at a later date, with a higher and normal level of the river, the ice would have passed over the piles and consequently would not have damaged them. If these contentions are right, and I think they are, it would mean that the cause of the disaster was not only uncontrollable but even unforeseen. However it may be, the exception in clause 10 of the general conditions of the specifications, as I have already noted, does not stipulate that the action of nature responsible for the damage must be unforeseen; the exception merely requires that it be uncontrollable.

It was urged on behalf of the suppliant that the ice break-up in the spring of 1929 had been hastened by an ice-breaker, the property of the Dominion Government, which broke the ice in Sorel harbour, particularly near the spot where the piles were situated, very early in the season, when the ice was still solid and green and the water low and that this had contributed to a large extent to the damage done to the piles. The evidence on this point, quite positive and definite as regards the action of the ice-breaker on that occasion, is, naturally enough, not so categorical regarding the consequences of such action; it never-

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theless creates a strong presumption that the premature breaking up of the ice by the ice-breaker did its share in the shattering of the piles. It is almost impossible to say when, otherwise, the ice would have started moving and in what condition of solidity and compactness it would have been at that moment; it is equally difficult to say what would have been the level of the water on the day the ice break-up would have taken place under natural conditions. The ice would undoubtedly have been softer and more friable and, in consequence, less apt to cause damage; moreover the river would very likely have been somewhat higher due to the increased inflow occasioned by the melting of ice and snow: the contingency of a smash up of the piles in these circumstances would have been considerably diminished, if not entirely averted.

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

After weighing the evidence carefully I have reached the conclusion that the partial destruction of the piles is attributable to "an uncontrollable action of nature which it would have been impossible to guard against" and that this action of nature, namely the ice break-up, was aggravated by the premature breaking up of the ice by the Government ice-breaker, the *Mikula*.

The exactness of the amount of \$163,800.43 was not disputed; so that, if the suppliant is entitled to recover the value of the work done in removing or replacing the damaged piles and shifting the outer face of the wharf, he must receive the said sum of \$163,800.43, no more and no less.

It has been argued on behalf of the respondent that the suppliant is not entitled to be paid the sum of \$163,800.43 or any portion thereof for want of a written order from the chief engineer authorizing the execution of the works for which the said sum is claimed and of a certificate from said engineer showing that the said order has been complied with and fixing the value thereof; it has been urged that the engineer's certificate is a condition precedent to the suppliant's right to be paid for such works. The respondent's contention is based on sections 7 and 10 of the contract; the following authorities were cited by counsel

for respondent: *Pigott v. The King* (1); *Beaulieu v. The King* (2) *The Queen v. Starrs* (3); *Wood v. The Queen* (4); *Berlinquet v. The Queen* (5); *Guilbault v. McGreevy* (6); *Peters v. Quebec Harbour Commissioners* (7). There are other decisions in the same sense, among which I may cite: *Isbester v. The Queen* (8); *Jones v. The Queen* (9); *Ross v. The Queen* (10); *O'Brien v. The Queen* (11); *Goodwin v. The Queen* (12); *Murray v. The Queen* (13); *The Queen v. McGreevy* (14).

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I do not propose to discuss each of the above decisions separately; I will content myself with saying that, in my opinion, they do not apply to works done in the circumstances disclosed in the present case. The engineer's certificate is required for the payment of works specified in the contract and of additional work not covered by the contract but ordered by the engineer; I do not think it is a condition precedent to the right of a contractor to be paid for work done to replace works executed in virtue of the contract which have been destroyed or damaged by an act of nature. If the engineer's certificate were to be a condition precedent to the right to be paid for work of that nature, the exception contained in clause 10 of the general conditions might as well be eliminated. The contract is very onerous and oppressive and it must be interpreted strictly.

A question on which I may say a word in passing is that of the production of the various memoranda prepared by respondent's chief engineer or local engineer, which were filed, under reserve of respondent's counsel's objection, as exhibits or part of exhibits 2, 4 and 20.

Objection was made to the production of these documents as being privileged, for two reasons: (a) because it was against public interest that they should be filed; (b) because they constituted memoranda or reports prepared for the guidance of the Minister with respect to the suppliant's claim.

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| (1) (1907) 38 S.C.R., 501. | (8) (1877) 7 S.C.R., 696. |
| (2) (1915) 17 Ex. C.R., 298. | (9) (1877) 7 S.C.R., 570. |
| (3) (1889) 17 S.C.R., 118. | (10) (1895) 25 S.C.R., 564. |
| (4) (1877) 7 S.C.R., 634. | (11) (1880) 4 S.C.R., 529. |
| (5) (1886) 13 S.C.R., 26. | (12) (1897) 23 S.C.R., 273. |
| (6) (1890) 18 S.C.R., 609. | (13) (1896) 26 S.C.R., 203. |
| (7) (1891) 19 S.C.R., 685. | (14) (1890) 18 S.C.R., 371. |

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I do not think that public policy or public security are in the least concerned in the present case; on the first ground I would have no hesitation to dismiss the objection to the filing of the memoranda in question. The production of these documents could not be prejudicial to public interest; they only deal with the relations of the Crown and the suppliant. The privilege of exclusion of documents as evidence at the request of the Crown must not be extended beyond the requirements of public safety or convenience.

In a case of *Robinson v. State of South Australia* (1) (before the Privy Council on appeal from the Supreme Court of South Australia), Lord Blanesburgh, who delivered the judgment of their Lordships of the Privy Council, says (at p. 714):

And, first of all, it is, their Lordships think, now recognized that the privilege is a narrow one, most sparingly to be exercised. "The principle of the rule," Taylor points out in his work on Evidence, section 939, "is concern for public interest, and the rule will accordingly be applied no further than the attainment of that object requires."

It is perhaps matter for surprise that the cases illustrating the limitations upon a rule so circumscribed are not more numerous. But their Lordships cannot doubt that the explanation is to be found in the judgment of Rigby L.J. in *Attorney-General v. Newcastle-upon-Tyne Corporation* (1897, 2 Q.B. 384, 395), where, himself an ex-law officer, he says: "I know that there has always been the utmost care to give a defendant that discovery which the Crown would have been compelled to give if in the position of a subject, unless there be some plain overruling principle of public interest concerned which cannot be disregarded."

As the protection is claimed on the broad principle of State policy and public convenience, the papers protected, as might have been expected, have been public official documents of a political or administrative character. Yet the rule is not limited to these documents. Its foundation is that the information cannot be disclosed without injury to the public interests and not that the documents are confidential or official, which alone is no reason for their non-production: see *Asiatic Petroleum Co. v. Anglo-Persian Oil. Co.* (1916, 1 K.B. 822, 829, 830) and *Smith v. East India Co.* (1 Ph. 50).

And at page 715 Lord Blanesburgh adds:

In view of the increasing extension of State activities into the spheres of trading business and commerce, and of the claim of privilege in relation to liabilities arising therefrom now apparently freely put forward, his observations stand on record to remind the Courts, that while they must duly safeguard genuine public interests they must see to it that the scope of the admitted privilege is not, in such litigation, extended. Particularly must it be remembered in this connection that the fact that production of the documents might in the particular litigation prejudice the Crown's own case or assist that of the other side is no such "plain over-

ruling principle of public interest" as to justify any claim of privilege. The zealous champion of Crown rights may frequently be tempted to take the opposite view, particularly in cases where the claim against the Crown seems to him to be harsh or unfair. But such an opposite view is without justification. In truth the fact that the documents, if produced, might have any such effect upon the fortunes of the litigation is of itself a compelling reason for their production—one only to be overborne by the gravest considerations of State policy or security.

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The second ground of objection invoked by the respondent against the production of the memoranda is more serious.

These memoranda, as already stated, were made for the guidance of the Minister so as to enable him to decide whether the suppliant's claim should be entertained or not. No action had yet been taken when these memoranda were made; there had even been no threat of action. The suppliant had sent in a claim and the matter apparently stood in abeyance, pending the investigation by the Crown. In the event of the dismissal by the Minister of the suppliant's claim, legal proceedings could be anticipated. I think that, in the circumstances, the said memoranda were confidential reports and that they constitute privileged matter: Halsbury's Laws of England, vol. 13, No. 781; *Ankin v. London and North Eastern Railway Company* (1); *Ogden v. London Electric Railway Co.* (2); Canadian Encyclopedic Digest (Ontario Edition), vol. 3, p. 725 and notes (f) and (g) at foot of page 726; *Savignac v. Montreal Tramways Co.* (3). The objection made by counsel for respondent to the production of the memoranda forming part of exhibits 2, 4 and 20 must be maintained and the said memoranda are accordingly struck from the record.

I may add that I doubt very much whether any statement made by the chief engineer or the local engineer in a memorandum would be binding upon the Crown.

There will be judgment against the respondent for \$175,563.63 and costs.

Judgment accordingly.

(1) (1930) 1 K.B., 527.

(2) (1932-3) 49 T.L.R., 542.

(3) (1916) 18 P.R. (Quebec), p. 360.

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BETWEEN:

A. HOLLANDER & SON, LIMITED.. SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Revenue—Sales Tax—Special War Revenue Act Regulations—“Manufacture”—Civil Code—Plaintiff required to have an interest in action brought.

Suppliant is engaged in the business of dressing and dyeing furs for others and not for its own account. It paid to the respondent certain sums of money as sales tax imposed by the Special War Revenue Act 1915, and amendments thereto. The suppliant was prepaid or repaid by the customer, the tax so paid, being out of pocket only such amounts as certain customers failed to repay it. Suppliant brought suit to recover all money paid by it as sales tax, alleging such payments to have been made by mistake of law and of fact.

Held: That under s. 87 (c) of c. 179, R.S.C. 1927, it is the goods of the owner, manufactured by the labour of another, that are to be taxed as a sale; it is not intended the person performing the labour should be taxed for the goods so manufactured or produced.

2. That the suppliant, not having paid the tax itself, but rather as an intermediary for and on account of its customers, has no right of action against the Crown to recover the same.
3. That the suppliant, not having an interest in the money in question, as required by Article 77 of the Code of Civil Procedure of Quebec, cannot maintain the action against respondent.

PETITION OF RIGHT by suppliant herein asking that the amount of money alleged to have been paid to the Crown as sales tax, by mistake of law and of fact, be refunded.

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

L. A. Forsyth, K.C., P. Bercovitch, K.C., and J. deM. Marler for the suppliant.

J. A. Mann, K.C., and L. Choquette for the respondent.

The questions of fact and parts of the Act relevant to this case are stated in the reasons for judgment.

THE PRESIDENT now (July 28, 1934), delivered the following judgment:

The suppliant is a company engaged in the business of dressing and dyeing furs, for others and not for its own account. By virtue of the Special War Revenue Act 1915, and amendments thereto, and within the periods herein-

after to be mentioned, the suppliant paid to the Crown, as sales tax, certain sums of money, by mistake of law and of fact it is claimed, and the suppliant by its petition herein seeks repayment of such moneys from the Crown.

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The matters in issue relate to two different periods, that between May 19, 1920, and December 31, 1923, and that between December 31, 1923, and May 31, 1931, and for that and other reasons, it perhaps would be most convenient at this stage to set out the provisions of the statute applicable to those periods.

The Special War Revenue Act 1915, and amendments thereto, in force in the period between May 19, 1920, and December 31, 1923, provided, by chap. 47, s. 13, Statutes of Canada 1922, that:

19BBB (1) In addition to any duty or tax that may be payable under this Part, or any other statute or law, there shall be imposed, levied and collected an excise tax . . . on sales and deliveries by Canadian manufacturers or producers, . . .

The suppliant claims that during this period, it was not a manufacturer or producer within the meaning of the Act, that it made no sales or deliveries of goods then taxable under the Act, and that no tax was then exigible from the suppliant. It claims, however, that by mistake of law and of fact, during that period, it accounted to the Collector of Customs and Excise at the Port of Montreal, at the rate of tax then in force, upon the amount of all invoices issued to the suppliant's customers for dressing and/or dyeing of furs for such customers, although in fact and in law such transactions of the suppliant with its customers were not sales and deliveries of a Canadian manufacturer or producer, and that in respect of such accounting the Crown was paid by the suppliant, through error of law and of fact, \$8,014.66.

The above mentioned section of the Act was repealed by chap. 70, s. 6 of the Statutes of Canada 1923, and for the period between January 1, 1924, and May 31, 1931, the following section was in force:

19BBB (1) In addition to any duty or tax that may be payable under this Part, or any other statute or law, there shall be imposed, levied and collected a consumption or sales tax . . . on the sale price of all goods produced or manufactured in Canada, . . . which tax shall be payable by the producer or manufacturer at the time of the sale thereof by him; . . .

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By virtue of this section, which came into force on January 1, 1924, sales tax became payable "at the time of the sale thereof" and not "on sales or deliveries" as provided by the repealed section. The suppliant puts forward the same claim under this last mentioned section, for the period just mentioned, and upon the same grounds as in the first mentioned period, under the repealed section, and it alleges that in this period it paid sales tax in the amount of \$201,530.37.

By chap. 70, s. 6, ss. 13, Statutes of Canada 1923, there was enacted for the first time, the following section, now section 87 of the Act as found in the Revised Statutes of Canada 1927, chap. 179, but in precisely the same language, and it will be convenient hereafter to refer to sec. 19BBB (13) as enacted in 1923, as sec. 87. The relevant portion of this new section reads:

87. Whenever goods are manufactured or produced in Canada under such circumstances or conditions as render it difficult to determine the value thereof for the consumption or sale tax because

- (a)
- (b)
- (c) such goods are manufactured by contract for labour only and not including the value of the goods that enter into the same, or under any other unusual or peculiar manner or conditions; or
- (d)

the Minister may determine the value for the tax under this Act and all such transactions shall for the purposes of this Act be regarded as sales.

This section, as sec. 19BBB (13), came into force on January 1, 1924. It is because of the coming into force of this section, on January 1, 1924, and the changes effected in the Act thereby, that the time material here is divided into two periods.

Effective on September 1, 1924, the Minister of Customs and Excise, purporting to act under authority conferred by the Act, issued certain regulations among which was the following:—

Furriers are not to be granted a consumption or sales tax licence on and after the 1st September, 1924. Licences issued to furriers prior to that date are to be cancelled.

Dressers and dyers of furs, however, are required to take out a sales tax licence and account to the Collector of Customs and Excise for consumption or sales tax on furs dressed or dyed by them.

Such tax is to be computed on the current market value of the dressed furs whether the dresser is the owner of the furs or not.

The suppliant contests the validity of this regulation and says it was wholly or partially, *ultra vires* of any power or authority conferred upon the Minister of Customs and Excise by the Act, and that such regulations therefore imposed no liability for the payment of the sales tax upon the suppliant, except possibly in part and this will be mentioned later, and that the cancellation of licences to furriers was void.

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From September 1, 1924, until May 31, 1931, through error of law and of fact, it is alleged, the suppliant accounted in the usual way for the sales tax, in respect of furs dressed or dyed by it for its customers, the tax being computed upon the current market value of the dressed and dyed furs, and that during this period it paid to the Crown the sum of \$564,444.38, of which sum \$501,791.07 represents sales tax paid in respect of furs dressed or dyed, or both, for customers of the suppliant whose licences had been cancelled, illegally it is claimed, by virtue of the regulation.

The suppliant claims, in its petition, that it is entitled to recover altogether from the Crown the sum of \$574,539.96, subject to a slight deduction in respect of the first mentioned period, but which I need not delay to explain. The suppliant also claims that the sums mentioned were paid to the Crown, at Montreal, in the province of Quebec, and that the provisions and dispositions of the Civil Code of the Province of Quebec apply thereto.

In the case of *Vandeweghe v. The King* (1), the suppliant, Vandeweghe Ltd., dressed and dyed its own furs and later sold them, the reverse of this case. On appeal to the Supreme Court of Canada, it was there held that the furs dressed and dyed by the suppliant fell within the description of goods "manufactured or produced in Canada" within the meaning of sec. 86 of the Act, and were taxable under that section of the Act. Duff C.J., who delivered the judgment of the court, said:

Although it does not strictly enter into the argument, it may not be out of place to observe that the dyer and dresser who neither owns the fur nor sells the fur, within the proper meaning of the word, is clearly not within s. 86. He may come within s. 87, and, if so, the transaction between him and the owner of the fur, which is not truly a sale at all, is deemed to be a sale for the purposes of the Act. The respondents,

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as we have already observed, are not within s. 87 but, if they are a "producer" or "manufacturer" they are within s. 86.

The Supreme Court of Canada thus definitely held, that in the facts of this case, the suppliant would not be taxable under what is now sec. 86 of the Act, which for all purposes here may be regarded as of the same effect as the earlier and corresponding sections of the Act which I have already referred to; that means that the suppliant here would not be liable to the sales tax upon the furs dressed and dyed by it for its customers, under sec. 86 of the Act, because it was neither the owner nor seller of the furs, but that it might be liable under sec. 87 of the Act.

It occurs to me that I should supplement my reference to the regulation in question, in order that there be no misunderstanding as to the authority under which it purports to have been enacted. The introductory clause of the regulation I omitted to mention, and it is as follows:

Under authority of section 19BBB, subsection 3, and section 19C of The Special War Revenue Act, 1915, the regulations contained in Memorandum No. 39, Supplement D, as affecting furriers are hereby cancelled.

Then follows the balance of the regulation as already quoted. Subsection 3 of sec. 19BBB, one of the sections under which the regulation purports to have been enacted, is as follows:

Notwithstanding anything contained in this section, if at any time it appears to the Minister of Customs and Excise that payment of the consumption or sales tax is being evaded by a licensed manufacturer or producer or licensed wholesaler or jobber the Minister may require that the consumption or sales tax shall be imposed, levied and collected on any material specified by the Minister sold to any licensed manufacturer or producer or licensed wholesaler or jobber specified by the Minister, at the time of sale of such material when produced or manufactured in Canada

Ss. 19 (c) of sec. 19BBB reads:

The Minister may make such regulations as he deems necessary or advisable for carrying out the provisions of this Part.

It is clear, I think, that the regulation (requirement) in question was enacted under ss. 3 of 19BBB. It could hardly have been enacted under sec. 19 (c) above mentioned, or under any other provision of the Act. I quite agree with Mr. Mann, that it is for the Minister to decide, under ss. 3 of 19BBB, if the sales tax were "being evaded," and if that is so decided it is not open to question by the taxpayer. In a circular letter addressed to the Collector of Customs at Montreal, by the Deputy Minister of Customs

and Excise, dated September 2, 1924, it is stated that under the provisions of this regulation, the "consumption or sales tax is to be computed on the value of the furs, including the dressers' and dyers' charges for dressing and dyeing." The letter then states that each dresser and dyer is to furnish the local Collector of Customs with a daily statement of all furs received by him, such statement to show the names of the owners of the furs and the number and kinds of skins received; and these statements are to be retained by the Collector. Then it is directed by the letter that a competent officer of the staff of the Collector of Customs and Excise is to determine the value of such furs for sales tax purposes, such valuation to be determined as soon as possible after the receipt of the daily statement from the dresser and dyer, and such officer is required to furnish the dresser and dyer with a separate memorandum, showing, in respect of each owner of furs, the amount of sales tax payable. The letter then proceeds to state that each dresser and dyer is required to make a monthly return to the Collector of Customs and Excise covering the amount of the tax on the furs dyed or dressed during any month, and to attach thereto the separate memorandum prepared by the revenue officer just above referred to. All these directions will appear to have been followed when I describe, as I am about to do, the procedure followed in actual practice in this case, by the revenue officers, the suppliant, and the customer or owner of the furs. It will be sufficient for the present to point out, that if the authority for the regulation is to be found in ss. 3 of sec. 19BBB, and I think it is only to be found there, then the tax became payable only at the time of sale of any specified material, to a licensed manufacturer or producer, or a licensed wholesaler or jobber; if it were enacted under 19 (c) of the same section then it should contain only such directions or requirements as would be necessary for carrying out the provisions of Part IV of the Act, and should not purport to effect any substantive change in the provisions of that part of the Act.

In this case, the following procedure was in practice followed, subsequent to the regulation coming into force, in determining the value of the dressed and dyed furs, and in ascertaining the amount of the tax. This procedure will

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disclose that the tax was paid by the suppliant to the Collector of Customs at Montreal, and it was prepaid or repaid the tax by the owner of the furs. The suppliant reported daily to the Department of National Revenue at Montreal, on form E163, supplied by the revenue officers, and this would show the number and description of skins, the name of the owner, the nature of the work performed upon the skins by the suppliant, and the customer's valuation of the skins. On the form there is a column headed "Officer's Valuation," to be filled in by a revenue officer, and next a column wherein is to be filled out the amount of the sales tax by a revenue officer. The customer's valuation of the skins would, in practice generally, be forwarded to the suppliant with the raw skins and when this form, Exhibit 5, was completed, except the last two columns, it would be sent to the proper revenue officer by the suppliant, when the valuation of the fur, and the amount of the tax would be finally determined by the former. Then form E162, Exhibit 4, prepared by a revenue officer, showing the name of the skins, the quality, the value, the dressing and dyeing charges, the total value for taxation, and the total amount of tax payable, would be forwarded the suppliant. The amount of the tax was determined by applying the tax, at the rate then in force, upon the value of the raw skin, or the dressed and dyed fur,—it is difficult to say which—and upon the charges for dressing and dyeing the furs, the combined figures constituting the aggregate of the tax on each dressed and dyed fur. The total tax was then paid, subject to rare exceptions, by the customer to the suppliant, and by it paid over to the Collector of Customs and Excise at Montreal. It would appear that the suppliant was instructed by revenue officers not to part with the possession of the furs until it had been paid the tax mentioned, by the customer. The suppliant would of course also be paid for its charges for dressing and dyeing the fur. The revenue officers were of course aware of this practice, and apparently it was not intended that the suppliant should bear the burden of the tax. It therefore appears that, at all the times material here, while the tax was paid upon the dressing and dyeing charges, and the value of the raw skin or fur, by the suppliant in the first instance, yet the suppliant was prepaid or repaid, by the customer, the tax so paid, and in the result, the suppliant

was out of pocket only such amounts as certain customers failed to repay the suppliant, and to such cases I shall have occasion to refer later.

Some further facts should also be mentioned before proceeding further. In the period from May 31, 1921, down to September 1, 1924, when the regulation came into force, the tax was paid by the suppliant only on its dressing and dyeing charges, on the ground I assume that it was a manufacturer or producer of goods. After September 1, 1924, the tax was paid by the suppliant on the amount of its dressing charges and the value of the skin or fur, as just explained, except that during the eight-month period between January 1, 1924, when section 87 came into effect, and September 1, 1924, when the regulation came into effect, it would appear that the sales tax was paid by the suppliant only on its dressing and dyeing charges, and I assume that the amount so paid in that period was prepaid or repaid the suppliant by its customers.

The question for decision is reduced to somewhat narrow limits. In respect of the period ending December 31, 1923, the suppliant was apparently taxed on account of the dressing and dyeing of furs for customers, under sec. 19BBB. But the suppliant was not taxable under that section, upon the ground laid down in the Vandeweghe case by the Supreme Court of Canada in regard to the effect of sec. 86, in the case where the dresser and dyer did not own or sell the furs. Sec. 87 was not in force during that period, and neither was the regulation in question. I think it is beyond controversy that the suppliant was not taxable in this period.

Now in regard to the second period. If the tax were imposed upon the suppliant, in exercise of the power conferred upon the Minister by ss. 3 of sec. 19BBB, and if the regulation in question expresses the decision of the Minister to exercise such power and the manner of so doing, then the tax was not, I think, payable by the suppliant, because the material or goods on which the tax was in fact imposed, levied and collected, was not sold to a licensed manufacturer or producer, or to a licensed wholesaler or jobber. The suppliant did not own or sell any dressed or dyed furs that are in question here. Ss. 3 of s. 19BBB contemplates an actual sale; this provision would seem to be applicable to the case where the

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dresser and dyer owned the furs so processed, and sold them to a person licensed under the Act. I understand it to be suggested at the trial, by counsel for the Crown, that the regulation was enacted because there was an attempt on the part of some licensed persons, in some way, to evade the tax in connection with dressed or dyed furs. Further, I seriously doubt if the Minister had any authority under the Act to cancel the licences hitherto issued to furriers, so called. If any sales tax were payable by the suppliant it therefore must have been authorized by sec. 87 (c), and such contention is made on behalf of the Crown; and I understood it to be also contended that the regulation in question was enacted by virtue of the general powers to enact regulations, granted by ss. 19 (c) of sec. 19BBB, and as being necessary "for carrying out the provisions of this Part," and therefore a necessary regulation in the carrying out of sec. 87 (c). It remains therefore to consider the interpretations to be placed upon sec. 87 (c), and whether the regulation is applicable to sec. 87 (c).

Under sec. 87 (c), either the suppliant or the owners of the furs which it dressed and dyed were liable for the sales tax, or sec. 87 (c) has no application whatever to the state of facts here. The first part of sec. 87 refers to goods "manufactured or produced," and "the consumption or sales tax," just as in sec. 86. It is the primary purpose of sec. 87 to confer upon the Minister the power to determine the "value" of goods manufactured or produced, for the purposes of the sales tax because, in the cases mentioned, there may be some difficulty in determining such "value." I am unable myself to see how there could be any difficulty in determining the value of dressed and dyed furs, once it was determined to tax them. The value of the dressed and dyed furs would be the same, whether the owner or another dressed and dyed them. If the Minister in fact decided there were any difficulty in that connection, that decision I apprehend would be final; there is no suggestion in the evidence here that the Minister decided that in this particular trade or business there was any difficulty in determining the value of dressed and dyed furs, for the purposes of the tax. However, I cannot see that I can say that the Minister could not say that this was a case where he could exercise that power, even if the grounds for it do not seem convincing to me. While by no means free from

doubt, I am not convinced that I should disregard sec. 87 (c) in this issue. If that provision were not intended to confer upon the Minister the power to "value" goods for the purpose of the tax, I can see no reason for constituting the transaction mentioned as a statutory sale. It is difficult for me to see any reason for differentiating between the case where the owner dresses and dyes his own furs, and this case, yet I can hardly say that such was not the intention of sec. 87 (c).

The circumstances in which sec. 87 comes into play are referred to at the end of the section as "transactions," which is as appropriate and convenient a term as any other for describing the several matters mentioned in the subparagraphs of the section. In so far as 87 (c) is concerned, it refers to goods manufactured by contract for labour for the person who supplies and owns the raw material or goods. This provision of the section was never intended, I think, to mean that the "labour" entering into or applied to the owner's goods was of itself the whole "transaction," or that the value of the labour was alone subject to the tax and payable by him who performed the labour; the "transaction" relates to goods manufactured in the circumstances therein mentioned, that is to say, by the owner supplying the material or goods, and some one else the labour. Supplying the raw material or goods necessarily constituted a part of the contract or transaction. It is the goods of the owner, manufactured under contract by the labour of another, that are to be taxed as a sale; "manufacture," I think, here means a "manufacture" for and on account of the owner who has supplied the goods, not a manufacture by the person who has performed the labour, and it is "the value" of the goods after the "labour" has been applied to or bestowed upon the goods or material that the Minister is authorized to determine. The meaning to be attributed to sec. 87 (c) is, I think, that in the case where goods or raw material are, by contract for labour, manufactured or converted from one commodity class into another, and the raw material or goods so manufactured or converted are provided by the owner, and their value is not included in the contract for labour, then, the Minister may determine the value of the goods so manufactured or produced. In this case, as in all others, the contract would indicate the value or cost of the

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labour for dressing and dyeing the furs, and it would also indicate that the raw furs were to be supplied to the dresser or dyer by the owner, but the contract would be silent as to the value of the raw furs or the dressed and dyed furs. "Value" in sec. 87 (c) means that the value of the raw material or goods to be supplied was not included in the contract for labour, and probably it was for that reason that sec. 87 (c) was enacted so as to provide a summary and final method of determining the value of the goods manufactured and produced under such conditions. There is no suggestion in sec. 87 (c), so far as I can observe, that the person performing the labour was the person to be taxed for the goods manufactured or produced, and I do not think that was intended. If "transactions" means that the contract for the labour involved in dressing and dyeing the furs of customers was taxable as a sale against the dresser and dyer that would give to "sale" a meaning utterly foreign to the whole spirit of the Act, including even sec. 87 (a), (b) and (d). Take, for example, the case where one contracts to manufacture clothing, from goods and material supplied by the owner; it seems impossible to believe that the legislature intended that in such a case the contractor should be liable for the sales tax, or that such labour was intended to constitute a sale. One could understand the legislature intending by sec. 87 (c), that the owner of the furs should be taxed, and why goods manufactured under such conditions should be deemed a sale. But I cannot believe that sec. 87 (c) was intended to mean that the dresser and dyer of furs which he did not own, could not sell, could not consume, and which I think he was bound to deliver back to the owner on payment of the labour charges, should be made liable for the tax, and put to the possible inconvenience, annoyance and expense, of paying the tax in such circumstances. If "transaction" here relates only to the labour of dressing and dyeing, then the dresser and dyer would, at the most I think, be taxable only on the contract price of the labour. but that is not, I think, the meaning or intention of the section. The regulation does not seem to be one framed for the purpose of assisting in the determination of the "value" of the goods manufactured or produced, under the conditions set forth in sec. 87; it seems to be legislation and not regulation. I am therefore of the opinion that

the true construction of sec. 87 (c) is, in so far as this case is concerned, that it was the owner of the dressed and dyed furs—and that is what was really done here—and that the regulation is one not authorized by, or pertinent to, this section. If that is not the meaning of sec. 87 (c) then it is arguable that the section is inoperative on account of uncertainty. Were it not for what I am about to say I think the suppliant would be entitled to recover the amount claimed.

If the construction which I place on 87 (c) be correct, then it was the owners of the furs which were taxable, and they could not, I think, recover the moneys paid by them on account of the tax, from either the suppliant or the Crown. Now, in the state of facts explained, can the suppliant recover such moneys from the Crown? Mr. Mann suggested that on equitable grounds the suppliant should not succeed, because the moneys it paid to the Crown as taxes were paid to it by the owners of the furs, for the purpose to which in fact they were applied by the suppliant. Mr. Forsyth argued that the suppliant having paid the taxes mentioned, which in law were not exigible from it, it was entitled to recover the same, and the court need not and should not enquire if such amounts were prepaid or repaid by the owners of the furs, to the suppliant, or what disposition the suppliant might make of such moneys if recovered. As I have already explained, the moneys which the suppliant paid to the Crown, on account of the sales tax, were in fact generally prepaid to the suppliant by its customers, and any amounts that were paid the suppliant after the latter paid the tax, was owing to a courtesy extended the customer by the suppliant, and such postponed payments may be placed in the same category as those that were prepaid. It seems to me that the suppliant not having really paid the taxes itself, but rather as an intermediary for and on account of the customers, it has no right of action against the Crown to recover the same. It is true, I understand, that in some few instances the suppliant paid the tax prior to the receipt of the same from some of its customers, and were never repaid, but to this exception I shall refer later. It appears to me that, in this state of facts, if the suppliant could now recover such moneys it would be against principle and justice; and it would not be a case of giving relief to the suppliant

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because it had been injured, or because its position was altered to its disadvantage, or because it ever expected that the taxes should be repaid it by the Crown. It is not on the other hand unconscionable, in the circumstances, for the Crown to resist repayment. Even if the tax were properly payable under the statute by the owners of the furs, but invalidly or by mistake, or owing to some irregular procedure, the payments were made through the suppliant, the latter knowing the application to be made of such payments, it seems to me it should not now be able to recover the same. If the suppliant were wrongfully required to pay the tax in the first instance, it wrongfully received the same from its customers, and I do not think the suppliant can now be heard to say it is entitled to recover the moneys so paid just because it was once in possession of the same. It is a principle of law, I think, that in order to have a right of action one must have some interest in the thing sought to be recovered or the right sought to be enforced, unless he sues in a representative capacity which is not the case here. The suppliant here either collected the tax from the customer for the use of the Crown, or, it paid the tax for the customer with moneys advanced by the customer. The Crown seems to have made the dresser and dyer its medium for the collection of the tax, and the dresser and dyer acted accordingly. In a letter dated July 7, 1931, addressed to the Commissioner of Excise, the suppliant refers to "burdening the dresser and dyer with the collecting of the tax . . ."

In any event, the suppliant does not appear to have any interest of right in the taxes received from its customers and paid over to the Crown. It seems to me that it is the owner of the furs alone, who has a right of action for the recovery of the taxes paid, that is, if any is maintainable at all. If the dresser and dyer were a seller of the furs under the statute it was liable for the tax; if no statutory sales were made by the suppliant then the taxes irregularly paid through it were for the account of its customers, and this it received from its customers. The principle which I have stated, I apprehend, expresses the rule of the common law. If it is the law of Quebec which applies here, and the suppliant relies on Articles 1047 and 1140 of the Civil Code of Quebec, then Article 77 of the

Code of Civil Procedure would seem applicable. That article is as follows:

77. No person can bring an action at law unless he has an interest therein.

Such interest, except where it is otherwise provided, may be merely eventual.

The suppliant, in my opinion, has not an interest in the moneys in question here, and on this ground, I think, it must fail. Whether the tax were paid over by the suppliant to the Crown, in error of law or fact, matters not in the facts of this case. Therefore I think the petition must be dismissed subject however to what follows.

It would appear from the evidence that in some instances, the suppliant was never repaid by its customers, sales taxes which it had paid to the Crown, owing, for example, to the bankruptcy of such customers, either before or after the return of the dressed and dyed furs to such customers. I am not prepared to decide presently what should be done in respect of such tax payments. Upon the settlement of the minutes I shall be pleased to hear counsel fully argue this point, and until then it is reserved. If it should be decided that the suppliant is entitled to recover such amounts, it is probable that a reference to the Registrar or Deputy Registrar would be made. Until then I also reserve the question of the disposition of the costs of this petition, including of course the costs relative to the point just above mentioned and reserved.

Judgment accordingly.

BETWEEN:

LAWRENCE V. CASHIN AND GERALD } CLAIMANTS;
LEWIS

AND

HIS MAJESTY THE KING..... RESPONDENT.

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Customs—Customs Act ss. 11, 185, 207—Seizure—Foreign Ship—No exemption from local law for foreign ship putting into port under constraint—Untrue report—Merchant Shipping Act—Constitutional law—Revenue laws.

The *Apockmaouchea*, a ship owned by the claimant, Cashin, of St. John's, Newfoundland, the port of registry, cleared from Halifax, N.S., unladen, took on a cargo at St. Pierre and unloaded that cargo on to another vessel at a point some fourteen or fifteen miles off the coast

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of Nova Scotia. The ship then put into Halifax on account of engine trouble; the claimant, Lewis, master of the ship, in reporting to the Collector of Customs at Halifax, as required by s. 11 of the Customs Act, c. 42, R.S.C. 1927, made an untrue report. Later the ship was seized by the Royal Canadian Mounted Police for an alleged violation of s. 185 of the Customs Act. On appeal from the decision of the Minister of National Revenue, confirming the seizure, claimants contended *inter alia* that s. 11 of the Customs Act was *ultra vires*.

Held: That for customs purposes, a vessel which is not registered in a Canadian port, even though a British vessel, must be considered a foreign vessel.

2. That putting into port under constraint does not carry any legal right to exemption from local law or local jurisdiction.
3. That the report required by s. 11 of the Customs Act is required to be made only after the vessel has entered a Canadian port, and the fact that disclosure is required of acts which may have occurred during the course of the voyage, outside of the territorial waters of Canada, does not render the enactment extra-territorial in its operation.
3. That the offence charged herein under s. 185 of the Customs Act is that of having made an untrue report.
4. That the Parliament of Canada, for the protection of the revenue, has the right to require a master coming into a Canadian port, to make a full and complete statement, in his report, of the dealings in cargo which he had during the voyage which immediately preceded his arrival at the port.

REFERENCE by the Crown under s. 176 of the Customs Act.

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

F. W. Bissett for claimants.

Ronald McInnes, K.C., for respondent.

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

ANGERS J. now (February 15, 1935) delivered the following judgment:

This matter comes before me on a reference by the Minister of National Revenue under section 176 of the Customs Act (R.S.C., 1927, ch. 42), which reads as follows:

176. If the owner or claimant of the thing seized or detained, or the person alleged to have incurred the penalty, within thirty days after being notified of the Minister's decision, gives him notice in writing that such decision will not be accepted, the Minister may refer the matter to the court.

On Sunday, October 15, 1933, the *Apockmaouchea*, a vessel of approximately 67 tons, owned by Lawrence V. Cashin, one of the claimants, in charge of Gerald Lewis, the other claimant, as master, docked at Halifax, N.S., in ballast.

The following day, the master, Gerald Lewis, went to the Customs House at Halifax and made a report to the collector or his assistant in the following terms (leaving out the part of the printed matter immaterial herein):

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REPORT INWARDS—PORT OF HALIFAX, N.S.

In the ss. *M. V. Apockmaouchea*. Registered tonnage, 67. Registered at the Port of St. John's, Nfld., with 8 men. Gerald Lewis, Master for this present voyage from Halifax, N.S., to Sea and returned to Halifax, N.S.

In Ballast.

In on account of engine trouble.

Sgd. I, Gerald Lewis, Master of the Ship or Vessel called the *Apockmaouchea* of 67 tons measurement or thereabouts, last cleared from the Port of Halifax, N.S., to Sea and return to Halifax, N.S., do solemnly swear that since the said vessel was so cleared I have not broken bulk, nor has any part of her cargo been discharged or landed or moved from the said vessel *Apockmaouchea* except as shown above and I do further swear that the Manifest now exhibited by me, and hereto annexed, doth to the best of my knowledge and belief, contain a full, true and correct account of all goods, wares and merchandise laden on board such vessel at the Port of Halifax, N.S., to Sea and return to Halifax, N.S., or at any other port or place during her present voyage. So help me God.

Sworn to at Halifax, N.S., this 16th day of October, 1933, before me

Sgd. J. H. BARNSTEAD,

for Collector.

Sgd. GERALD LEWIS,

Master.

On December 11, 1933, the *Apockmaouchea* was seized by the Royal Canadian Mounted Police for alleged violation of section 185 of the Customs Act. The first paragraph of section 185, which is the only one relevant herein, reads as follows:

185. If any goods are unladen from any vessel or vehicle or put out of the custody of the master or person in charge of the same, before report is made as required by this Act, or if such master or person fails to make such report, or to produce such goods, or makes an untrue report or does not truly answer the questions demanded of him, he shall for each such offence incur a penalty of four hundred dollars; and the vessel or vehicle and the animals drawing the same shall be detained until such amount is paid; and, unless payment is made within thirty days, such vessel or vehicle and any animals drawing the same may, after the expiration of such delay, be sold to pay such penalty and any expenses incurred in detaining and selling such vessel or vehicle.

On January 5, 1934, in compliance with the requirements of section 172 of the said Act, a notice of seizure on the usual departmental form (K. 30) was sent by the Commissioner of Customs to Lawrence V. Cashin, St. John's,

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Nfd., registered owner of the vessel, containing, *inter alia*, the following statements:

The Commissioner, R.C.M. Police, Ottawa, Ont., having reported that a seizure has been made from you on the 11th day of December, 1933, of the following goods, viz:—

Motor Vessel

Apockmaouchea,

valued at \$4,500 more or less; and the following charges for infractions of the Customs laws having been made against you, viz:—

That on or about the 16th day of October, 1933, the Master of the said vessel made an untrue report inwards at Customs, Halifax, N.S.

Wherefore take notice that if such seizure or charges be maintained, the said vessel or moneys, if accepted on deposit in respect thereof, become liable to forfeiture, and each party concerned in such infraction of the law subject to penalties under the provisions thereof.

The notice further states that any evidence which may be presented within thirty days, by affidavit or affirmation, in rebuttal of the charge preferred, will be considered and that, at the end of the said delay or sooner if so desired by the person notified, the Commissioner of Customs will, in accordance with the provisions of section 173 of the said Act, report upon the merits of the seizure and the evidence, if any, so furnished, to the Minister for his decision and that such decision will be final, unless, within thirty days after receiving notification thereof, the party so notified gives notice in writing to the Minister, in conformity with section 175, that the decision will not be accepted.

On the 30th of January the solicitor for the claimants wrote to the Commissioner of Customs, saying that he was sending him a statutory declaration made by the Master of the *Apockmaouchea*, Gerald Lewis, in answer to the notice of seizure. The declaration was either omitted from the letter or mislaid in the Department of National Revenue; on the 5th of February the chief clerk, acting for the Commissioner of Customs, acknowledged receipt of the letter, stating that the statutory declaration therein referred to had not been received.

On the 8th of February claimants' solicitor sent to the chief clerk a copy of this statutory declaration; it reads, in part, as follows:

I, Gerald Lewis, of Lunenburg, in the county of Lunenburg, Master of the motor vessel *Apockmaouchea*, do solemnly declare that the report Inwards I made on or about the 16th day of October, A.D. 1933, at the Customs, Halifax, Nova Scotia, was true and correct and that I did come into Halifax in ballast on account of engine trouble

The Commissioner of Customs, in due course, made a report recommending

that the motor vessel *Apockmaouchea* be released on payment of \$400, together with expenses of seizure and subsequent keep, to be forfeited, and in default of such payment within thirty days that the vessel be sold to realize such penalty, together with expenses of seizing, keeping and selling same.

On the 14th of March, 1934, the Minister of National Revenue rendered his decision in the terms of the recommendation aforesaid and, on the same day, claimants' solicitor was notified accordingly.

Pursuant to section 176 of the Customs Act, the latter wrote to the Commissioner of Customs notifying him that his clients did not accept the Minister's decision and wished the matter referred to the Court. The reference was made on the 4th of April.

The claimants, in their statement of claim, allege that the report inwards made by the master of the *Apockmaouchea* was true and that the vessel should not be condemned to pay the sum of \$400 and they ask that the ship be released and the penalty remitted.

The case was heard on the 19th of June. Early in July I received a letter from claimants' solicitor saying that he wished to raise the question as to whether the Parliament of Canada, by section 11 of the Customs Act, can compel the captain of a ship to disclose transactions taking place outside of Canadian territory or, in other words, as to whether or not this section is *ultra vires*. Nothing had been said at the trial on the subject, counsel on both sides confining their observations to the facts and the meaning and scope of section 11 of the Customs Act. It seemed to me expedient that the whole issue should be dealt with at once and I advised counsel that they should produce written arguments dealing with this aspect of the case. The last brief was filed and the record completed sometime in November.

The facts are simple and undisputed. The mate of the *Apockmaouchea* was called as witness. He said his boat came into Halifax during the afternoon of the 16th of October; as far as he remembers it was a Sunday. The port engine was in very bad condition and was repaired in Halifax. In cross-examination the witness stated that, before coming to Halifax, the cargo of the *Apockmaouchea*,

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taken at St. Pierre, had been unloaded onto the *Ganneff* at a point 14 or 15 miles off the land.

James Fultz, a machinist, testified that he had examined the engine of the *Apockmaouchea* about the middle of October and had put a new bearing in it. He added that, in the condition in which the engine was when the vessel came in, it would not function properly.

Recalled, the mate swore that he had left Halifax without any cargo and that he had come back in the same condition. The only dealing witness said he had in cargo was on the high seas, between 6 and 8 miles southeast of the Halifax lightship.

The only other evidence adduced on behalf of claimants consists of the two exhibits previously referred to, viz., the report inwards and the notice of seizure, filed respectively as exhibits 1 and 2.

The respondent did not put in any evidence.

Notwithstanding the almost invariable practice of masters, whose vessels hover in territorial waters or come into a harbour unexpectedly, to put the blame on some mechanical trouble, I think that, in the present instance, the proof discloses that the *Apockmaouchea* came into the port of Halifax on account of a defective engine, for the purpose of having it repaired.

It is further established that the *Apockmaouchea* took a cargo at St. Pierre and that she transhipped it onto the *Ganneff* at a distance of approximately 14 or 15 miles from the coast of Nova Scotia; that she had left Halifax on her previous call unladen and that she returned on the 16th of October in the same condition.

In addition to this, there is the fact previously alluded to that, the day after the arrival of *Apockmaouchea* in Halifax, her master made a report inwards stating, *inter alia*, that, since his vessel had last cleared from the port of Halifax, he had not broken bulk and that no part of the cargo had been discharged or landed or moved from the vessel.

It seems clear to me that the *Apockmaouchea* was not forced to come into Halifax harbour on the 16th of October, but that she came in voluntarily. The engine in question undoubtedly needed repairs; it did not work properly and it took a long time to put it in motion. I doubt very much

however if these repairs were so urgent as to necessitate calling at Halifax. The evidence does not disclose any reason compelling the master of the *Apockmaouchea* to put in at Halifax, as he did, on the 16th of October.

The general rule of the law of nations is that a merchant or private vessel entering a foreign port subjects herself to the local jurisdiction and territorial law of the place; Phillimore, Commentaries upon International Law, 3rd Ed., Vol. I, p. 483; Oppenheim, International Law, 3rd Ed., Vol. I (Peace), p. 339; Halleck's International Law, 4th Ed., Vol. I, p. 245; Travers Twiss, Law of Nations, pp. 272 and 273; *The Queen v. Kayn* (1); *The Schooner Exchange v. McFadden* (2); *Cunard Steamship Co. v. Mellon* (3); *United States v. Diekelman* (4); *Wildenhu's Case* (5); *Manchester v. Massachusetts* (6).

Even if the master of the *Apockmaouchea* had been compelled to enter the port of Halifax in distress, I do not think that he could have dispensed with making a report to the Customs authorities. It is a well recognized principle, supported by the jurisprudence as well as by the opinions of authors on international law, that a ship, compelled through stress of weather, duress or other unavoidable cause to put into a foreign port, is, on grounds of comity, exempt from liability to the penalties or forfeitures which, had she entered the port voluntarily, she would have incurred. This principle however must not be too widely interpreted. It does not carry any right of exemption from local laws, especially revenue laws. Such exemption would require express legislation.

The doctrine is clearly laid down in Pitt Cobbett's Leading Cases on International Law, 4th Ed., Part I (Peace), p. 294:

It is sometimes asserted that private vessels putting into a foreign port in consequence of duress or under stress of weather are by that fact alone exempted from the local law and local jurisdiction. Such a contention was put forward by the United States Government in the case of the *Creole*. The latter was an American vessel, carrying a cargo of slaves, and bound for New Orleans. In the course of the voyage the slaves rose in revolt, murdered a passenger, and wounded the captain and several of

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| (1) (1876) L.R. 2 Ex. D., 63, at 82. | (4) (1875) 92 U.S. Rep., 520. |
| (2) (1812) 7 Cranch's Rep., 116, at 144. | (5) (1886) 120 U.S. Rep., 1. |
| (3) (1923) 262 U.S. Rep., 100, at 124. | (6) (1890) 139 U.S. Rep., 240, at 258. |

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the crew, and then forced the latter to put into the British port of Nassau. The British authorities, whilst imprisoning those concerned in the murder, refused to interfere with the freedom of the others, on the ground that the moment they came into British territory they became free. On appeal by the owners to their Government, the Attorney-General of the United States gave an opinion to the effect that "if a vessel were driven by stress of weather, or forced by *vis major*, or, in short, compelled by any overruling necessity, to take refuge in the ports of another nation, she was not to be considered as subject to the municipal law of the latter, so far as related to any penalty, prohibition, tax, or incapacity that would otherwise be incurred by entering such port, provided she did nothing to violate the municipal law during her stay"; and this principle, it was contended, was not only a principle of the law of nations, but had also been recognized by English law. In the result the matter was submitted to arbitration, and an award given against the British Government. In the case of the *Industria* the British law officers also expressed the view that a foreign vessel carrying slaves which had put into a British port in distress was exempt from seizure by the local authorities; even though she might have been seized by a British cruiser on the sea, under the treaty with Spain. But despite these opinions, and notwithstanding that this principle is frequently cited with approval, it would seem that such an immunity is not well founded, or in any sense obligatory; and that whilst putting into port under constraint might be a good ground in comity for excusing such infringements of local regulations as were due to the exigencies of her position (such as harbour or quarantine rules), it would certainly not carry any legal right to exemption from the local law or local jurisdiction. Nor would such an excuse, in any case, serve to exempt a vessel from the consequences of offences previously committed in violation of the law of nations.

The reports in the cases of the *Creole* and of the *Industria* referred to in the above citation are to be found in Forsyth, Cases and Opinions on International Law at pages 399 and 400.

Piggott on Nationality, Part 2 (English Law on the High Seas and beyond the Realm), p. 32, after commenting upon the cases of the *Industria* and of the *Creole*, adds (p. 33):

With deference, too wide a doctrine seems to be here laid down. Undoubtedly, if, by the manner of her coming, the ship had neglected to observe some formalities required by the law of the port—as non-observance of quarantine regulations—stress of weather would be a good defence. But exemption to local laws, more especially revenue laws, requires, it is suggested, express legislation. There does not seem to be any such exemption in the English Customs Acts.

In this connection the following authors may be consulted profitably: Halleck's International Law, 4th Ed., Vol. I, p. 245, parag. 26; Travers Twiss, Law of Nations, 2nd Ed., Vol. I (Rights and Duties of Nations in time of peace), p. 272, parag. 166; Oppenheim, International Law, 3rd Ed., Vol. I (Peace), 340.

In entering the port of Halifax, even under constraint or in distress, the *Apockmaouchea*, in my opinion, became

subject to the laws of Canada and her master was bound to make a report to the collector of customs, in compliance with the requirements of section 11 of the Customs Act.

Be that as it may, the master, apparently acting under this apprehension, made a report and the only question now arising is whether this report is, in the sense of section 11, untrue.

It is quite obvious that, if the provisions of section 11 dealing with the contents of the report inwards, particularly those concerning the cargo and its disposal, apply to whatever may have happened outside of the territorial waters of Canada, the report is untrue. It states that bulk was not broken and that no part of the cargo was discharged or landed or moved from the vessel, whilst the evidence, adduced by the claimants themselves, is to the effect that at a distance of 14 or 15 miles off the land a full cargo picked up at St. Pierre was transferred onto the *Ganneff*. It would be idle to insist on the absolute inconsistency between the two versions.

It was submitted on behalf of claimants that the provisions of the Customs Act do not apply beyond the territorial limits of Canada, that Canada cannot legislate and attach penalty for the actions of a foreign ship upon the high seas and that, if she did, such legislation would be *ultra vires*.

The *Apockmaouchea*, as I have already said, is owned by Lawrence V. Cashin, of St. John's, Nfld., one of the claimants herein. The vessel is registered in St. John's.

The register in Newfoundland, as the register in Canada, is a branch of one and the same register, viz., the British register. The provisions concerning the registry of ships are contained in Part I of the Merchant Shipping Act, 1894, chapter 60. Section 91 of the Act, which deals with the application of Part I, reads as follows:

This part of this Act shall apply to the whole of Her Majesty's Dominions, and to all places where Her Majesty has jurisdiction.

There is no occasion to go minutely into the several provisions of Part I of the Act; reference however may be had particularly to sections 4 (1) (e) and 89 which contain the following stipulations:

4. (1) The following persons shall be registrars of British ships:—
 - (a)
 - (b)
 - (c)

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(d)

(e) At any other port in any British possession approved by the governor of the possession for the registry of ships, the chief officer of customs, or, if there is no such officer there resident, the governor of the possession in which the port is situate, or any officer appointed for the purpose by the governor;

89. In every British possession the governor of the possession shall occupy the place of the Commissioners of Customs with regard to the performance of anything relating to the registry of a ship or of any interest in a ship registered in that possession, and shall have power to approve a port within the possession for the registry of ships.

Section 10 of the Canada Shipping Act (R.S.C., 1927, chapter 186) enacts as follows:

10. The Governor in Council may appoint at and for every port at which he deems it expedient to authorize the registry of ships, the collector or other principal officer of Customs as registrar for all the purposes of the Merchant Shipping Act 1894, and amending Acts, and of this part.

There is no such thing as an independent Canadian register; the certificate of registry wherever issued within the British Empire confers the same rights and carries with it the same obligations: *Algoma Central Railway Co. v. The King* (1). The *Apockmaouchea* has the status of a British ship; she is in fact a British ship registered in Newfoundland.

Reference was made by counsel for the respondent to the British Commonwealth Merchant Shipping Agreement signed at London on December 10, 1931, to which participated, among others, His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland, His Majesty's Government in Canada and His Majesty's Government in Newfoundland. Counsel submitted that the principles laid down in this agreement which until now are merely of conventional significance, inasmuch as new merchant shipping acts have not yet been passed in all parts of the British Commonwealth, indicate that the character of the *Apockmaouchea* may, from the conventional, though not the legal, standpoint, be assimilated to that of a foreign ship. Counsel added that, while the Court is not bound to apply the principles of an agreement which has not been given legal effect, it would be assumed, for the purposes of argument, that the vessel occupies, in relation to Canadian laws and jurisdiction, a position analogous to that of a foreign ship.

(1) (1903) A.C. 478, at 481; (1902) 32 S.C.R., 277, at 290; (1901) 7 Ex. C.R. 230, at 258 and 261.

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I think that, for customs purposes, a vessel which is not registered in a Canadian port, even though a British vessel, must be considered a foreign vessel.

The respondent's contention being that the provisions of the Customs Act do not exist beyond the territorial limits of Canada, it may be apposite to indicate briefly what are the territorial limits of a country bordering on the sea.

The national territory of a state consists of land and water. The maritime territory includes, *inter alia*, harbours, ports, mouths of rivers and estuaries, bays and parts of the sea enclosed by headlands. It is the general, although not the universal, usage of nations to recognize to a littoral state an exclusive territorial jurisdiction over the sea for a distance of one marine league (or three miles) along all its coasts, subject however to the right of innocent passage: Halleck's International Law, Vol. I, p. 167, parag. 13; Twiss, The Law of Nations, Rights and Duties in Time of Peace, p. 293; Oppenheim, International Law, 3rd Ed., pp. 334 *et seq.*; Phillimore, Commentaries upon International Law, 3rd Ed., Vol. I, p. 274; Jessup, The Law of Territorial Waters and Maritime Jurisdiction, p. 7.

Whatever may be the limits of territorial waters, it has long been recognized that for purposes of police, revenue, public health, etc., a state may adopt laws affecting the seas surrounding its coasts to a distance exceeding the limits of its territory. It was so held recently by the Judicial Committee of the Privy Council in the case of *Croft v. Dunphy* (1) In this case a schooner registered in Nova Scotia, belonging to the respondent, a resident of Nova Scotia, sailed from the island of St. Pierre with a cargo of liquors. When at a distance of 11½ miles from the coast of Nova Scotia she was boarded by the appellant, a customs officer. The goods on board having been found to be dutiable, the vessel and the cargo were seized, taken into port and forfeited.

The seizure was effected in virtue of the provisions of sections 151 and 207 of the Customs Act dealing with vessels hovering in territorial waters. The owner of the vessel brought an action in the Supreme Court of Nova Scotia against the officer of the Crown who had made the seizure, challenging the validity of the seizure on the ground that the Parliament of Canada had exceeded its

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

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legislative competence in conferring the powers provided in said sections and claiming the return of the vessel and of the cargo. The trial judge upheld the validity of the legislation and consequently of the seizure. His decision was confirmed by a unanimous judgment of the Supreme Court of Nova Scotia *en banc*. On an appeal to the Supreme Court of Canada this judgment was reversed by a majority (Duff, Newcombe (dissenting), Rinfret, Lamont and Cannon (dissenting) JJ.). The Judicial Committee of the Privy Council reversed the decision of the Supreme Court of Canada and restored the judgment of the Supreme Court of Nova Scotia. Lord MacMillan, delivering the judgment of the Judicial Committee, said (at page 162):

It may be accepted as a general principle that states can legislate effectively only for their own territories. To what distance seaward the territory of a state is to be taken as extending is a question of international law upon which their Lordships do not deem it necessary or proper to pronounce. But whatever be the limits of territorial waters in the international sense, it has long been recognized that for certain purposes, notably those of police, revenue, public health and fisheries, a state may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory. There is the weighty authority to this effect of Lord Stowell, who, when Sir William Scott, said in *The Le Louis* (1817, 2 Dod, Adm. 210, 245): "Maritime states have claimed a right of visitation and inquiry within those parts of the ocean adjoining to their shores, which the common courtesy of nations has for their common convenience allowed to be considered as parts of their dominions for various domestic purposes, and particularly for fiscal or defensive regulations more immediately affecting their safety and welfare. Such are our hovering laws, which, within certain limited distances more or less moderately assigned, subject foreign vessels to such examination." This special latitude of legislation in such matters is a familiar topic in the text-books on international law. Thus Sir Travers Twiss, in his treatise on International Law in the volume dealing with Peace, says at p. 265 (1) that a state in matters of revenue and health "exercises a permissive jurisdiction the extent of which does not appear to be limited within any certain marked boundaries further than that it can only be exercised over her own vessels and over such foreign vessels as are bound to her ports." In Halleck's "International Law," 4th ed., vol. i, p. 168, it is pointed out that beyond the generally accepted limits of territorial waters "states may exercise a qualified jurisdiction for fiscal and defence purposes—that is, for the execution of their revenue laws and to prevent 'hovering on their coasts'." Again, in Hall's "Foreign Powers and Jurisdiction of the British Crown," it is stated in para. 108, p. 244, that "the justice and necessity of taking precautionary measures outside territorial waters, in order that infractions of revenue laws shall not occur upon the territory itself, is in principle uncontested." Without further multiplying quotations it may be sufficient to add references to Phillimore's "International Law," vol. I, para. 198, and Wheaton's "International Law," 6th ed., vol. i, p. 367.

(1) The citation is also found in Sir Travers Twiss' *The Law of Nations*, Edition of 1884, at p. 311.

Phillimore (op. cit.), at page 274, says:

197. Though the open sea be thus incapable of being subject to the rights of property, or jurisdiction, yet reason, practice, and authority have firmly settled that a different rule is applicable to certain portions of the sea.

198. And first with respect to that portion of the sea which washes the coast of an independent state. Various claims have been made, and various opinions pronounced, at different epochs of history, as to the extent to which territorial property and jurisdiction may be extended. But the rule of law may be now considered as fairly established—namely, that this absolute property and jurisdiction does not extend, unless by the specific provisions of a Treaty or an unquestioned usage, beyond a marine league (being three miles), or the distance of a cannon-shot, from the shore at low tide:—"quousque a terra imperari potest,"—"quousque tormenta exploduntur,"—"terrae dominium finitur ubi finitur armorum vis,"—is the language of Bynkershock. "In the sea, out of the reach of cannon-shot" (says Lord Stowell), "universal use is presumed." This is the limit fixed to absolute property and jurisdiction; but the rights of independence and self-preservation in times of peace have been judicially considered to justify a nation in preventing her revenue laws from being evaded by foreigners beyond this exact limit; and both Great Britain and the United States of North America have provided by their municipal law against frauds being practised on their revenues, by prohibiting foreign goods to be transhipped within the distance of four leagues of the coast, and have exercised a jurisdiction for this purpose in time of peace. These were called the Hovering Acts.

Nevertheless, it cannot be maintained as a sound proposition of International Law that a seizure for purposes of enforcing municipal law can be lawfully made beyond the limits of the territorial waters, though in these hovering cases judgments have been given in favour of seizures made within a limit fixed by municipal law, but exceeding that which has been agreed upon by International Law. Such a judgment, however, could not have been sustained if the Foreign State whose subject's property had been seized had thought proper to interfere. Unless, indeed, perhaps, in a particular case, where a State had put in force, or at least enacted, a municipal law of its own, like that of the Foreign State under which its subject's property had been seized.

I may add to these quotations and references the following authorities: Oppenheim, International Law, 3rd Ed., Vol. I (Peace), p. 340, parag. 190; Piggott on Nationality, Part II (English Law on the High Seas and beyond the Realm), pp. 49 *et seq.*; Taylor, International Public Law, p. 294, parag. 248; *Hyde*, International Law, Vol. I, p. 417, parag. 235; *The Queen v. Keyn* (1); *Church v. Hubbart* (2); *Le Louis* (3); Masterson, Jurisdiction in Marginal Seas, pp. 380 *et seq.*

Before closing this already long, though incomplete, review of the doctrine and jurisprudence, I wish to quote

(1) (1876) L.R. 2 Ex. D., 63, at 214. (2) (1802) 2 Cranch, 187, at 234.

(3) (1817) 2 Dodson Adm. Rep., 210, at 245.

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an extract from the opinion of Dr. Lushington in *The Annapolis* (1), which Cockburn, L.J. cited with approval in re *The Queen v. Keyn* (loc. cit., 220):

The Parliament of Great Britain, it is true, has not, according to the principles of public law, any authority to legislate for foreign vessels on the high seas, or for foreigners out of the limits of British jurisdiction; though, if Parliament thought fit so to do, this Court, in its instance jurisdiction at least, would be bound to obey. In cases admitting of doubt, the presumption would be that Parliament intended to legislate without violating any rule of international law, and the construction has been accordingly. Within, however, British jurisdiction, namely, within British territory, and at sea within three miles from the coast, and within all British rivers *intra fauces*, and over foreigners in British ships, I apprehend that the British Parliament has an undoubted right to legislate. I am further of opinion that Parliament has a perfect right to say to foreign ships that they shall not, without complying with British law, enter into British ports, and that if they do enter they shall be subject to penalties, unless they have previously complied with the requisitions ordained by the British Parliament: whether those requisitions be, as in former times, certificates of origin, or clearances of any description from a foreign port, or clean bills of health, or the taking on board a pilot at any place in or out of British jurisdiction before entering British waters.

The extent within which a littoral state may exercise jurisdiction on the sea surrounding its coasts for the enforcement of its revenue laws does not appear to have ever been limited within any definite boundaries; it first formed the subject of legislation in Great Britain in the so-called Hovering Acts: 9 Geo. II, chap. 35, and 47 Geo. III, 2nd Session, chap. 66.

Section XXII of the Act 9 Geo. II, chap. 35, renders liable to forfeiture certain goods (as tea, foreign brandy, rum, etc.) found on vessel at anchor or hovering within the limits of a port or within two leagues of the shore.

Section XXIII provides for the forfeiture of any foreign goods taken in or put out of any vessel within four leagues of any of the coasts of the United Kingdom without payment of customs and other duties and for the forfeiture of the vessel if not above 100 tons.

All the provisions contained in 9 Geo. II, chap. 35, concerning hovering vessels were in virtue of 47 Geo. III, 2nd Session, chap. 66, extended to vessels within 100 leagues from said coasts. Both these Statutes were repealed but some of their provisions, with a limitation however of three leagues, were re-enacted in the Customs Consolidation Act, 1876 (39-40 Victoria, chap. 36).

(1) (1861) 1 Lush. Adm. Rep., 295, at 306.

Somewhat similar provisions were adopted in the United States: see Laws, U.S., Vol 4, p. 320, paragraphs 25, 26 and 27, and p. 437, paragraph 99; see also *Church v. Hubbard* (loc. cit.).

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The provisions in our law dealing with hovering are to be found in sections 151 and 207 of the Customs Act, R.S.C., 1927, chap. 42, and amendments, which were held to be *intra vires* and valid in the case of *Croft v. Dunphy* (loc. cit.).

Among the provisions contained in section 151 is one empowering an officer of customs to board a vessel hovering in territorial waters of Canada, to examine her cargo and also to examine the master or person in command upon oath touching the cargo and voyage.

Section 207 renders liable to seizure and forfeiture a vessel hovering in territorial waters of Canada, together with her apparel, rigging, tackle, furniture, stores and cargo, if, upon examination by an officer of customs of the cargo, dutiable goods or goods the importation whereof into Canada is prohibited are found on board.

Subsection 7 of section 151 defines the words "territorial waters" for the purposes of these two sections; it reads as follows:

(7) For the purposes of this section and section two hundred and seven of this Act, "Territorial waters of Canada" shall mean the waters forming part of the territory of the Dominion of Canada and the waters adjacent to the Dominion within three marine miles thereof, in the case of any vessel, and within twelve marine miles thereof, in the case of any vessel registered in Canada, or any other vessel which is owned by any person domiciled in Canada.

Subsection 8 is another section extending the jurisdiction on the marginal sea beyond the three-mile limit. It enacts, *inter alia*, that no goods shall be unladen from a vessel arriving at a port in Canada from any place out of Canada or from a vessel having dutiable goods on board brought coastwise nor bulk broken within three leagues of the coast until due entry has been made.

The distance seaward from any coast of Canada within which a vessel hovering in territorial waters may be boarded by an officer of customs for purposes of examination or within which goods may not be unladen from a vessel arriving at a port in Canada from any place out of Canada or from a vessel having dutiable goods on board brought

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coastwise is fixed, in the first case at twelve miles and, in the second one, at three leagues.

It seems to me, in the circumstances, that the transshipment by the *Apockmaouchea* onto the *Ganeff* of her cargo at a distance of fourteen or fifteen miles from the coast of Nova Scotia does not come within the scope of section 8 of the Act and that it was accordingly not prohibited thereunder.

This however is not the question with which we are concerned. The question I have to determine is whether the Act, in requiring the master of a vessel coming into a port in Canada to declare in his report to the Collector of Customs if he has unladen any goods or broken bulk during his voyage, wherever this may have occurred, is *ultra vires*.

Section 11, which requires the master of a vessel coming from any port out of Canada or coastwise and entering any port in Canada, whether laden or in ballast, to go, as soon as his vessel is moored or anchored, to the custom house and there make a report in writing to the Collector of the arrival and voyage of his vessel, stating, so far as they are or can be known to him, the particulars specified in subsection 2 and especially what goods, if any, have been laden or unladen, or if bulk has been broken, during the voyage, is a precautionary measure which, it is to be assumed, was deemed by the Parliament of Canada to be essential for the protection of the revenue.

Section 185 enacts that if any goods are unladen before report is made in compliance with section 11, or if the master fails to make such report or to produce the goods or if he makes an untrue report, the master shall for each offence incur a penalty of \$400. Section 185 adds that the vessel shall be detained until such amount is paid and that, unless payment is made within 30 days, such vessel, after the expiry of such delay, shall be sold to pay the penalty and the expenses incurred in detaining and selling the vessel.

In my opinion, sections 11 and 185 are intra-territorial in their operation. The report which they require to be made is only required to be made after the vessel has entered a Canadian port. The report is accordingly made within the territorial limits of Canada. The fact that section 11 requires the disclosure of acts which may have

occurred during the course of the voyage, outside of the territorial waters of Canada, does not, in my judgment, render the enactment extra-territorial in its operation. No penalty is imposed on the master or person in charge of the vessel in respect of any such acts. Their commission is not, under the statute, an offence.

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The substance or gravamen of the offence created under section 185, in so far as the report is concerned, is not that the cargo was unladen at sea but that, having entered a Canadian port and made a report inwards, the master did not make a true report of the voyage of the vessel in compliance with the requirements of section 11.

If the master of the *Apockmaouchea* had declared in his report that he had transhipped his cargo onto the *Ganneff* at 14 or 15 miles from the coast, as the evidence shows is what happened, he would not have been subject to any penalty. The offence with which he is charged and which is created by section 185 is of having made an untrue report.

After having given the matter due consideration, I have reached the conclusion that the Canadian Parliament, for the protection of the revenue, has the right to require that, in the report which a master coming into a Canadian port has to make, a full and correct statement be included regarding the dealings in cargo which the master had during his last voyage, i.e., the voyage which immediately preceded his arrival at the port.

The decision of the Minister, in the circumstances, must be confirmed. The *Apockmaouchea* or the sum of \$400 deposited with the Minister of National Revenue to obtain the release of the vessel, as the case may be—it was not clear at the trial whether or not the sum of \$400 had been deposited and the *Apockmaouchea* released—is accordingly declared forfeited.

The respondent is entitled to his costs against the claimants.

Judgment accordingly.

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 Angers J.

The case of *Elinor Shipping Co. Ltd.* and *Moyle Randall v. The King* was tried at Halifax on the same day before the Honourable Mr. Justice Angers. The facts differed from those of the case of *Cashin et al v. The King* in that the master of the ship did not declare in his Report Inwards that he had loaded liquor from the *Apockmaouchea* while at sea and delivered same at a point on the United States coast, before putting into port on account of stress of weather. The learned Judge holding that the report was untrue in that it was incomplete and did not comply with s. 11 of the Customs Act said:

Untrue does not necessarily imply something that is false. A statement or report is untrue if it does not express things exactly as they are; it is equally untrue if it omits or conceals facts which ought to be disclosed: *Moular v. American Life Insurance Co.* (1); *Attorney-General v. McEwan* (2); *Fowkes v. Manchester & London Assurance Association* (3); *Globe Life Insurance Association v. Wagner* (4); *Broome v. Speak* (5); *Greenwood v. Leather Shod Wheel Co.* (6); *Shephard v. Broome* (7); *Lord Advocate v. McLaren* (8).

QUEBEC ADMIRALTY DISTRICT

BETWEEN:

1934
 Nov. 20.

DELMA C. OUTHOUSE AND ERNEST } PLAINTIFFS;
 H. HIMMELMAN

AND

STEAMER THORSHAVN..... DEFENDANT.

Admiralty—Jurisdiction—Action in rem—Oil pumped overboard by a ship causing damage—Damage done by a ship.

Plaintiffs were the owners of a large number of live lobsters lying in crates in the waters of the Strait of Canso, N.S., for refreshment purposes, while being transferred from Magdalene Islands, P.Q., to Gloucester, Mass. Defendant steamer ran aground in the Strait of Canso and in order to lighten the ship a large part of its cargo of oil was pumped into the waters of the strait. Plaintiff claimed this was carried by the winds and tide to the resting place of the lobsters, causing damage to the lobsters, crates and connecting lines. Plaintiff Outhouse also claimed for loss of freight.

Defendant contended that the court was without jurisdiction to entertain the action.

Held: That damage by a ship means damage done by those in charge of a ship, with the ship as the noxious instrument.

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|--|--------------------------------|
| (1) (1884) 111 U.S. Rep., 335, at 345. | (5) (1903) L.R. 1 Ch. D., 586. |
| (2) (1920) 36 T.L.R., 815. | (6) (1900) L.R. 1 Ch. D., 421. |
| (3) (1863) 3 B. & S., 917 at 929. | (7) (1904) App. Cas., 342. |
| (4) (1900) 188 Ill., 133, at 138. | (8) (1905) 42 Sc.L.R., 762. |

MOTION by defendant that plaintiffs' action be dismissed and the arrest of the steamer *Thorshavn* quashed, and that the bail bond furnished on behalf of the *Thorshavn* be cancelled and annulled.

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The motion was argued before the Honourable Mr. Justice Phillippe Demers L.J.A., Quebec Admiralty District, at Montreal.

R. C. Holden, K.C., for the defendant, argued: That the jurisdiction of this court is limited to the Admiralty jurisdiction which the High Court in England had in 1890, when the Imperial Legislature enacted the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict., c. 27). That the only jurisdiction over causes for damage is to be found: (a) In s. 7 of The Admiralty Act, 1861 (24 Vict., c. 10) which gives jurisdiction over "any claim for *damage done by a ship*," and (b) In s. VI of The Admiralty Court Act, 1840 (3-4 Vict., c. 65) which gives jurisdiction over claims and demands in the nature of "*damage received by any ship* or seagoing vessel." That the plaintiffs' statement of claim alleges that the damage was caused by the oil which formed part of the ship's cargo and had been pumped overboard and that this is not *damage done by a ship*, nor is the claim of the plaintiff, Outhouse, for loss of freight *damage done by a ship* nor *damage received by any ship*. That there is no jurisdiction in Admiralty, and in any event there is no maritime lien or action *in rem*. The following authorities were cited by Mr. Holden in support of his contentions: Mayers Admiralty Law & Practice (1916), pp. 111, 115; *The Vera Cruz* (1884), 9 P.D. 96; *The Theta* (1894), 7 Asp. M.C. 480; *Currie v. McKnight* (1896), 8 Asp. M.C. 193; *St. Lawrence Transportation Co. Ltd. v. Schooner Amedee T.* (1924), Ex. C.R. 204; *Mulvey v. The Barge "Neosho"* (1920), 19 Ex. C.R. 1; *Barber v. The Ship "Netherland"* (1909), 12 Ex. C.R. 252; *The Victoria* (1887), 6 Asp. M.C. 120; *The Rigel* (1912), 12 Asp. M.C. 192; *The Circe* (1905), 10 Asp. M.C. 149.

C. R. McKenzie, K.C., for plaintiffs, argued *contra*.

That the act of the defendant ship in the use of its pumps in pumping out oil as the originating and proximate cause of the damage to plaintiffs' property, must be regarded as *damage done by the ship*. That if the cause of action

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has been established the plaintiff should be given his remedy in the court which is best qualified to consider the merits of the case. That the ship was actually doing something with its equipment, namely, its pumps, the operation of which, through the ejection of oil, has caused damage to the plaintiffs. That there is no question of priorities but merely that of a procedural right. That under s. 35 of the Admiralty Act of 1861 the jurisdiction conferred may be exercised either by proceedings *in rem* or by proceedings *in personam*. That consequently when any damage is done by a ship under s. 7 of the Act proceedings may be instituted *in rem* against the offending ship. Mr. McKenzie cited the following authorities: *Chr. Knudsen* (1932), 43 Lloyds List Law Reports 423; *The "Santa Rita"* (1910), 176 Fed. Rep. 890; *The Clara Killam* (1870), L.R. 3 A. & E. 161; *Good v. London Steam-ship Owners' Mutual Protecting Association* (1871), L.R. 6, C.P. 563.

DEMERS L.J.A., now (November 20, 1934), delivered the following judgment:

It seems that damage by a ship means damage done by those in charge of a ship, with the ship as the noxious instrument (1).

These words do not mean that the ship must come in contact with the thing damaged; a ship may be responsible for its excessive waves.

I am of opinion also that when we speak of damages by a thing, we do not mean necessarily a damage caused by the whole body. We include damage by a part of that body.

Therefore, damages caused by the fires of a ship or by her pumps are damages by the ship.

For these reasons the motion is dismissed with costs.

Judgment accordingly.

(1) *The Vera Cruz* (1884), 9 P.D. 96 at 101.

NOVA SCOTIA ADMIRALTY DISTRICT

1935
Feb. 5.

BETWEEN:

THE LINCOLN PULPWOOD CO. } PLAINTIFF;
LTD..... }

AND

THE MOTOR VESSEL RIO CASMA. DEFENDANT.

Admiralty—Jurisdiction—Action in rem—Removal of barge from berth at pier by crew of ship—Improper navigation of ship.

Plaintiffs' barge, with no one on board, was lying at a berth next to a pier and moored to it. The crew of defendant ship removed the barge from her berth, which was then occupied by the ship, the barge being placed outside the ship in a foul berth, as a result of which the barge suffered damage. Plaintiff brought an action *in rem* to recover the amount of the damage.

Held: That the improper navigation of the defendant ship carried out by her master's orders made her the instrument causing the damage to the barge, and that the claim for such damage may be enforced by an action *in rem*.

MOTION to dismiss an action *in rem* brought to recover damages alleged to have been caused by the improper navigation of defendant ship.

The motion was argued before the Honourable Mr. Justice Mellish, Local Judge in Admiralty, at Halifax.

W. C. MacDonald, K.C., and *V. B. Fullerton, K.C.*, for the plaintiff.

H. P. MacKeen, K.C., for the defendant.

MELLISH L.J.A. now (February 5, 1935) rendered the following judgment:

This is a motion to dismiss the action, made on behalf of the defendant ship on the ground of want of jurisdiction.

The plaintiff's barge was lying at a berth next a pier at Bass River partly loaded and moored to the pier, with no one on board. The defendant ship came to the pier and by her crew removed the barge from the pier and took her berth, placing the barge outside the ship in a foul berth. The tide was then falling and as it ebbed the barge suffered damage by reason of being so placed. This is an action *in rem* to recover said damage.

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It is claimed that the damage was not caused by the *Rio Casma* and that consequently the action *in rem* is not maintainable.

It can, I think, be fairly said that the damage was caused by the *Rio Casma* on a falling tide wrongfully taking and keeping the barge's berth so as to exclude the barge from it. She was thus made the instrument causing the damage by her improper navigation, which was deliberately carried out by her master's orders.

There are many cases where a ship is answerable in admiralty in an action *in rem* for damages caused by her improper handling where the ship has not been in collision and the ship does not escape liability by reason of the fact that her crew or some of them might also be liable. In the case of *Graham v. The E. Mayfield* (1) it was decided that where a ship was so manoeuvred as to exclude another from the berth which she was warping into, she was being unreasonably operated and was responsible in damages for excluding that other ship from her berth. *A fortiori* it would appear that a ship should be held liable for excluding another from a berth already occupied by her. No case has I think been cited holding that a ship is not liable in an action *in rem* for damages resulting from her improper navigation. But a case has been cited to us presumably to shew that the docking of the ship in circumstances such as disclosed herein is not an act of navigation. That case is *St. Lawrence Transportation Co. Ltd. v. The Schooner Amedee T.* (2). In that case the plaintiff's scow was tied up to its dock in the harbour of Quebec and as stated in the judgment of Mr. Justice McLennan (p. 205)

the persons in charge of the schooner defendant, in order to come alongside the dock, unmoored or cast off the lines of the plaintiff's scow and let her go adrift on the rocks, without any right or excuse, thereby causing her considerable damage. . . . The question to decide is: Was the damage to the scow done by the schooner by any wrongful act or manoeuvre or negligent navigation on her part in such a manner that it can be said that the schooner was the active cause and instrument of mischief in which happened to the scow?

After quoting from the reasons of Lord Halsbury and Lord Watson in the case of *Currie v. M'Knight* (3) the learned Judge finds (p. 206):

The injuries sustained by plaintiff's scow were not caused by any manoeuvre or movement of the schooner, but by an act of some of

(1) (1913) 14 D.L.R. 505.

(2) (1924) Ex.C.R. 204.

(3) (1897) A.C. 97 at pp. 101 and 106.

her crew The damage here sought to be recovered did not arise from any wrongful act of navigation of the schooner, and, as the schooner was not the instrument which caused the damage, the present action must fail.

The schooner's arrest was accordingly set aside and the writ of summons *in rem* dismissed.

On the relevant facts, as I understand them, I regret that I am unable to follow this decision, assuming, as I think I must on the facts appearing in the reasons for judgment, that what was done by the crew of the schooner was done at the instance of those properly in command of her. The ship is inanimate and whether she is properly navigated or not must depend upon the conduct of her crew. The securing of a proper berth for a ship is a duty of navigation, and in my opinion it is wrongful navigation, with a view of securing such a berth, by means of the crew or otherwise, to take away the lawful berth of another vessel, for the purpose of using it for one's own ship. And such a proceeding if carried out can I think be fairly said to be using one's ship in an improper manner in order to make her the occupant of another ship's berth.

If it be necessary to make the schooner an instrument causing the damage I should have no difficulty in finding that she was made such an instrument by using her to bring the necessary force to remove the scow from its moorings for her benefit and by placing her in the scow's berth. The purpose of the whole operation was to put the schooner in the berth occupied by the scow which I think it would be difficult to accomplish without making the schooner an instrument in its performance. In my opinion the operation is from first to last one of navigation, and as incident to its performance the scow had necessarily to be moved and was moved by the ship's crew as I assume under her master's orders. Such an act has been held to be an act of the ship (1).

With the greatest deference I do not think that the case relied on, *Currie v. M'Knight* (*supra*) sometimes cited as the *Dunlossit* is precisely in point. It appears from the facts stated in the reasons for judgment, that there were three ships moored alongside a quay at Port Askaig, Sound of Islay, where there is no harbour. The *Dunlossit* was in the centre and the S.S. *Easdale* outside and moored to the

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(1) *The Clara Killam* (1870) L.R. 3 A. & E. 161.

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quay by cables passing over the *Dunlossit's* deck. There was a violent storm and the *Dunlossit* was in serious peril, and her master to enable his ship to get to sea for her protection, after notice to the *Easdale* cut her moorings. The *Easdale* being unable to get up steam was driven ashore and damaged. An action was brought in Scotland by the *Easdale's* owners against the owners of the *Dunlossit* and it was found on the trial as appears from the judgment of Lord Shand that the crew of the *Dunlossit* was entitled to cut the *Easdale's* moorings as she had refused to remove them. This judgment was reversed by the First Division of the Court of Session and the owners of the *Dunlossit* were held liable. This judgment was not appealed from. But the question arose whether by reason of this judgment the plaintiff was entitled to a maritime lien on the proceeds of the sale of the ship *Dunlossit* in preference to the claim of the mortgagee of the ship. The Second Division of the Court of Session held that by the law of Scotland such a lien did not exist. The case in the House of Lords was an appeal from that decision. The House of Lords held that there was no distinction between the law applicable in Scotland and England, but also that in the circumstances a maritime lien did not exist, apparently adopting the findings of fact of the Scotch Court that the injuries sustained by the *Easdale* were not owing to any movement of the *Dunlossit*; they were wholly occasioned by an act of the *Dunlossit's* crew, not done in the course of her navigation, but for the purpose of removing an obstacle which prevented her from starting on her voyage. (See judgment of Lord Watson in *Currie v. M'Knight* (*supra*) at p. 107).

As applied to the case now before this court, the foregoing language would I think be inappropriate.

It may be worth noting that the section of the Imperial Act of 1861 which provides "that the court shall have jurisdiction over any claim for damage done by any ship" and that such claim may be enforced by an action *in rem* does not necessarily imply the existence of a maritime lien. (See Marsden on Collisions at Sea, 9th ed., p. 85).

The facts so far disclosed I think shew that the *Rio Casma* was by those entrusted with her navigation manoeuvred in such a manner as to wrongfully place her in the berth up to that time occupied by the scow and that this in law was the act of the *Rio Casma* as a ship. It is a

special feature of this case that the scow was not set adrift, but by an act of trespass which was doubtless not intended as such, the scow was moored outside the ship and so kept by the hull of the ship outside the ship in a dangerous position which act was the immediate cause of the damage.

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It is not surprising, perhaps, that there is an apparent dearth of cases where a state of facts as disclosed herein has been considered. But the general principle of law often seems clear from many cases that the court *can* entertain an action *in rem* against a ship for any damage which she has done as a ship whether by colliding with another object or otherwise.

In my opinion a ship which forcibly takes possession of another ship's lawful berth is liable in such an action for the damage so occasioned and cannot escape such liability by shewing that in obedience to her master's orders she has been assisted in so doing by her crew. In such a case the ship is, I think, "the instrument of mischief and the active cause of the damage."

The motion is dismissed with costs.

Judgment accordingly.

BETWEEN:

NORTHERN ELECTRIC CO. LTD. }
AND WESTERN ELECTRIC CO. } PLAINTIFFS;
INC. }

1934
Sep. 18, 19,
20, 21, 22
& 24.

AND

JOHN CHARLES BURKHOLDER, }
L. A. KELLEY AND BURK- } DEFENDANTS.
HOLDER & KELLEY, LTD.... }

1935
Mar. 13.

Patents — Subject matter — Anticipation — Prior art — Specification — Disclosure — Company — Infringement of Patent — Officers — Liability.

Held: That in order to establish that a patent has been anticipated, any information as to the alleged invention given by any prior publication must, for the purpose of practical utility, be equal to that given by the subsequent patent. The latter invention must be described in the earlier publication that is held to anticipate it in order to sustain the defence of anticipation.

2. Where the question is solely one of prior publication it is not enough to prove that an apparatus described in an earlier specification, could have been used to produce this or that result. It must also be shown that the specifications contain clear and unmistakable direction, so to

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use it. It must be shown that the public have been so presented with the invention, that it is out of the power of any subsequent person to claim the invention as his own.

3. That the officers and directors of a company cannot be made liable for an infringement of a patent by the company, merely by reason of their position as officers and directors.

ACTION for the infringement of five patents assigned to the plaintiffs. The patents related to the simultaneous transmission of telephone and telegraph signals over a single pair of wires and the means employed for the separation of the electric currents conveying telegraph signals from those conveying telephone signals, with the minimum of interference the one with the other. The individual defendants are the officers and directors of the defendant company which made the installation which it was alleged infringed plaintiffs' patents.

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 for the defendants.

The facts are stated in the reasons for judgment

THE PRESIDENT, now (March 13, 1935) delivered the following judgment:

This is an action for the infringement of five patents which I shall presently mention. The case has to do with the simultaneous transmission of telephone and telegraph signals over a single pair of wires and more particularly with the means employed for the separation of the electric currents conveying telegraph signals from those conveying telephone signals, with the minimum of interference the one with the other.

So far as we are here concerned, telephony is carried on by the ordinary telephone arrangement whereby the sound energy of the voice, or music, impinging on the diaphragm of a microphone or transmitter causes the latter to vibrate, thus setting up vibrating electric currents in sympathy therewith. These currents are conveyed along the electric wires to the reproducing apparatus which in turn converts the electric energy back into sounds, intelligible to the human ear. The telegraphy is carried on not by the ordin-

ary means in which a direct current passing along the wires is interrupted into dots and dashes by a Morse key, but by what is called the "carrier current" system. In this system the signals are carried by a high frequency alternating current, the frequencies in this case being of the order of 5000 cycles for the outgoing signals and 7500 cycles for the incoming signals.

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Maclean J.

The transmission of both telephone and telegraph signals involves the transmission of electrical currents of varying frequencies. For the faithful transmission of music it is necessary to transmit electric currents of all frequencies between approximately 50 and 10,000 cycles per second, see *Western Electric Co. v. Baldwin International Ltd* (1), but for the transmission of intelligible speech a band of frequencies between 200 and 2,500 cycles will suffice. Telegraphy occupies a much smaller or narrower band of frequencies, namely, one of approximately 30 cycles for the automatic printer telegraphy, but in practice it is found necessary to allow a band of approximately 200 cycles in order to secure clear signals.

This controversy has its origin in the fact that the Ontario Hydro-Electric Commission had a telephone circuit between certain sub-stations at Toronto and Chats Falls on the Ottawa river, and thence down to Val Tetreau, P.Q. Over these wires they were sending telephone messages, but subsequently the defendants installed certain apparatus whereby the Ontario Hydro-Electric Commission now sends both telegraph and telephone messages simultaneously over this telephone line, utilizing the frequencies below 2,500 cycles for the telephone, and one band of frequencies at about 5,000 cycles and another at about 7,500 cycles, for the telegraph, and the contention of the plaintiffs is (1) that the means used to separate the low frequency telephone signals from the two high frequency telegraph channels constitutes an infringement of their patents, and (2) that the use of these means in combination with a vacuum tube repeater constitutes a further infringement.

Turning now to a brief statement of the means whereby electric currents of different frequencies may be separated from one another. These means are variously referred to as separators, filters, etc., but as the term "filter" appears

(1) (1933) Ex. C.R. 13.

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to be now in current use, and because it seems to express more precisely the process involved, I propose to use that term throughout my discussion of the case. Electric filters are divided into four classes and may be described as follows: A low pass filter is one which eliminates all currents having frequencies above a certain predetermined value. For example, if the filter is arranged for a frequency of 2,600 cycles it will pass currents of all frequencies from 0 to 2,600 cycles and reject those above that frequency. A high pass filter is the opposite of a low pass filter and is one which eliminates all currents having frequencies below a certain predetermined value, and to repeat our example, it would pass currents of all frequencies from 2,600 cycles to infinity and reject those from 0 to 2,600 cycles. A band pass filter is one which will pass currents having frequencies confined to a certain predetermined band, that is frequencies between two predetermined values, and which will eliminate all others. A band suppression filter is one which will pass the currents of all frequencies, except those in a band between two predetermined frequencies. This case is concerned only with the high pass and low pass filters.

Throughout the trial there was frequent reference to what is called the sharpness of the "cut-off." A filter which would cut off at a single frequency would be a perfect filter, but such excellence is not achieved in actual practice and it is found that, varying in different filters, a number of frequencies will be heard with diminishing loudness beyond the "cut-off" frequency. In other words the cut-off is not sharp, but the fewer frequencies that are heard after the cut-off frequency has been reached, the sharper is the cut-off, and the more effective is the filter. Electrical filters consist of a combination of capacities and inductances arranged in meshes or sections a number of which are connected in the line, and generally speaking, the greater the number of meshes included in the structure or network the more effective is the action of the filter. The various combinations used determine whether the filter is a high pass, a low pass, or one of the other forms of filter.

The plaintiffs are the owners by assignment of five Canadian patents which they claim the defendants have in-

fringed. The first to be mentioned is patent no. 187,959, issued to Campbell on December 17, 1917, to be referred to hereafter as Campbell no. 1. The next is patent no. 269,137, a reissue patent, hereafter to be referred to as Campbell no. 2, and which was granted on March 15, 1927. The next is patent no. 216,852, issued to Osborne on March 14, 1922, and hereafter to be referred to as Osborne no. 1. The next is patent no. 269,136, issued to Osborne on March 15, 1927; this patent will be referred to hereafter as Osborne no. 2. And the last of the plaintiffs' patents said to be infringed is one issued to Reier on January 15, 1924, and numbered 237,090. The corresponding patents issued in the United States at dates considerably earlier.

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Campbell no. 1 has to do with combinations of inductances and condensers of certain predetermined values and connected together in a specified manner to form closed resonant circuits, each circuit being referred to as a mesh. This patent claims that if a plurality of these meshes (each identical with the other) are connected together in series, and inserted in a wire circuit carrying electric currents of all frequencies, the structure possesses the ability to extinguish certain predetermined frequencies and to permit the balance to pass along the line without serious loss, or to use the technical term, without attenuation. The greater the number of meshes included in the structure or network the more perfect the operation of the filter, that is to say, the sharper the cut-off or dividing line between the frequencies passed and those extinguished.

Campbell, describing his invention in his specification, states:—

This invention relates to an Electric Wave Filter and more particularly to a wave filter adapted to transmit with small or negligible attenuation sinusoidal currents of all frequencies lying within a range or ranges of preassigned limiting frequencies while attenuating and approximately extinguishing sinusoidal currents of frequencies lying outside the limits of the preassigned range or ranges.

My invention, though it may find expression in many embodiments, has common to all the broad idea of a wave filter in the nature of a connecting line having an impedance element or elements in series with the line and an impedance element or elements in shunt across the line, the values of the impedance elements being so proportioned that the structure will transmit, with small or negligible attenuation, from a source of electromagnetic energy to an electrical receiving, translating or repeating device, sinusoidal currents of all frequencies lying within specified and preassigned limits or ranges while attenuating and sensibly extinguishing currents of all frequencies lying outside such limits.

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My invention in one or more of its embodiments has important applications in connection with Wireless Telegraphy, Wireless Telephony, Multiplex High Frequency Wire Telephony, Composite Telegraph and Telephone Lines.

Of importance is his statement on page 2,

My invention is illustrated in the accompanying drawings in which Figure 1 is a diagram illustrating the broad form of my invention from which all specific embodiments may be derived by assigning proper values to the electrical constants of the structure; Figures 2, 3, 4, 5, 6, and 7 are diagrams illustrating different embodiments of my invention; Figures 8 and 9 show curves illustrating the characteristic performance of the wave filter; and Figures 10 and 11 are diagrams showing my invention embodied in telephone repeater circuits.

Like reference characters refer to like parts throughout the several figures of the drawings.

Referring to figures 1 to 7 inclusive, each wave filter 1^a, 1^b, 1^c, 1^d, 1^e, 1^f, 1^g, is composed of a plurality of identical sections 2^a, 2^b, 2^c, 2^d, 2^e, 2^f, 2^g, respectively each including lumped impedance in series with the line and lumped impedance in shunt across the line. Said impedance may be provided by condensers, C₁, C₂ or by inductance coils L₁, L₂, or by a suitable combination of both, there being at least, for each section of wave filter, an inductance element in series with the line and a capacity element in shunt across the line or *vice versa*.

And on page 3:

Said Figures 1 to 7 inclusive, merely show typical forms of the invention and are not intended to illustrate all of the possible modifications thereof.

His statement on page 7 is of particular importance:

It is not always desirable to transmit two bands of frequencies, and as a further refinement, my invention also contemplates a wave filter which will transmit freely all frequencies lying within a single band of specified limits. As will hereinafter be more fully set forth, the structures shown in Figures 2 to 7 inclusive will function as a single band wave filter, and the structure shown in Figure 1 may be made to so function.

He then proceeds to show how a single band may be secured, and he goes on to describe a second method of so doing, viz:—

The second method of realizing a single band wave filter is attained by relegating the upper band to infinity or the lower band to zero.

And on page 8, still discussing this single band feature, he states:—

(f) Making $L_1=C_2=0$ and thereby transmitting freely all frequencies above a specified value.

(g) Making $L_2=C_1=0$ and thereby transmitting all frequencies below a specified value.

Then on page 12 he states:

It will be further understood that the number of sections of the wave filter will depend on the degree to which it is desired to extinguish the currents to be filtered out. If the number of sections is doubled the ratio of the current of any particular frequency entering the filter to the current of that frequency leaving the filter is approximately squared.

Then follows a complicated mathematical treatment of his arrangement which I do not pretend to follow and I must rely upon the expert witnesses for the conclusions resulting therefrom. Fortunately they appear to agree upon this. On page 13 Campbell works out an example for a band pass filter to pass voice telephone frequencies between 200 and 2,200 cycles, and the circuit arrangement to do this appears in fig. 10; and on page 15 he refers to his fig. 11 as showing a low frequency filter and a high frequency filter connected in series and he states that the low frequency filter may be omitted when there is no desire to suppress low frequency disturbances.

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The plaintiffs rely on the following claims in this patent:

1. An electric wave filter consisting of a connecting line of negligible attenuation containing lumped impedance in series with the line and lumped impedance in shunt across the line, said impedances having pre-computed values dependent upon the upper limiting frequency and the lower limiting frequency of a range of frequencies it is desired to transmit without attenuation, the values of said series and shunt impedances being so proportioned that the structure transmits with practically negligible attenuation sinusoidal currents of all frequencies lying between said two limiting frequencies, while attenuating and approximately extinguishing currents of neighbouring frequencies lying outside of said limiting frequencies.

2. An electric wave filter consisting of a connecting line of negligible attenuation composed of a plurality of sections, each section including a capacity element and an inductance element, one of said elements of each section being in series with the line and the other in shunt across the line, said capacity and inductance elements having pre-computed values dependent upon the upper limiting frequency and the lower limiting frequency of a range of frequencies it is desired to transmit without attenuation, the values of said capacity and inductance elements being so proportioned that the structure transmits with practically negligible attenuation sinusoidal currents of all frequencies lying between said two limiting frequencies, while attenuating and approximately extinguishing currents of neighbouring frequencies lying outside of said limiting frequencies.

3. An electric wave filter consisting of a connecting line of negligible attenuation containing lumped capacity in series with the line and lumped inductance in shunt across the line, said capacity and said inductance having pre-computed values dependent upon the upper limiting frequency and the lower limiting frequency of a range of frequencies it is desired to transmit without attenuation, the values of said capacity and inductance being so proportioned that the structure transmits with practically negligible attenuation sinusoidal currents of all frequencies lying between said two limiting frequencies, while attenuating and approximately extinguishing currents of neighbouring frequencies lying outside the said limiting frequencies.

* * * * *

7. The combination with a signaling circuit and a repeater therefor, of a wave filter inserted in circuit between said signaling circuit and said repeater for transmitting with practically uniformly negligible attenuation,

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between said signaling circuit and repeater, sinusoidal currents of all frequencies between an upper preassigned limiting frequency and a lower preassigned limiting frequency of a predetermined range of frequencies, while attenuating and approximately extinguishing currents of neighbouring frequencies lying outside of said range.

* * * * *

14. The combination with a signaling circuit and a translating device therefor, of a wave filter inserted in circuit between said signaling circuit and said translating device, said filter including impedances having values depending upon the upper limiting frequency and the lower limiting frequency of a prescribed range of frequencies, the values of said impedances being so proportioned that said filter transmits with practically uniformly negligible attenuation, between said signaling circuit and translating device, sinusoidal currents of all frequencies within said range of frequencies, while attenuating and approximately extinguishing currents of neighbouring frequencies lying outside of said range.

* * * * *

16. The combination with a transmission line and a repeater therefor, of a wave filter inserted in circuit between said line and said repeater, said filter consisting of a connecting line having lumped impedances in series with said connecting line and lumped impedances in shunt across said connecting line, said impedances having values dependent upon the upper limiting frequency and the lower limiting frequency of a prescribed range of frequencies, the values of said series and shunt impedances being so proportioned that said connecting line transmits with practically negligible attenuation, between said line and repeater, sinusoidal currents of all frequencies within said range of frequencies, while attenuating and approximately extinguishing currents of neighbouring frequencies lying outside of said range.

Coming now to the second Campbell patent. Campbell no. 2 relates "to a special form of filter of the general type disclosed and claimed by my prior patents." The object the patentee had in mind was to increase the sharpness of discrimination between the frequencies that were to be transmitted and those that were to be suppressed. The specification states:—

The invention has among its objects the production of a wave filter which is capable of sharper discrimination between frequencies in the transmitted and suppressed ranges than the specific forms of filter which are shown and described as examples of the general type in said patents.

The invention comprehends as specialized forms ultra and infra filters, the former term designating a filter which suppresses frequencies above a definite limit, the latter being applied to a filter which suppresses frequencies below a definite limit. These two types of filters may also be distinguished as low pass and high pass, the low pass filters being those which pass low frequencies and the high pass filters being those which pass high frequencies. The limiting frequency between a range of passed frequencies and a range of suppressed frequencies is referred to as the critical frequency. On one side of the critical frequency is a transmission range of frequencies, and on the other side there is a range of suppressed frequencies.

And on page 6:—

It will further be noted that the lower portion of the descending branch of the solid line curves of Figs. 5 and 6 lies below the dotted line curve. This signifies that between the frequencies F_3 and F the attenuation of the filter of this invention is greater than that of the filters of my previous patents, while between the frequencies O and F the attenuation is less, F denoting the frequency at which the attenuation is the same for both filters.

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And on page 10:—

Since filters must be finite in length it is necessary to determine the impedance with which a given filter should be terminated in order that it may behave as nearly as possible like an infinite network. It is obvious that this terminal impedance should be the same as the impedance of that portion of the corresponding infinite filter which has been neglected. This impedance is known as the "iterative impedance."

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Campbell no. 2 shows five diagrams, numbered 2, 7, 8, 9 and 10, of networks of combinations of inductances and capacities which differ from the particular arrangements shown in the diagrams 1 to 7 in Campbell no. 1.

The plaintiffs rely upon claims 1, 3, 13 and 14; these claims it is conceded are practically the same, and Mr. Gowling admitted that if one were infringed they all were. Claim 1 reads as follows:—

1. A wave filter for electric circuits comprising an impedance element in series with the circuit and a capacity element and an inductance element in series with each other and in shunt to the circuit adjacent to the impedance element, said elements being so proportioned that currents of frequencies lying within a range of frequencies are approximately, suppressed by the structure, with a maximum of suppression at a frequency close to the end of said range, currents of other frequencies being transmitted with substantially equal freedom.

The next patent to consider is Osborne no. 1. This patent relates to the simultaneous transmission of telegraph and telephone signals over one pair of wires and the effective elimination of mutual interference. The specification states:

The means employed to eliminate said interference consists broadly of electric wave filters so designed and so associated with the telephone and telegraph circuits as to prevent low frequency telegraph currents from entering the telephone apparatus and also to prevent high frequency telegraph impulses from being transmitted from the telegraph apparatus to the telephone apparatus.

Osborne contemplates here the use of the band from 0 to approximately 200 cycles for the transmission of the telegraph signals, and the band from 200 up for the transmission of the telephone signals. Osborne's object was to show means whereby Campbell's high and low pass filters might be used simultaneously and multiplex communication be secured thereby.

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The plaintiffs rely upon claims 1, 14 and 15 in this patent, and Mr. Gowling conceded that they were practically the same. Claim 15 is typical of the others, and is as follows:—

15. In a transmission system a main transmission line having a plurality of branches, broad band wave filters in each branch, each wave filter comprising a plurality of sections, each section having series and shunt impedances, the impedances of one filter being so proportioned that a band of frequencies below an upper limiting frequency will be transmitted to one branch while frequencies above that limit will be substantially excluded, and the impedances of the other filter being so proportioned that a band of frequencies above said limit will be transmitted to the other branch and frequencies below said limit will be substantially excluded.

Osborne no. 2 amounts to a sort of reversal of Osborne no. 1. The objects of this invention are stated to be as follows:—

One of the objects of this invention is to provide a means for separating into different branches of a common transmission circuit frequencies lying to either side of a definite limiting frequency so that low frequency currents may be transmitted over one branch and high frequency currents transmitted over the other.

A further object of the invention has reference to the provision of means whereby a multiplex carrier system may be superposed upon an ordinary signaling line, such as a telegraph or telephone line, without necessitating any alteration or rearrangement of the low frequency apparatus normally associated with such a line.

Osborne no. 2, which has gone into considerable use, contemplates the telegraph channels in the band above the regular telephone bands, i.e., above 2,600 cycles, and contemplates the use of high frequency or carrier currents for the telegraph. This it might be here remarked is the general arrangement used by the defendants, that is, the telegraph signals are transmitted by carrier currents at frequencies higher than the ordinary telephone frequencies.

The claims relied on by the plaintiffs, in this patent, are 1 to 8 inclusive, and claim 1, which is typical of the others, reads as follows:—

1. In a transmission system, a main transmission line adapted to transmit both low frequency currents of an order lower than the upper limiting frequency employed in ordinary telephonic transmission and high frequency currents having frequencies of the order used in carrier transmission, branches leading from said line, one branch being adapted to transmit said low frequency currents and the other branch being adapted to transmit said carrier frequencies, means in the former branch to substantially exclude carrier frequencies while transmitting with substantially uniform attenuation a range of said low frequency currents, and means in the latter branch to substantially exclude said low frequencies while transmitting with substantially uniform attenuation a range of carrier frequencies.

The final patent owned by the plaintiffs and said to be infringed is that of Reier, who, in his specification states:—

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The principal object of my invention is to provide a new and improved wave filter having certain desirable operating characteristics. Another object of my invention is to provide a modification of a simple high-pass or low-pass wave filter that shall sharpen the cut-off between the free transmitting and attenuating ranges.

After a lengthy mathematical discussion he concludes:—

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By my invention, it becomes possible to improve the attenuation characteristic of a high-pass or low-pass filter by a simple modification of a structure so as to sharpen the cut-off without altering the filter from an impedance standpoint.

Reier, which has also gone extensively into use, shows a new way whereby the different sections or meshes of a network containing unlike sections, that is, sections of different characteristics, may be connected together, thereby securing improved results in the sharpness of the cut-off. It will be recalled that the meshes contemplated by Campbell were identical meshes, and the problem which Reier sought to solve was how to make a filter consisting of a number of sections of one type, combined with sections of another type. The plaintiffs rely on the following claims in this patent:—

2. A wave filter having its cut-off sharpened by the replacement of a section thereof by a section of different type whereby its attenuation characteristic is made steeper near its critical frequency.

3. A wave filter having sections of different attenuation frequency characteristics, one section giving high attenuation over one frequency range and another section over another frequency range, whereby the composite filter gives high attenuation over both ranges.

The defendants alleged infringing structure is schematically set out in Exhibits 9 and 11. It will be seen that the main line conveying the combined telegraph and telephone signals is divided into two branch lines or paths. The first leads to the telephone apparatus and in it is inserted a low pass filter designated by the letter E. The second path leads to the telegraph apparatus and in this path is inserted a high pass filter designated by the letter D. After passing the high pass filter the telegraph signals pass through two other filters designated as B and C, respectively, and thence through a thermionic amplifier a rectifier, and finally into an apparatus designated as "D.C. Equipment."

The high pass filter D consists of three condensers respectively marked Ca, Cb, Ca, connected in series in one side of the telegraph path, and three similar condensers

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in series in the other side of this line, whilst across the line or in parallel with it there are two inductances marked on the diagram as La, La. The low pass filter E consists of four inductances marked Lb, Lc, Lc, Lb, connected in series with one side of the telephone path, and four similar inductances on the other side of this line, whilst in parallel with the line are connected two condensers marked Cc, Cc, and, in addition, what is referred to as a resonant shunt circuit consisting of two inductances marked Ld and Ld in series with a condenser marked Cb. Reference to the diagrams in Exhibits 9 and 11 will show how these instrumentalities are connected.

The amplifier, which follows the high pass filter D, consists of three audions connected in cascade whereby the output of the first audion is fed into the input of the second audion, the output of the second into the third, and thence into an appliance designated on the diagram as "Rectox Rectifier." The purpose of the amplifier is to amplify or strengthen the telegraph signals so that they may adequately operate the telegraph recording apparatus. The purpose of the low pass filter E is to accept or pass currents of frequencies below approximately 2,600 cycles, that is, the telephone currents carrying the voice signals, and to reject or refuse the frequencies higher than 2,600 cycles. The purpose of the high pass filter D is to accept currents of all frequencies above approximately 2,600 cycles, that is, those which are used for the carrier currents which convey the telegraph signals, and to reject all frequencies below 2,600 cycles, that is the telephone currents.

In comparing the defendants' structure with those disclosed in the patents sued upon we will first consider the defendants' high pass filter D. This consists, as before stated, of a number of condensers in series with the line, and of inductances in parallel such line, connected in meshes in a specific manner, and is the equivalent of the structure shown in fig. 6 of Campbell no. 1, which sets out a similar arrangement of meshes of condensers and inductances. In comparing diagram D and fig. 6 of Campbell no. 1, it should be noted that the fact that the defendants place condensers in the lower side of each mesh as well as in the upper, is of no moment, it being immaterial electrically whether the condensers are placed in either the upper or lower lines, or

in both; it is a question of the value of the capacity in each mesh. Hence, if Campbell no 1 is valid, claims 1, 2 and 3 are infringed by the defendants' structure.

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The defendants' low pass filter E consists of two meshes of the structure shown in fig. 7 of Campbell no. 1 with the addition of a single mesh of the structure shown in figure 9 of Campbell no. 2, which the defendants have inserted in E between the two meshes of Campbell no. 1 just referred to. Again it is observed that the fact that the defendants place inductances in the lower side of the meshes as well as the upper is not of moment. The defendants' filter E therefore consists of a combination of unlike meshes, viz., two meshes of fig. 7, Campbell no. 1, and one mesh of fig. 9, Campbell no. 2. Reier also describes and claims a wave filter, one section of which is replaced by a mesh of a different type; hence, I think, if Campbell no. 2 and Reier are valid the defendants' structure E infringes them both.

Osborne nos. 1 and 2 describe arrangements whereby the main line conveying multiplex signals is divided into two branches one containing a high pass filter and the other containing a low pass filter. This appears in the defendants' structure where the main line is divided into two branches in one of which is inserted low pass filter E, and in the other high pass filter D; hence if the Osborne patents are valid, the defendants' infringes the same.

The last consideration on this aspect of the case, which I have deliberately postponed to this stage, is the combination claimed in Campbell no. 1 of an electric filter in conjunction with a repeater, and to which claims 7, 14 and 16 of that patent relate. The defendants' structure shows high pass filter D connected to a thermionic amplifier, and it was argued that this amplifier is not a repeater as described in this patent. I have given the best thought I could to this point and I have concluded that the repeater contemplated by Campbell is an apparatus whereby the signal in the form of electric energy is impressed on the input side of the repeater, and is repeated in an amplified form by the instrument and fed into the outgoing line, still in the form of electric energy, as distinguished, for example, from sound energy. This is exactly what the amplifier shown in the defendants' structure does. The currents are

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impressed upon the input and are fed out again into a line at the output, still in the form of electric energy, and it is not until these currents go through the translating device that they are converted into sound or mechanical energy, whereby the signals become intelligible to the senses. The fact that a pair of wires between the output of the amplifier and the rectifier and translating device, may be only a few inches long does not appear to me to alter the situation. It is convenient, no doubt, to have the amplifier, the rectifier, and the translating device in close proximity to one another, in fact they might be in the same box, but as far as the operation is concerned, the amplifier might be one or even a number of miles back along the line and in this case I think it certainly should be classed as a repeater. Therefore, if claims numbered 7, 14 and 16, in Campbell no. 1 contain subject matter, then the defendants' infringe them.

The chief defence here is that of anticipation. It was not seriously suggested that there was lack of utility in the patents in suit. Numerous references to the prior art were made on behalf of the defendants, and this might be a convenient stage at which to refer to the requirements of the law regarding prior art cited to establish anticipation. Two authorities were referred to by Mr. Smart and those I think are sufficient for our purposes here. In the case of *Canadian General Electric Co. Ltd. v. Fada Radio Ltd.* (1), it was held by the Judicial Committee, adopting my own language, as trial Judge in that case:

Any information as to the alleged invention given by any prior publication must be for the purpose of practical utility, equal to that given by the subsequent patent. The latter invention must be described in the earlier publication that is held to anticipate it, in order to sustain the defences of anticipation. Where the question is solely one of prior publication, it is not enough to prove that an apparatus described in an earlier specification could have been used to produce this or that result. It must also be shown that the specifications contain clear and unmistakable directions so to use it. It must be shown that the public have been so presented with the invention that it is out of the power of any subsequent person to claim the invention as his own.

Then there is the case of *British Thomson-Houston Co. Ltd. v. Metropolitan Vickers Electrical Co. Ltd.* (2). There the anticipation set up against the plaintiff's patent was one where the circuit diagram was an exact picture of the Rosenberg patent owned by the plaintiff, and with the same

(1) 47 R.P.C. p. 69; 1930 A.C. (2) (1928) 45 R.P.C. 1 at p. 24.
 97 at p. 103.

electrical connections, but they were to be used for a different purpose, and there was no suggestion in the earlier publication that those connections could be used for the purpose set forth in the plaintiff's patent, which was alleged to be infringed. Lord Dunedin discussing the prior art relied on by the defendant said:—

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My Lords, these three cases specially cited are quite at one as regards the law and they only differ because the facts differ. Taking the test I have already suggested, a man who, on the eve of the Brush patent, had said: 'I want to find a winding which will retain the advantages but get over the disadvantages of the series and shunt arrangements,' and also had been handed *Varley's* patent, would invariably have said: "Why, here is exactly what I want." In *Otto v. Linford* and in *Flour Oxidizing Company v. Carr & Co.* he could have made no such remark.

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Applying this test to the present case, I do not think that anyone who was confronted, as *Rosenberg*, with the difficulty of getting a heavy machine into synchronism, and troubled with the too great consumption of current if the synchronized motor were turned on at once, and who, looking over older specifications which had to do with such machines, had come upon *Tesla's* Specification—I do not think that such a man would have been in the least likely to think that the solution of his problem had been provided for him. True he would, in the drawings, have seen two machines in series, but the reason suggested for that would have been the idea of getting both the machines at work, and there would have been no indication, or even hint, that the series arrangement, with properly proportioned machines, got over the difficulty of getting into proper synchronism.

The inference drawn from this by Mr. Smart was, that in the facts of this case, anyone wanting a high pass or low pass filter, at the date of Campbell's invention, would have found no anterior patent or publication which would tell him how to get exactly what he wanted. The same inference doubtless was intended to be drawn in the case of the other patents in suit. The authorities just mentioned accurately state, I think, what is the law.

I come now to a consideration of the prior art cited by the defendants in support of their plea of anticipation. They consist of published patents, text books, and other publications. This prior art was classified by the plaintiffs' witness Stevenson into four general groups, and, I think, we may accept this classification as being generally correct.

Group 1 covers patents and publications having reference to simultaneous transmission over a pair of wires, of telegraph and telephone signals, by battery or direct current, as distinguished from alternating current or carrier operation. The patents, with their numbers, included in this group are Van Rysselberg, 361,734; Van Rysselberg,

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363,188; Pickernell, 492,471; Pickernell, 512,214; Colpitts, 712,766; Athearn, 778,297; and Yorke, 845,157. The other publications are: American Telegraph Engineering Transactions, Vol. 29; American Telegraph Practice, McNicol (1913); and an article in the Telegraph Journal and Electrical Review, Vol. 10 (1882).

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I have carefully examined all these patents and publications, and in none of them do I find any disclosure or claims which resemble, or which might lead to Campbell no. 1 or no. 2, or the other patents in suit. It was well known to the prior art that an inductance had the property of offering a resistance to currents of the frequency used in telephony, but would pass the direct currents used in telegraphy; on the other hand a condenser offers infinite resistance to a direct current and passes those of high frequency, and it seems to me that the object in all these publications was to secure or suggest better separation by a judicious use of the properties in the instrumentalities just mentioned. In no case can I find anything which might be construed as a network of sections, or any mathematical formulæ which might lead to the development of such networks as are to be found in the patents in suit, and generally nothing except the equivalent, at the very outside, of a single mesh of either Campbell no. 1 or no. 2.

Group 2 relates to publications having to do with tuned circuits, and the patents, with their numbers, are as follows: Stone, 714,756; Marconi, 757,559; Ehret, 789,124; Stone, 802,426; Davis, 808,438; Hutin & Leblanc, 838,545; Compos, 1,034,198; Vreeland, 1,171,813; Colpitts, 1,200,082; Vreeland, 1,224,342; Colpitts, 1,256,983; De Forest, 1,134,593; Squier, 980,356; and Espenschied, 1,578,495. The text book "The Principles of Electric Wave Telegraphy and Telephony" by Flemming, also falls in this group. All these publications relate to the separation of high frequency currents, that is to say, currents of frequencies much higher than those used for ordinary telephony, in fact radio or approximately radio frequencies.

The most important patents of this group and those on which, I think, the defendants relied, are Stone and Marconi, and Flemming's publication. All these have to do with the separation of radio frequencies and are in effect narrow band pass filters. The object of Stone and Marconi

was to select the signals of one radio station having a particular frequency, from one using an immediately adjoining frequency or wave-length, and the better to achieve this Stone proposed to use a series of inductively coupled meshes thereby achieving the reception of the desired station by sharpening the cut-off on either side of the band until it approximated a vertical sided narrow V.

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The plaintiffs referred to this type of arrangement as a single frequency device, but, I think, this can hardly be so because recalling the evidence given before me in the *Alexanderson* case (1), and in *Western Electric Co. v. Baldwin* (2), I have the impression that there must be several million radio receivers in use to-day using this type of selection which must pass, if they are to reproduce satisfactory music, a band of frequencies at least 10,000 cycles wide. There is, however, in my opinion, based upon the evidence here, a wide and fundamental difference between an instrumentality which will at 1,000,000 cycles pass a band of 10,000 cycles, and one which will pass all frequencies from 1,000,000 cycles to the infinite and reject all those below, or vice versa. Campbell achieves this, but I do not think it can be achieved by Stone or Marconi, and when the cut-off frequency is made as low as 2,600 cycles, I am satisfied that a network of the meshes of Stone or Marconi is not a practical arrangement.

The witness Kelley suggested that resistance introduced into the circuit would broaden out the V into a band, but once resistance is introduced into a filter it is no longer Campbell who contemplates a structure as free from resistance as is possible to obtain, and the fact that the defendants do not use Stone in filters D and E, which is the defendants' installation, with or without resistance, but does use Campbell no. 1, and a combination of Campbell 1 and 2, is indicative to me that there is a distinction between them, and that Campbell possesses qualities for this particular problem not found in Stone or Marconi.

We now turn to Stevenson's third group of the prior art references and which relate to what is called a "loaded line." The patents, with their numbers, are as follows: Kitsee, 766,451; Kitsee, 766,503; Kendall, 1,773,901; Pupin, 652,230; and Pupin, 652,231. The other publications are,

(1) (1927) Ex. C.R. 134.

(2) (1933) Ex. C.R. 13.

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an article by Campbell in the Philosophical Magazine and Journal of Science, 1903, on "Loaded Lines in Telephonic Transmission"; an article by Pupin on "Wave Transmission Over Cables and Long Distance Air Lines" to be found in the Transactions of the American Institute of Electrical Engineers, 1900; and an article also by Pupin entitled "A Note on Loaded Conductors" to be found in the Electrical World and Engineer, October 12, 1901.

The invention of the loaded line is attributed to Pupin, and is an arrangement whereby the transmission of speech at long distances is materially improved. It was developed prior to the invention of the audion or vacuum tube repeater, and consists of the insertion in a telephone line of inductances of a certain definite value at certain definite intervals. Using an ordinary line, prior to Pupin, the relative high frequency speech currents became more and more attenuated as the line became longer and there was a definite limit to the distance over which intelligible speech could be transmitted. Pupin discovered that by inserting these inductance coils at proper intervals this attenuation could be reduced and the purpose of these coils, as stated by the witness Johnston, is to offset the effect of the capacity which exists between the line and earth, or adjacent lines.

Pupin, discussing mathematically the loaded line would appear to have laid some of the ground work on which Campbell built but he did not pursue the problem to any conclusion, and he did not discover what was afterwards disclosed by Campbell, that a loaded line is in effect a low pass filter with a cut-off at somewhere around 2,600 cycles. The whole object of Pupin was to improve the transmission qualities of the line and he does not appear to have considered the question of suppression of frequencies or anything in the nature of a filter action. His aim was to preserve frequencies and not to eliminate them. Campbell, in his patent no. 1 states:

It should be clearly understood that my invention differs fundamentally both in structure and function from loaded transmission line systems. In transmission lines in which loading coils may advantageously be inserted, the attenuation is excessive and the sole purpose and object of the loading is to reduce the attenuation which normally exists in the unloaded line.

Pupin may have intended to extend his enquiry over the whole field, but there is no evidence that he did so, and

there is no discussion in his 1901 paper which would indicate that his investigations took him higher than the frequency of 750 cycles. I am of the opinion that Campbell cannot be found in Pupin's contributions.

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Group 4 comprises certain miscellaneous patents. They are: Zobel, 1,538,964; Pupin, 1,541,845; Hoyt nos. 1,475,997 and 1,124,904; Kendall, 1,479,613, 1,773,901, and 1,459,709.

Zobel contains features of certain of the patents sued on by the plaintiffs. Mr. Smart practically admitted that Zobel and Reier were the same but that the latter having been filed in Canada in December, 1921, and the former having been published only in May, 1925, that therefore, under sec. 37 (a) of the Patent Act, Zobel could not be cited here as an anticipation even if it were applied for at an earlier date in the United States, and this view of the statute, I think, is correct. Pupin 1,541,845, is a device showing a number of resonant shunt branches separated by series resistances, and is accordingly not a filter of the Campbell type, which contemplates circuits of negligible resistance. The patents to Hoyt do not appear to have any reference to the separation of frequencies and are confined to balancing of loaded lines or to improving the transmission. The Kendall patents have to do with multiplex high frequency telephone systems and are cited against the Osborne patents; they show a combination of a band pass filter and a vacuum tube, the latter presumably being used to prevent inter-action between the different filters. Kendall states in his patent no. 1,459,709, at page 3:—

In fig. 2 the unilateral device 17 performs an additional function in that it prevents any interaction between the filters in the various circuits. If the devices 17 were not provided, transients in one of the filters would serve to impress voltages on the other filters and also the efficiency of transmission would be reduced. But the unilateral devices 17 prevent any interaction of the filters.

This passage indicates, I think, that when Kendall was concerned with this problem he was of the belief there would be difficulties in connecting two filters in parallel and that the interactions of the one upon the other were of an unknown character, and that the connection of the two would make the action impossible of performance without running the risk of serious damage to the transmission properties. Kendall was apparently of the opinion then, that an arrangement or circuit such as suggested by Osborne

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would be inefficient. But the arrangement of Osborne is two filters connected together and allowed to react the one upon the other. Further, Kendall's fear of inefficiency is not apparently borne out by the actual facts. Mr. Biggar, in his opening, stated that Osborne had gone into use on quite a large scale in telephone systems and this was not controverted, but I understood admitted. It was said, that thirty-five or forty per cent of all filters in operation in telephone lines use Osborne's arrangement of connection.

The defendants contended that Campbell no. 1 is an intangible structure in that it contemplates an infinity of meshes, and that since it does not specifically set out how to calculate the resistance in which the last mesh must terminate to secure the best results, nor even mention the same, that it does not disclose all the particulars needful for its proper assemblage and functioning, and is therefore void for insufficiency of description. With this I cannot agree. In the first place, on page 13 of the patent, Campbell shows the formula for designing a filter which would transmit all frequencies lying between 200 and 2,000 cycles per second, and he states on page 14 that

if five sections are employed the current of 2200 cycles in the 5th section is less than 2% of its value in the first section, while currents of frequency lying between 200 and 2000 cycles per second are practically unattenuated. Further, in diagram 10 he shows a filter of four meshes connected to a vacuum tube repeater, all of which I think points to a finite arrangement. As to the terminal resistance, I understood from the explanations given by the expert witnesses that this is a question of matching impedances, which was discussed in the case of *Western Electric Co. v. Baldwin* (1); the submission of the plaintiffs was that Campbell being skilled in the art was familiar with this principle. Such I think must be admitted to be the case. Colpitts in his patent no. 1,129,959, dated 1914, sets out that:

A well known law of electric circuits requires that the impedance of the external path of the circuit should equal the internal path.

And the defendants' witness Kelley admitted that the formulæ set out by Campbell in Exhibit 8, his 1901 paper, gives the same general result as that given by the witness Johnson in his book, though in a different form, and this Kelley admitted was one method of calculating the proper

terminating resistance. In other words, it is reasonable to assume that, in 1901, Campbell was cognizant of the principle of matching impedances.

The remaining question for determination is whether the patents sued upon contain subject matter. The witness Johnson stated that 150,000 filters have been produced by or for the telephone companies,—it was not stated in what country or countries—and he stated that in that number 100 per cent comprised the idea in Campbell no. 1, 95 per cent comprised the Campbell no. 2 idea, 95 per cent the Reier idea, and 35 or 40 per cent the Osborne idea; while many of the five patents would appear to have much that is in common yet they are not identical arrangements. Campbell nos. 1 and 2, in my opinion, constituted a very considerable and useful contribution to the art and required the exercise of the inventive skill. Campbell was the first to conceive of the filtering properties of a series of recurring resonant circuits connected in the manner disclosed by him. It is true that Marconi and Stone, in their investigations and research work in connection with the new problems of radio, sought and succeeded in producing electric wave filters which possessed the virtue of accepting certain frequencies and rejecting others, but their whole effort was directed to a filter which would accept the narrowest possible bands at radio or high frequencies, but this was not the problem which concerned Campbell. Campbell's filter has the quality of being able to expand or narrow the accepted band of frequencies, or it can accept all frequencies above a certain value, or vice versa, which does not obtain in the arrangement of Marconi or Stone. In other words Campbell can do all that Marconi and Stone can do, but in addition much more. It was contended that claims 1 and 3 of Campbell no. 1 referred to only one section and not a plurality of sections, but claim 2 does, so whether claims 1 and 3 are valid or not would not seem to be of practical importance. I am of the opinion, however, that Campbell never contemplated a single section only, and this is made quite apparent, I think, from the portions of Campbell's first specification which I have earlier quoted. All the other patents sued upon, the two Osborne patents and the Reier patent, I think, are patentable improvements based upon the fundamental discoveries and mathematical treatment of the subject made by Camp-

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bell, and the networks which he disclosed; but Osborne and Reier were not, I think, apparent from Campbell. The inventions claimed in the plaintiffs' patents may seem obvious to-day, but it should be emphasized that the date of invention in each case goes back now many years, as will be observed from the dates of the applications for the patents, and in some cases the date of invention goes back beyond such dates.

In connection with the Osborne patents, possibly the evidence of the witness Johnson, well sets forth the problem facing anybody wishing to use filters in a system such as Osborne shows in his first patent. I quote from the evidence of Johnson:—

Q. Now going on to Osborne. What were the problems facing somebody who wanted to use these filters in a system such as Osborne shows in his first patent, where you are using the telegraph low frequencies and the telephone high frequencies?—A. The telegraph circuits involved the use of frequencies below a certain value and the telephone conversations required the use of frequencies above that same value. In order to get the maximum vitality of both telegraph and telephone messages and the speech it is essential that the frequencies used in the telephone channel be as wide as possible; in other words, that they go down as low in frequency as it is possible to go, or I should say, that it is practical to go, and, in the telegraph, in order to get good telegraph reception, it is again desirable to have as wide a band of frequencies as is possible. In the preceding art, where the use of such devices, such as were available before the Campbell invention, were used, it was not possible to get those two frequencies, one on one side limiting the telegraph channel and one on the other side limiting the telephone channel, very close together; in other words, there had to be a wide separation in order to get the necessary attenuation to keep the telegraph from giving what is known as Morse thump noises in the telephone channel and vice versa, the telephone interfering with the telegraph.

Then as to the question of the termination and interaction of the low pass and high pass filters respectively, Johnson stated:

The Campbell patents did not give any clue directly as to how the filters should be connected, if they were to be connected in parallel or series. They could be connected in parallel with certain terminations that would be inoperative and likewise connected in series with certain terminations also inoperative. If they were connected in parallel one filter might absorb all the energy that should go into the other filter and Osborn'e invention determined how those filters could be used in parallel, if they were connected in certain ways, and how they could be used in series, if connected in other certain ways, and he also found it desirable to have the cut off frequency of the low pass filter approximately the same as the cut off frequency for the high pass filter. This gave the telegraph channel as wide a band as possible and it did the same thing for the telephone channel and also gave certain advantageous characteristics which would not be expected before the combination had been tried out.

Then a portion of the evidence of Johnson as to the problem Reier was attempting to solve might also be mentioned. He stated:—

Q. Are you familiar with Reier's mathematics?—A. I am.

Q. What would you say as to the simplicity of the problem, even from a mathematician's standpoint?—A. The problem is one, as it stood from knowing Campbell No. 1 and 2, that was by no means apparent, that you could connect sections together in the way in which Reier indicated and I think the fact that a good many engineers had knowledge of Campbell no. 1 and 2 for a good many years and did not appreciate they could be connected in the way he indicated, was pretty good evidence that the original concept was quite a difficult thing.

I have reached the conclusion that there is subject matter in all the plaintiffs' patents and that all the claims sued upon upon in each have been infringed by the installation made by the defendants, and in the defendants' installation, I think, is to be found, in one form or other, everything contained in the claims of the several patents here in suit.

The defendant corporation Burkholder & Kelley Ltd. was incorporated and organized in May, 1933, and it at once acquired the business and assets of the two first named defendants, who were carrying on the business of telephone engineers at Toronto, under the partnership name of Burkholder & Kelley. While the partnership was in existence Burkholder & Kelley entered into a contract with the Ontario Hydro-Electric Power Commission and the Gati-neau Power Co. Ltd., to install the selective circuit which is said to constitute the infringement in this case. This contract was subsequently assigned to the defendant corporation and the defendant corporation made the installation complained of. The defendant Burkholder is the President of the corporation, and the defendant Kelley is Vice-President, and it would seem that they are sued because they are officers and directors of the corporation, at least there is nothing in the evidence which suggests anything to the contrary; Mr. Gowling argued this point on that assumption and counsel for the plaintiffs said nothing to dispel the suggestion, in fact they did not seem to press the point that the first two named defendants were liable at all. I do not think the designing of the circuit, or the making of the contract, by Burkholder & Kelley would constitute infringement. The installation was made by the defendant corporation and it alone is liable. The directors and officers of the corporation would not be liable for in-

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fringement. See *British Thomson-Houston Co. Ltd. v. Sterling Accessories Ltd.* (1).

Judgment will therefore be for the plaintiffs against the defendant company, and the plaintiffs will have their costs of the action. The action against the first two named defendants is dismissed without costs.

Judgment accordingly.

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 Mar. 19.

BETWEEN:

THE UNIVERSITY OF MANITOBA. SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

AND

THE BANK OF NOVA SCOTIA..... THIRD PARTY.

Jurisdiction—Third party procedure—Crown a defendant claiming indemnity against third party by virtue of regulations made under the provisions of the Consolidated Revenue and Audit Act, R.S.C. 1927, c. 178, s. 15—Jurisdiction of Exchequer Court in respect to claim against third party—Exchequer Court Act, R.S.C. 1927, c. 34, s. 30—British North America Act.

The University of Manitoba took an action against the Crown to recover certain moneys, the proceeds of Dominion of Canada bonds which had been registered in the name of the University, alleging that the Crown had wrongfully, and in breach of the contract contained in the bonds, transferred the same to third parties, or, in the alternative, that the Crown had cancelled such bonds without the presentation of a written instrument or transfer executed by or on behalf of the University.

The Crown served a third party notice on the Bank of Nova Scotia claiming to be indemnified by the Bank against liability to the University under the bonds on the ground that the Bank, by contract, guaranteed to the Crown the signatures and authority of the officers of the University who had executed the form of transfer (for which claim the Crown relied upon the regulations respecting the transfer or exchange of such bonds, made under the provisions of the Consolidated Revenue and Audit Act, R.S.C. 1927, c. 178, s. 15).

The Bank moved to set aside the third party notice on the ground that the Court was without jurisdiction.

Held: That since this Court has jurisdiction to entertain an action by the Crown against the Bank, on the guarantees, if the petition were finally disposed of adversely to the Crown, it follows that the Court has jurisdiction to entertain the third party proceeding between the Crown and the Bank.

2. That the operation of the third party rule is not excluded by the Exchequer Court Act, R.S.C. 1927, c. 34, s. 30, ss. d.

MOTION to set aside third party notice.

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

W. N. Tilley, K.C., for the motion.

P. M. Anderson, contra.

M. B. Gordon for the suppliant.

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THE PRESIDENT now (March 19, 1935) handed down the following reasons:

This is a motion made on behalf of the Bank of Nova Scotia, hereinafter called the Bank, to set aside a third party notice, served on the Bank, at the instance of the Crown under the provisions of the Exchequer Court Rules.

To apprehend clearly the submissions made on behalf of the Bank in support of the motion it becomes necessary to state the material facts upon which the main proceeding, a Petition of Right brought by the University of Manitoba, hereinafter called the University, is grounded.

The University was the registered holder of three bonds issued by the Dominion of Canada, under the authority of a statute of the Dominion, in the principal sum of \$100,000 each, bearing interest at the rate of five and one-half per cent payable semi-annually, the maturity date of each bond being November 1, 1934.

For the purpose of transferring or exchanging the bonds there was printed thereon a form to be signed or executed by the registered holder. Regulations as to the transfer or exchange of such bonds were prescribed and they are in part as follows:

(1) In order to effect the transfer of a Dominion of Canada War or Victory Loan Bond, it must be presented at the office of the Minister of Finance and Receiver General at Ottawa or at the office of the Assistant Receiver General at . . . , accompanied by a written instrument of transfer in form approved by the Minister duly executed by the registered holder.

(2) The signature of the transferor must be guaranteed.

(3) Guarantees will be accepted from the following:—

(a) Canadian Chartered Banks;

* * * * *

(6) Where a transfer form is signed by a person acting for the registered owner under a power of attorney there must be produced to the Department with the transfer form a properly authenticated copy of the power of attorney together with clear and unequivocal evidence that the power of attorney was at the time of the signing of the transfer form still in force; provided however that such evidence will not be

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required if the party guaranteeing the signature on the transfer form guarantees also the authority of the attorney to sign for the registered owner. The following form of words must be used: "Signature and authority to sign guaranteed."

The regulations just mentioned were made under the provisions of section 15 of chapter 178, Revised Statutes of Canada (1927), the Consolidated Revenue and Audit Act, and which section reads as follows:

(15) The regulations made or to be made by the Governor in Council, as to the inscription, transfer, management and redemption of any Canada Dominion stock, debentures or other Canada securities herebefore mentioned, shall, in so far as they are not inconsistent with the Act under which they are made, have the same force and effect as if embodied and enacted in an Act of the Parliament of Canada.

The three registered bonds in question were in fact transferred or exchanged, and it is to be inferred from the petition that the University proposes to contest the authority of the officers of the University purporting to execute the transfers on behalf of the University. The transfers of the said bonds, before the same were presented to the respondent, had affixed thereto the seal of the University and were executed and signed as follows:

The University of Manitoba,

"John A. Machray"

Chairman Board of Governors.

"W. B. H. Teakles"

Asst. Registrar.

and in each case the transfer had endorsed thereon a guarantee by the Bank in the following or similar words: "Signature of Transferor and authority to sign guaranteed," followed by the signature of the Bank.

The University now claims that the Dominion of Canada did wrongfully and in breach of its contract transfer to some person or persons unknown to the suppliant, the said three bonds, or in the alternative did cancel such bonds without the presentation of a written instrument or transfer executed by or on behalf of the University, and that the respondent has, since a date mentioned, failed to pay to the University the interest payable under such bonds; and the suppliant seeks a declaration that it has been at all times material, and still is, the registered holder of the three bonds in question and is entitled to payment of the principal sum and interest secured thereby, or to a delivery up of the said bonds and the payment of the accrued

interest thereon, or in the alternative to damages in the sum of \$352,250 being the amount of the principal secured by the said bonds and accrued interest.

The Crown, by its third party notice, claims to be indemnified by the Bank against liability to the University under the said bonds, or to relief over against the Bank, and the grounds for the claim to indemnification against the Bank are set forth in the third party notice, but essentially they are that the Bank, by contract, guaranteed to the Crown the signatures and authority of Machray and Teakles, and that if the transfer of the three bonds in question were unauthorized by the University, or is held to be void, then the Bank is responsible to the Crown upon the guarantees, for not having such transfers properly executed by the University, and for its negligence in respect of such transfers.

Mr. Tilley, in support of the motion to strike out the third party notice, contended that the Crown's claim to indemnification by the Bank was virtually an action based on a contract, or representation, or guarantee, as to the signatures of the transferors and their authority therefor, which was not a subject matter upon which the Dominion was competent to legislate, and that it was only within the competence of the Provincial legislatures to say what are the rights of parties under a guarantee of the nature here in question; and generally he contended that the Exchequer Court was without jurisdiction to entertain the claim of the Crown to be indemnified by the Bank, in respect of the guarantees as to signatures and authority, and that the issue could only be litigated in the Provincial courts. Mr. Tilley relied upon sec. 101 of the British North America Act and the decision of the Judicial Committee of the Privy Council in the case of *Consolidated Distilleries Ltd., et al., v. The King* (1); the Crown also relied upon the same case.

The question of jurisdiction depends upon a consideration of the British North America Act, and the Exchequer Court Act, chap. 34, R.S.C. 1927. The Provincial legislatures have exclusive power to make laws under the British North America Act in respect of "Property and Civil rights in the Province," and "The administration

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of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts." Sec. 101 however provides that: "The Parliament of Canada may, *notwithstanding anything in this Act*, from time to time provide for the . . . establishment of any additional courts for the better administration of the laws of Canada," and it was in the exercise of this power that the Exchequer Court of Canada was created in 1875.

The matter of jurisdiction then resolves itself into the question as to whether the language of the Exchequer Court Act confers the necessary jurisdiction. It was not contended that here the Exchequer Court was without jurisdiction to entertain the petition itself. The important section of the Act to consider upon the motion, it was said by both Mr. Tilley and Mr. Anderson, was the following:—

30. The Exchequer Court shall have and possess concurrent original jurisdiction in Canada

(d) in all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner.

Whatever be the true interpretation of the words "the laws of Canada," as found in sec. 101 of the British North America Act, they must, I think, be held to embrace a case of the kind here, where the bonds were issued under the authority of a Dominion statute undoubtedly within the legislative competence of Parliament, and where the regulations concerning their transfer and the required guarantee as to signature and authority have the force of statute; in fact the documents, that is the bonds, each contain the obligations of the Dominion of Canada to pay the registered holder the face value thereof, the written transfer itself, and the obligation of the Bank guaranteeing the signature and authority of the transferors, all of which were prescribed by a Dominion statute or by regulations having the force of statute.

In the two cases of *The King v. Consolidated Distilleries Ltd.* (1), actions were taken by the Crown upon bonds entered into by the defendants pursuant to the provisions of the Excise Act, and it was held, on appeal, by the Supreme Court of Canada, that the Exchequer

(1) (1931) Ex. C.R. 85 and 125; (1932) S.C.R. 419.

Court had jurisdiction to hear and determine the claims. The present Chief Justice of Canada, then Duff J., upon the appeal, stated:—

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I do not doubt that "the better administration of the laws of Canada," embraces, upon a fair construction of the words, such a matter as the enforcement of an obligation contracted pursuant to the provisions of a statute of that Parliament or of a regulation having the force of statute,

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and he held that while something might be said for the view that the case did not fall within subsection (a) of sec. 30, it was plainly within subsection (d). On further appeal to the Privy Council their Lordships of the Judicial Committee sustained the judgment of the Supreme Court of Canada. They declined to decide whether subsec. (a) of sec. 30 of the Exchequer Court Act conferred jurisdiction and stated that while these actions were no doubt "cases relating to revenue" it might perhaps be said that no law of Canada was sought to be enforced in them, but they held that these actions fell within subsec. (d). They further stated:—

Their Lordships, however, do not think that subsec. (d) in the context in which it is found, can properly be read as free from all limitations. They think that in view of the provisions of the three preceding subsections the actions and suits in subsec. (d) must be confined to actions and suits in relation to some subject matter, legislation in regard to which is within the legislative competence of the Dominion. So read the subsection could not be said to be *ultra vires*, and the present actions appear to their Lordships to fall within its scope.

In the petition herein the Crown appears as defendant, and not as plaintiff, and subsec. (d) of sec. 30 purports to confer jurisdiction where the "Crown is plaintiff or petitioner." The primary object of the third party procedure is to prevent the necessity of two actions. In the first place, it is for the determination of all questions between the plaintiff and the defendant who brings in the third party, and in the second place for the determination of questions between the defendant and the third party against whom the defendant claims contribution or indemnity. It appears to me that upon the facts here this is a case in which the Crown may properly invoke the third party procedure. The effect of it is that the Crown becomes a plaintiff as against the Bank. If this Court would have jurisdiction to entertain an action by the Crown against the Bank, on the guarantees, if the petition herein were finally disposed of adversely to the Crown and

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in favour of the University—and, I think, the Court would undoubtedly have such jurisdiction—then, I think, it follows, that the Court has jurisdiction to entertain the third party proceeding between the Crown and the Bank. I do not think subsec. (d) of sec. 30 was intended to exclude the operation of the third party rule. The precise point involved here has apparently not arisen for consideration before this, so far as I know. In the unreported case of *Magee v. The Queen* (1896), the City of Saint John was, on motion of the Crown, joined as a third party on an order made by Burbidge J., but this was by consent of counsel; the consent order would not confer jurisdiction, but evidently Burbidge J. was of the opinion that there was jurisdiction to entertain the third party notice. See Audette's Exchequer Court Practice, page 504. In the case of *The King v. Consolidated Distilleries Ltd.* (1), a third party notice was set aside, but that involved an issue between subject and subject and did not relate to the original subject-matter of the action.

I am therefore of the opinion that the Bank has been properly joined as a third party and that the motion to set aside the third party notice must be refused with costs.

Judgment accordingly.

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 Mar. 27.
 Apr. 30.

BETWEEN:
 NORTHERN SECURITIES COM- }
 PANY } SUPPLIANT;
 AND
 HIS MAJESTY THE KING..... RESPONDENT.

Revenue—Income—Income War Tax Act secs. 5 and 9B—Non-resident shareholder in Canadian company—Mining company—Companies Act, s. 98—Dividends paid from reserve funds built up out of profits set aside as allowances for depletion and depreciation of company's assets taxable as income.

Suppliant owned shares of the capital stock of Crow's Nest Pass Coal Company Ltd., a Canadian mining company, which in 1933 distributed \$2 per share to its shareholders stating that "this payment is made from Depreciation and Depletion Reserve Funds of the Company." At this time there were no net annual operating profits available for dividends, nor was the company in liquidation. The reserve funds had been built up by amounts set apart from profits as allowances

(1) (1929) Ex. C.R. 101; (1930) S.C.R. 531.

for depreciation, and for depletion of the company's coal reserves, with the approval of the Minister of National Revenue, and in the exercise of his discretion under s. 5 (a) of the Income War Tax Act, R.S.C. 1927, c. 97. Pursuant to demand the company paid income tax on the money so distributed. Suppliant by its petition alleged that no tax is imposed by the Act in respect of the distributions so made, and prayed that the money paid as tax be refunded to it.

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Held: That the dividends here paid were not distributions of capital but distributions of profits derived from the operations of the company and therefore taxable as income received as dividends.

2. That the true construction of s. 9B, ss. 2 (a), Income War Tax Act is that dividends in the hands of a non-resident shareholder shall pay the tax imposed, no matter from whence derived.

PETITION OF RIGHT by suppliant seeking to recover money paid as income tax.

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

N. W. Rowell, K.C., and Peter Wright for suppliant.

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

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

THE PRESIDENT, now (April 30, 1935), delivered the following judgment:

The suppliant, a company incorporated under the laws of the state of New Jersey, a non-resident of Canada, was, at the time material here, the owner of certain shares of the capital stock of Crow's Nest Pass Coal Company Ltd., a company incorporated under the Companies Act (Canada) for the chief object of mining, and hereafter to be referred to as "the Company."

In the month of September, and in the month of December, 1933, the Company made distributions to its shareholders in the amount of \$2 per share. Accompanying each dividend forwarded to shareholders was the following covering letter:—

Enclosed find cheque for \$2 per share on the stock of this company recorded in your name at the close of business August 1, 1933.

This payment is made from Depreciation and Depletion Reserve Funds of the Company.

The Company was not in liquidation. The distributions so made from the depreciation and depletion reserve funds of the Company, it is claimed, constituted part of the capital of the Company, or, alternatively, it is claimed,

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the same was paid out of assets or funds of the Company which are exempt from the payment of Income Tax. At the time such distributions were made to shareholders the amount to the credit of profit and loss account had been exhausted, and there were no net annual operating profits available for dividend in the period in question.

The Commissioner of Income Tax, in December, 1933, demanded from the Company the sum of \$5,711.40, out of the distributions made or to be made as aforesaid to the suppliant, on the ground that an income tax of five per centum was payable thereon by the suppliant, under the Income War Tax Act, R.S.C. 1927, ch. 97, sec. 9B, ss. 2 (a). The Company pursuant to the demand of the Commissioner of Income Tax, deducted the amount of this tax from the amount so payable to the suppliant, and it paid the same to the Receiver General of Canada, under protest; the suppliant has demanded repayment of the said sum, but the same has been withheld. The suppliant in its petition alleges that no tax is imposed on the suppliant by the Income War Tax Act in respect of the distributions made, and prays that the sum so paid, with interest, be refunded.

The sections of the Income War Tax Act which are particularly relevant to the controversy here are the following:

5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—

(a) Such reasonable amount as the Minister, in his discretion, may allow for depreciation, and the Minister in determining the income derived from mining and from oil and gas wells and timber limits shall make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair;

And

9B. In addition to any other tax imposed by this Act an income tax of five per centum is hereby imposed on all persons resident in Canada, . . . , in respect of all interest and dividends paid by Canadian debtors, directly or indirectly to such persons, in a currency which is at a premium in terms of Canadian funds.

(2) In addition to any other tax imposed by this Act an income tax of five per centum is hereby imposed on all persons who are non-residents of Canada in respect of

(a) All dividends received from Canadian debtors irrespective of the currency in which the payment is made, and

(b) All interest received from Canadian debtors if payable solely in Canadian funds except the interest from all bonds of or guaranteed by the Dominion of Canada.

The amount to the credit of the depreciation and depletion reserves, as I understand it, amounted to some \$1,900,000, in considerable part consisting of investments and cash, and, I think, it is correct to say, that a portion of such reserves was in a form not available for distribution. These reserve funds had been built up by amounts set apart from profits as allowances for depreciation, and for depletion of the company's coal reserves, with the approval of the Minister, and in the exercise of his discretion under sec. 5 (a) of the Act. Precisely how the allowances for depreciation, and the amount or amounts, were arrived at is not clear, but the Commissioner of Income Tax appears to have agreed that ten cents per ton for each ton of coal mined, should be allowed on account of the depletion of the mine or mines owned and operated by the Company. However, these reserves were apparently built up with the approbation of the Minister.

If the Company's depreciation and depletion fund constituted capital, and if the distribution impaired capital, this was permissible only because the Company was a mining company. There is a statutory prohibition against payment of dividends out of capital, if it has the effect of impairing capital, but there is an exception in the case of mining companies. The Companies Act, ch. 27, s. 98, R.S.C. 1927, reads as follows:

98. No dividend shall be declared which will impair the capital of the company.

2. Nothing in this Act shall prevent a company incorporated for the chief object of mining from declaring or paying dividends out of its funds derived from the operations of the company, notwithstanding that the value of the net assets of the company may be thereby reduced to less than the par value of the issued capital stock of the company, or in the case of companies having shares without par value, to less than the amount of capital with which the company shall carry on business as prescribed by this Act, if such payment does not reduce the value of its remaining assets so that they will be insufficient to meet all the liabilities of the company then existing exclusive of its nominal paid up capital.

This provision of the Companies Act permitted the payment of a dividend to shareholders out of funds derived from the operations of the Company, even if it reduced the value of the net assets of the Company to less than the par value of its issued capital stock, and I would emphasize the word *dividend*; it is stated in the Company's financial statement for 1933 that the distributions in question were made to shareholders under the powers

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conferred on the Company by sec. 98 of the Companies Act, out of the depreciation and depletion reserves of the Company. It is not clear to me whether or not, in fact, the distributions here made did impair capital in the sense mentioned in this section.

The facts of the case being stated, and the relevant provisions of the Income War Tax Act and the Companies Act being stated, the point for decision may be put thus: Were the sums distributed to the suppliant derived from income or capital of the Company, or, out of assets or funds of the Company which were exempt from the payment of this income tax.

A number of authorities were referred to by counsel, but it will not be necessary to discuss all of them. The first to be mentioned is that of *Hill v. Permanent Trustee Company of New South Wales Ltd.* (1); this was an appeal from the Supreme Court of New South Wales to the Judicial Committee. The trustee company, as trustee of the will of one Hill, held shares in Buttabone Pastoral Co. Ltd., and the latter paid to the trustee company certain sums of money as dividends out of the proceeds of the sale of substantially the whole of its lands, live stock and other assets, it ceasing thereafter to carry on business. The dividends were declared and paid as "a distribution of capital assets in advance of the winding up." The question was, as between a life tenant and a remainderman, whether the dividends were, under the will of Hill, "net income or profits to be derived from such investment or investments," or "capital of my said trust estate." It was held that the dividend should be treated as income and not capital of the trust estate. Their Lordships of the Judicial Committee of the Privy Council, laid down the following proposition, which, I think, is applicable here.

A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorized reduction of capital. Any other payment made by it by means of which it parts with money to its shareholders can only be made by way of dividing profits. Whether the payment is called "dividend" or "bonus," or any other name, it still must remain a payment on a division of profits.

This means that any distribution of money, except on a reduction of capital, by which assets are released to the

(1) (1930) A.C. 720.

shareholders, can only be a distribution of profits, by whatever method it is made. Their Lordships also stated:

So long as such a company is a going concern and is not restricted as to the profits out of which it may pay dividends, it may distribute as dividends to its shareholders the excess of its revenue receipts over expenses properly chargeable to revenue account . . . On the other hand, if the company instead of distributing the same balance as dividends, resolved upon liquidation, the shareholder would be repaid his share of capital and in addition the share of surplus assets in the liquidation attributable to his shares . . . but no part thereof would belong to a tenant for life as income; it would all be corpus of the trust estate.

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Their Lordships referred to the case of *Bouch v. Sproule* (1) also cited before me; and much consideration was given to this case by the Supreme Court of New South Wales in the *Hill* case. Discussing this case their Lordships said:

It is not in their Lordships' view, an authority for the proposition that the company's statement of intention determines as between tenant for life and remainderman whether a sum paid away by the company to a shareholder who is a trustee is income or corpus of his trust estate. In *Bouch v. Sproule* no moneys, in fact, left the company's possession at all. It is not an authority which touches a case in which a company parts with moneys to its shareholders. The essence of the case was that the company, not by its statements, but by its acts, showed that what the shareholders got from the company was not a share of profits divided by the company, but an interest in moneys which had been converted from divisible profits into moneys capitalized and rendered for ever incapable of being divided as profits.

In that case it was proposed to distribute accumulated profits as a bonus dividend, and to allot new shares (partly paid up) to each shareholder, and to apply the bonus dividend in part payment of the new shares, and this was done; in this way the profits were permanently added to the company's capital, and it was held that no sum was paid as a dividend. But that is not the case which I have to decide.

Then discussing a decision of the High Court of Australia, in the case of *Knowles v. Ballarat Trustees, Executors and Agency Co.* (2), a case which the Supreme Court of New South Wales followed in reaching their decision in the *Hill* case, their Lordships make the following pertinent observations:

A careful consideration of the judgments delivered by the majority of the High Court judges satisfies their Lordships that the decision is based upon the view that a company, when dividing among its shareholders a sum of accumulated profit, is entitled to dictate and determine whether the moneys so received by the shareholder shall, in his hands

(1) (1887) 12 A.C. 385.

(2) (1916-17) 22 C.L.R. 212.

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be deemed corpus or income. Their Lordships know of no earlier authority justifying this view. It is a matter with which the company has not the remotest concern. If payment to the shareholders is made out of profits it is income of the shares, and no statement of the company or its directors can change it from income into corpus. Their Lordships agree with and are content to refer to, the dissenting judgment of Isaacs, J. as a correct exposition of the law.

In the *Knowles* case the facts were that the directors of a limited company, which was not in liquidation, by resolution resolved upon the payment to the shareholders of (1) a dividend of 6d. per share; (2) a bonus of 6d. per share; and (3) "distribution of assets 10s. per share," which was paid out of accumulated profits. The question for determination was whether the 10s. per share was paid out of capital or income. The High Court (Isaacs J. dissenting) held that the moneys were capital of the trust estate, because though they were payments of cash made out of accumulated profits the company intended the moneys to be a distribution of capital as distinguished from dividends. Their Lordships, it will be seen, accepted the dissenting judgment of Isaacs J. as the correct exposition of the law.

Their Lordships of the Judicial Committee in the *Hill* case, adopted the reasoning of Eve, J. in another case cited before me, *In re Bates* (1). There, the directors of a limited company, owning and operating steam trawlers, sold some of them for sums exceeding the values at which they stood in the company's balance sheet; the proceeds were carried to a suspense account and were subsequently distributed as cash bonuses to shareholders, accompanied by a covering letter stating that such bonuses were capital payments, and not liable to income tax. While the issue in this case arose as between a tenant for life and remainderman, yet it lays down a principle which, I think, is applicable here. It was held that the payments not having been capitalized by the issuance of bonus shares increasing the total capital, the payments were income receivable by the tenant for life, and that the fund was one which the company could treat as available for dividend and could distribute as profits. Eve J. said:

In this state of affairs it was a fund which the company could treat as available for dividend and could distribute as profits, or having regard to its power to increase capital could apply for that purpose by, for example, increasing the capital, declaring a bonus and at the same time

(1) (1928) Ch. Div. 682.

allotting to each shareholder shares in the capital of the company paid up to an amount equivalent to his proportion of the bonus so declared. Unless and until the fund was in fact capitalized it retained its characteristics of a distributable property . . . no change in the character of the fund was brought about by the company's expressed intention to distribute it as capital. It remained an uncapitalized surplus available for distribution, either as dividend or bonus on the shares, or as a special division of an ascertained profit . . . and in the hands of those who received it, it retained the same characteristics.

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It might be convenient here to observe that the effect of the notification of the Company here, that the dividend paid came from the depreciation and depletion funds was no doubt done with the intent that it might assist in protecting the recipients from liability to taxation, but as Eve, J. stated in the *Bates* case, the mere impressing of these distributions with the appellation of "Depreciation and Depletion Reserve Funds of the Company," cannot determine their true character. Nor can the fact that the distributions made here were described in the covering letter as a "payment," and not a "dividend," determine that they were not payments of dividends.

Finally, I shall refer to another cited authority, *Lee v. Neuchatel Asphalte Co.* (1), because of a discussion there as to reserve funds of a limited company, and of the proposition that a company is debtor to capital. That case decided that, under the English Companies Act,—and the same would be true, I think, of the Canadian Companies Act—there was nothing to prevent a company formed to work a wasting property, for example a mine, from distributing as dividend, the excess of the proceeds of working above the expenses of working, nor did the Companies Act impose on the company any obligation to set apart a sinking fund to meet depreciation in the value of a wasting property. If the expenses of working exceed the receipts, the accounts must not be made out so as to show an apparent profit, and so enable the company to pay a dividend out of capital, but the division of the profits without providing a sinking fund is not such a payment of dividends out of capital as is forbidden by law. I may quote Lord Lindley:

In an accountant's point of view, it is quite right, in order to see how you stand, to put down company debtor to capital. But the company do not owe the capital. What it means is simply this: that if you want to find out how you stand, whether you have lost your money

(1) (1889) 41 Ch. Div. 1.

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or not, you must bring your capital into account somehow or other. But supposing at the winding-up of the concern the capital is all gone, and the creditors are paid, and there is nothing to divide, who is the debtor? No one is debtor to any one. If there is any surplus to divide, then, and not before, is the company debtor to the shareholders for their aliquot portions of that surplus. But the notion that a company is debtor to capital, although it is a convenient notion, and does not deceive mercantile men, is apt to lead one astray. The company is not debtor to capital; the capital is not a debt of the company.

* * * * *

As regards the mode of keeping accounts, there is no law prescribing how they shall be kept. There is nothing in the Acts to shew what is to go to capital account or what is to go to revenue account. We know perfectly well that business men very often differ in opinion about such things. It does not matter to the creditor out of what fund he gets paid, whether he gets paid out of capital or out of profit net or gross. All he cares about is that there is money to pay him with, and it is a mere matter of book-keeping and internal arrangement out of what particular fund he shall be paid. Therefore you cannot say that the question of what ought to go into capital or revenue account is a matter that concerns the creditor. The Act does not say what expenses are to be charged to capital and what to revenue. Such matters are left to the shareholders. They may or may not have a sinking fund or a deterioration fund, and the articles of association may or may not contain regulations on those matters. If they do, the regulations must be observed; if they do not, the shareholders can do as they like, so long as they do not misapply their capital and cheat their creditors. In this case the articles say there need be no such fund, consequently the capital need not be replaced; nor, having regard to these articles, need any loss of capital by removal of bituminous earth appear in the profit and loss account.

All this is, I think, very pertinent here. It was not suggested that the Company was required to set up a depreciation or depletion fund, or to maintain the same intact for the ultimate repayment of capital. In fact, that could not be said because the dividends paid came from such a fund, and by virtue of the powers conferred on the Company by sec. 98, ss. 2, of the Companies Act, the Company was empowered to pay such dividends out of any funds which it possessed, even if it impaired capital.

For the reasons to be found in the several foregoing decided authorities, I think, the suppliant must fail. Even if the dividends paid out were derived from capital, the same could be lawfully paid therefrom by virtue of sec. 98 of the Companies Act, which permits mining companies to pay

dividends out of its funds derived from the operations of the company, notwithstanding that the value of the net assets of the company may be thereby reduced to less than the par value of the issued capital stock of the company . . .

But while this provision of the Companies Act permitted the Company to pay a "dividend," even if it impaired capital, that does not make the payment of the "dividend" a distribution of capital, which might have been done by reducing the capital of the Company, if the Company had acquired the power to do so; it permits that which was done here, the payment of "dividends" to shareholders, from funds derived from the mining operations of the company, which, I think, must be held to constitute income in the hands of the shareholders, because it is a dividend upon shares of the capital stock of the Company. The exception, as to the payment of dividends, in favour of mining companies where capital is impaired, does not give a new characteristic to the dividend paid; it is like any other dividend and is not a return of capital. It seems to me that the reserve funds in question here, built up from profits earned from the operations of the Company, could be treated by the Company, and were treated by the Company, as a fund available for dividend, and they could and did distribute the same, or a portion thereof, as profits derived from the operations of the Company. Accordingly, I am of the opinion that the dividends here paid were not distributions of capital but distributions of profits derived from the operations of the Company and therefore taxable as income received as dividends, under the particular provisions of the statute here in question.

But I do not think it is necessary to rely upon decided authority to determine the point at issue here. It is sufficient, I think, to look at sec. 9B alone. What did the legislature intend by enacting sec. 9B? Plainly, I think, it was to impose a tax upon two classes of dividends, and also upon interest payments,—excepting those made in respect of bonds of the Dominion of Canada—paid by Canadian debtors, regardless of the source from which they came. It is a tax quite distinct from the income taxes contemplated by sec. 9 of the Act, and the other provisions of the Act have no application to sec. 9B. It is a tax upon certain dividend and interest payments payable by the recipient thereof. A reference to the first clause of 9B will show that the tax is payable only on dividends received by residents of Canada when the same is payable in a currency which is at a premium in terms of Canadian funds.

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The purpose of this clause is quite obvious. Then dividends paid to non-residents of Canada are taxable, with the object, I assume, of placing all shareholders in Canadian companies on a parity, in respect of dividends paid by such companies. Then under ss. 5 of sec. 9B, the tax is imposed on many of the persons, companies, associations, etc., that are exempt from income tax under sec. 4 of the Act. But for the sake of convenience it seems to me sec. 9B might have been enacted as an independent statute, because it only purports to tax specific receipts of moneys, when paid as dividends or interest, by Canadian debtors, and in respect of which no deductions are allowable. I do not think one is required to go behind the payments and enquire into anything antecedent. Therefore it would seem to me to be unnecessary to look beyond the four corners of sec. 9B to determine the question at issue here. The tax here in question is something "in addition to any other tax imposed by this Act," and the receipt of moneys that are taxed seem plainly defined, and to it there are apparently no exceptions, except that ss. 2 (b) exempts from the tax, interest paid upon bonds of the Dominion of Canada, and by 9B (5), the tax falls upon many which are ordinarily relieved of income tax under sec. 4 of the Income Tax Act. I think therefore that it was the intention of the legislature by sec. 9B 2 (a), to tax any dividend payable to a non-resident shareholder, by a Canadian debtor, and no other enquiry is necessary except whether the dividend was paid or payable. The true construction of sec. 9B 2 (a) is, I think, that dividends in the hands of a non-resident shareholder shall pay the tax no matter from whence derived, and out of such dividends the tax is to be captured.

Accordingly, it is my opinion that the dividends paid the suppliant were taxable, and were not payments out of capital or out of funds free of the tax in question. Even if the dividends were derived from capital it was nevertheless a "dividend" here. The point at issue is of considerable importance and I can quite appreciate how contrary views might be held concerning it. In the circumstances there will be no order as to the costs of the trial.

Judgment accordingly.

BETWEEN:

NATIONAL TRUST COMPANY }
 LIMITED, executor of the will of }
 SIR LYMAN MELVIN JONES, }
 Deceased

APPELLANT;

1934
 Nov. 19.
 1935
 May 7.

AND

THE MINISTER OF NATIONAL }
 REVENUE

RESPONDENT.

Revenue—Income War Tax Act—Premium paid on redemption of capital stock of corporation taxable as income.

Held: That the premium paid by a corporation upon the redemption of its capital stock, in excess of the par value of the stock, is income and taxable under the Income War Tax Act, R.S.C. 1927, c. 97.

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.

C. B. Henderson for appellant.

W. S. Fisher for respondent.

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

ANGERS J., now (May 7, 1935) delivered the following judgment:

This is an appeal by the National Trust Company Limited, in its quality of executor of the will and trustee of the estate of Sir Lyman Melvin Jones, late of the city of Toronto, in the province of Ontario, deceased, from the decision of the Minister of National Revenue affirming an assessment made for the year 1929 against the estate of the said late Sir Lyman Melvin Jones, under the Income War Tax Act (R.S.C., 1927, ch. 97).

The facts, which are either admitted or established by documentary evidence, are briefly as follows:

Sir Lyman Melvin Jones died on or about April 15, 1917. Probate of his last will and testament was granted by the Surrogate Court of the County of York on June 22, 1917; a copy of the will and probate was filed as exhibit 1.

By his said last will and testament Sir Lyman Melvin Jones appointed as executors and trustees his wife, Louise

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Melvin Jones, his daughter, Eallien Necora Crawford Brown, and the National Trust Company Limited. The latter is the only surviving executor and trustee.

For sometime prior to 1929 the estate of Sir Lyman Melvin Jones was the owner of 2,900 preferred shares of the capital stock of Massey-Harris Company Limited.

Massey-Harry Company Limited was incorporated by letters patent of the Dominion of Canada, granted, it was said by counsel for the appellant at hearing, in 1891. The date is not material. Its capital consisted then of 250,000 common shares of \$100 each.

By supplementary letters patent issued in February, 1926, according to a statement by counsel for the appellant which was admitted, the capital of the company was changed to 125,000 7% cumulative preference shares of \$100 each and 125,000 common shares of the same par value. By consent of the parties, the letters patent of February, 1926, were not filed.

By further supplementary letters patent granted on March 10, 1927, the capital was again changed; the preferred stock was not altered, but the common shares were split in 4 and made shares with no par value. We are not concerned with the common shares in the present case.

An extract of the supplementary letters patent of the 10th of March, 1927, was by consent filed as exhibit 2. The clauses of these letters patent dealing with the preferred shares which are of any interest herein are the following:

(a) The holders of the said cumulative preference shares shall be entitled out of the available profits of the company to cumulative dividends on the capital for the time being paid up thereon at the rate of seven (7%) per centum per annum for each fiscal year of the company (payable at such times as the Board of Directors shall determine) in preference and priority to any payment of any dividend on the common shares for such fiscal years.

(b)

(c)

(d) The company shall have the right at any time for the purposes of redemption and cancellation with the consent of the holders thereof, to purchase any of the said cumulative preference shares then outstanding at any price not exceeding one hundred and ten (110%) per centum of their par value.

(e) The company shall also have the right without the consent of the holders thereof, from time to time to redeem the whole or any number of the said cumulative preference shares at one hundred and ten (110%) per centum of their par value, together with any accumulated dividends thereon upon giving notice of its intention to redeem to be sent through

the mails by prepaid registered post addressed to the holders of such cumulative preference shares at their last respective addresses appearing upon the books of the company at least thirty (30) days prior to the date specified for redemption and stating that such shares will be redeemed at the head office of the company. The holders of such cumulative preference shares shall be bound to surrender their shares in pursuance of such notice and to surrender corresponding certificates of shares and thereupon the company shall cause to be paid to the shareholders the amount payable to them respectively in case of such redemption and from and after the date of redemption mentioned in said notice no dividend shall be payable on such cumulative preference shares, and the holder or holders thereof shall cease to be shareholders in respect of such cumulative preference shares unless payment of the redemption money shall not be made on presentation of the respective certificates at the head office of the company on or before the date specified for redemption.

On March 19, 1929, new supplementary letters patent were granted to the company deleting and expunging from the letters patent incorporating the company and all letters patent supplementary thereto the provisions relating to the capital stock contained therein and substituting therefor the following:

The capital stock of the said company shall consist of 125,000 7% cumulative preference shares of \$100 each (being the already authorized preference shares) and 150,000 5% cumulative convertible preference shares of \$100 each, and 1,000,000 common shares without nominal or par value (including the already authorized 500,000 common shares without nominal or par value) subject to the increase of such capital stock under the provisions of the said Act.

The supplementary letters patent of the 19th of March, 1929, a certified copy whereof was filed as exhibit A, contain clauses substantially similar to clauses (a), (d) and (e) of the supplementary letters patent of the 10th of March, 1927 (exhibit 2) hereinabove reproduced; they are clauses (a), (c) and (d).

In virtue of clause (e) of the supplementary letters patent of the 19th of March, 1929, the holders of 7% cumulative preference shares were given the right, at any time up to ten days before the date specified in any notice as the day of redemption of such shares, to convert the whole or any number of their shares into a like number of 5% cumulative convertible preference shares, subject to certain conditions which have no relevance to the case.

Clauses were also included in the supplementary letters patent of the 19th of March, 1929, namely, clauses (i) and (j), authorizing the company to redeem the whole or part of the said 5% cumulative convertible preference shares, with or without the consent of the holders. The price, in

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the case of redemption without the shareholders' consent, is fixed at 125% of the amount paid up on the shares; in the case of redemption with the shareholders' consent, the price is not determined but it must not exceed 125% of the amount paid up on the shares. In virtue of clause (k) the holders of 5% cumulative convertible preference shares were given the right, at any time up to ten days before the date specified in any notice as the day of redemption of such shares, to convert the whole or any part of their shares into a like number of common shares without nominal or par value.

The other clauses in the supplementary letters patent of the 19th of March, 1929, are not material herein.

On the 15th of May, 1929, Massey-Harris Company Limited, after notice given in compliance with the requirements of its letters patent (see exhibit 4), redeemed the 2,900 shares held by the estate of Sir Lyman Melvin Jones for the sum of \$319,000, being at the rate of \$110 per share.

The appellant received the sum of \$319,000 and treated it entirely as capital; it did not include any portion thereof in the income tax return of the estate of Sir Lyman Melvin Jones for the year 1929 nor, in fact, for any subsequent year.

By a letter dated March 6, 1931, from one Hugh D. Patterson, inspector of income tax, to appellant and two assessment notices dated April 28, 1931, the Income Tax Division of the Department of National Revenue assessed the appellant and Mrs. Eallien Crawford Brown, only child of the late Sir Lyman Melvin Jones and one of the life tenants of his estate, in the sum of \$29,000 for income received during the year 1929, the said sum representing the difference between the par value of the said 2,900 shares of Massey-Harris Company Limited, to wit \$290,000 and the price at which the said shares were redeemed (\$319,000), apportioning one-half of the said sum of \$29,000 to the estate of Sir Lyman Melvin Jones and one-half to Mrs. Eallien Crawford Brown; the said letter and notices of assessment form part of exhibit 6.

By notices of appeal dated May 18, 1931, included in exhibit 6, the appellant and Mrs. Eallien Crawford Brown appealed the assessments aforesaid.

By a letter bearing date the 26th of October, 1933, the Commissioner of Income Tax allowed the appeal of Mrs.

Eallien Crawford Brown; the letter, which is part of exhibit 6, reads as follows:

Re: Mrs. Eallien Crawford-Brown (now deceased). 1929 Income Tax Appeal.

The appeal of the above named taxpayer against her assessment for 1929 on the ground that she was entitled to a life interest only in the estate of Sir Lyman Melvin Jones and accordingly that she should not be taxed on any portion of the premium received by the estate on the redemption of preferred shares of Massey-Harris Co. Limited owned by the said estate, has received further consideration. You are advised that the appeal filed by Mrs. Crawford-Brown is hereby allowed, as the Department is of the opinion that the premium on the said shares is taxable in the hands of the estate of Sir Lyman M. Jones.

Instructions to issue a revised assessment are being forwarded to the Inspector at Toronto.

By an assessment notice dated November 6, 1933, the whole sum of \$29,000 was assessed against the estate; this notice is also part of exhibit 6.

On or about the 15th of November, 1933, the appellant, by its solicitors, served a notice of appeal upon the Minister, setting out the reasons for appeal and the facts relative thereto, in compliance with the provisions of section 58 of the Income War Tax Act.

The Minister of National Revenue confirmed the assessment and notice of his decision was sent to the appellant and to its solicitors on or about the 22nd of December, 1933.

The appellant, having deposited \$400 as security for the costs of the appeal, sent to the Minister a notice of dissatisfaction, dated the 10th of January, 1934, containing a statement of additional facts and reasons in support of its appeal, in accordance with section 60 of the Act. The Minister, on or about the 19th of June, 1934, sent a reply to the appellant and its solicitors, denying the allegations and contentions set forth in the notice of dissatisfaction and confirming the assessment.

Complying with the requirements of section 63 the Minister, in due course, caused to be transmitted to the Registrar of this Court the following documents, to wit:

1. The Income Tax Return of the taxpayer for the year 1929.
2. The Notice of Assessment appealed from.
3. The Notice of Appeal.
4. The Decision of the Minister.
5. The Notice of Dissatisfaction.
6. The Reply of the Minister.

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In its notice of appeal the appellant, after setting out the facts which I have briefly summarized, states its reasons for appeal as follows:

(a) That no interest should be charged prior to the 6th day of November, 1933, on the ground that the Commissioner of Taxation stated that the question of whether this tax was payable should stand in abeyance until there had been a decision made by the Exchequer Court of Canada in regard thereto.

(b) That in no event should more than one-half the interest be charged on the ground that one-half of the amount in dispute was assessed against Mrs. Crawford Brown until the 26th day of October, 1933.

(c) That the entire sum of \$319,000 paid to the executors of the estate of Sir Lyman Melvin Jones was capital and the Income War Tax Act does not apply.

The appellant then adds:

The Massey-Harris Company Limited had prior to and including the year 1929, built up a surplus account of some six million dollars. The said company, as shown by their annual statements, had two separate accounts: an income account and a surplus account. The company entered up its net earnings for any given year in the income account. After deducting dividend requirements and other charges, the balance was transferred to the surplus account. The submission of the appellant is that all moneys transferred to the surplus account became in the strict sense a surplus account which was necessary for the proper carrying on of the business of the company, and was available to the company for many purposes other than the payment of dividends or for distribution to the shareholders, and that therefore funds in the surplus account were not "undistributed income on hand."

The appellant concludes in saying that the only relevant sections of the Act appear to be sections 13, 15, 16 and 17 and he discusses briefly each of these sections. I shall deal with these various sections later.

In its notice of dissatisfaction the appellant, after discussing the scope of sections 16 and 17, submits what it considers to be another reason for appeal; perhaps I had better quote the text of the notice:

The appellant has already set out in its notice of appeal several reasons why section 17 does not apply. In addition to the said reasons, the appellant submits that the word "premium" has many meanings.

The notice then cites definitions of the words "premium" and "bonus" from Murray's New English Dictionary and it continues as follows:

The appellants submit that a fair and usual interpretation to be placed on the word "premium" is that it is a bonus, i.e., an extra dividend.

The appellants did not receive any extra dividend, i.e., bonus or premium. They only received the prearranged contract price.

There is no authority for saying that the difference between the par value and the fixed redemption price of a preferred stock is a premium.

If it can be called a premium at all, it is (in the case of the Massey-Harris stock) a fixed premium and the Income War Tax Act recognizes a distinction between "premium" and "fixed premium" by making references to each respectively in said sections 16 and 17. Section 17 refers to "a premium" and it is submitted that had it been intended to tax a "fixed premium" section 17 should have said so in unequivocal language, particularly in view of the exemption given to a fixed premium in section 16 (2).

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In his decision, maintained, as we have seen, by the reply to the notice of dissatisfaction, the Minister affirmed the assessment

on the ground that under the provisions of section 17 and other provisions of the Income War Tax Act in that respect made and provided the premium paid on the redemption of the said shares is deemed to be a dividend and to be income received by the shareholders and accordingly has been properly assessed against the taxpayer. The provisions of subsection 2 of section 16 of the Act have no application whatever as the said subsection does not exempt from tax any premium paid on the redemption of shares.

No witnesses were called by either party.

In addition to the documents previously referred to, the appellant filed the annual reports of Massey-Harris Company Limited for the years 1928 and 1929; they are exhibits 3 and 5. In the "Consolidated balance sheet" of the report for the year ending on the 30th of November, 1928 (exhibit 3), we find among the liabilities, under the heading "Capital and Surplus," the following items:

7% Cumulative Preferred Shares		
Authorized	\$12,500,000	00
Issued		\$12,089,900 00
Common Shares—No par value		
Authorized	500,000	shares
Issued	483,596	shares \$12,089,900 00

In the "Consolidated balance sheet" included in the report for the year ending on the 30th of November, 1929 (exhibit 5), we find among the liabilities, under the same heading, the following items:

5% Cumulative Convertible Preferred Shares		
Authorized	\$15,000,000	
Issued		\$12,089,900 00
Common Shares—No par value		
Authorized	1,000,000	shares
Issued	725,970	shares \$26,612,180 00

It is obvious that the 7% cumulative preferred shares were, to the extent of their par value, redeemed either with the 5% cumulative convertible preferred shares or with the proceeds of the sale thereof, the amount of the issue of the latter being equal to the amount of the issue of

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the former. Now if we turn to what is called the report of the operations and affairs of Massey-Harris Company Limited and subsidiary companies for the year ending on the 30th of November, 1929, appearing on the first page of the annual report for that year, we see, under the caption "Surplus account," the following entries:

The surplus at 30th			
November, 1928, was..		\$6,982,098	02
Less Bond Discount and			
Expense	\$ 900,970	20	
Less Premium on 7%			
Preference Shares re-			
deemed	\$1,100,770	00	2,001,740 20 \$4,980,357 82

This shows clearly that the amount of \$10 per share paid on the 7% preferred shares, over and above their par value, came out of the so-called surplus account.

I may note incidentally that the figures mentioned in the report show that this alleged premium of \$10 was paid on only 110,077 of the 120,899 7% cumulative preference shares which were replaced by an equal number of 5% cumulative convertible preference shares. Were the remaining 10,822 7% cumulative preference shares merely exchanged for as many 5% cumulative convertible preference shares or were they redeemed at par, we do not know; there is nothing in the record to indicate it; even the statement contained in the clause entitled "Capital" at the foot of the second page of the report exhibit 5, which purports to be explanatory, is indefinite and throws no light on the subject. The question, at all events, offers little, if any, interest.

In order to complete the résumé of the facts it is convenient to state that an admission was made at the hearing that the quotations of the 7% cumulative preference shares of Massey-Harris Company Limited, from February to June, 1929, on the Toronto Stock Exchange, fluctuated between a low of 109 and a high of 112½.

The whole case narrows down to a question of determining whether the sum of \$29,000 paid by the Massey-Harris Company Limited to the plaintiff, as sole executor of the will and trustee of the estate of Sir Lyman Melvin Jones, when the company redeemed the 2,900 7% cumulative preference shares held by the estate, the said sum representing \$10 per share over and above the par value

thereof, was, for the purpose and within the meaning of the Income War Tax Act, income or capital. If the sum is to be considered as income, it is taxable and the assessment must be confirmed; if it is capital, it is not subject to taxation under the Act and the assessment must be set aside.

I do not think that sections 13 and 15 have any application in the present case. Section 13 applies to undivided or undistributed gains and profits of a corporation; it enacts that the share of a taxpayer in these gains and profits shall not be deemed to be taxable income, unless the Minister is of opinion that the accumulation of such gains and profits is made for the purpose of evading the tax and is in excess of what is reasonably required for the purposes of the business. Section 15 deals with the capitalization of undistributed income as a result of the reorganization of the corporation or the readjustment of its capital stock; it provides that the amount capitalized shall be deemed to be distributed as a dividend and that the shareholders shall be deemed to receive such dividend in proportion to their interest in the capital stock of the corporation or in the class of capital stock affected. These two sections deal exclusively with cases where accumulated profits or income of a corporation have not been distributed among the shareholders. In the case now under consideration the premium which is sought to be taxed was paid to the appellant.

It was argued on behalf of the appellant that the amount of the net profit at the end of each year was undistributed income on hand while it remained momentarily in suspense in the "income account," but that its transfer to what is called the "surplus account" was equivalent to a distribution of income. The conclusion drawn from this argument was that Massey-Harris Company Limited, having only \$620,781.74 in cash in the bank at the end of November, 1928, and current liabilities amounting to \$5,984,342.88 as appears from the report, exhibit 3, did not and could not redeem its 7% preferred shares out of undistributed income, since it had none. This proposition, in my opinion, is fallacious: the transfer of profits or income from an account called "income account" to another one called "surplus account" does not change the character of the funds transferred. The income account is kept

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separate from the surplus account in order that the company may determine its net profits for the current year. At the end of each fiscal year the net profit is transferred to the surplus account; the income account for the following year is then started on what I may call a clean sheet. The surplus account is thus built up of the net earnings or profits of each year. At the end of November, 1928, Massey-Harris Company Limited had a surplus, derived from the net earnings or profits of the previous years, amounting to \$6,982,098.02; it is out of this amount that the company paid the premium of \$10 per share when it redeemed its 7% cumulative preference shares in May, 1929, as is shown by the surplus account in the directors' report for the year ending on the 30th of November, 1929 (exhibit 5).

It was urged on behalf of the appellant that the case with which we are concerned comes within the ambit of section 16 and that the exception contained in subsection 2 of said section 16 relieves the appellant, and in fact all holders of the 7% cumulative preference shares of Massey-Harris Company Limited, whose shares were redeemed on the same occasion and under the same conditions, from the obligation of paying the income tax on the premium of \$10 paid by the company on these shares over and above their par value.

Section 16 reads as follows:

16. Where a corporation having undistributed income on hand reduces or redeems any class of the capital stock or shares thereof, the amount received by any shareholder by virtue of the reduction shall, to the extent to which such shareholder would be entitled to participate in such undistributed income on a total distribution thereof at the time of such reduction, be deemed to be a dividend and to be income received by such shareholder.

2. The provisions of this section shall not apply to any class of stock which, by the instrument authorizing the issue of such class, is not entitled on being reduced or redeemed to participate in the assets of the corporation beyond the amount paid up thereon plus any fixed premium and a defined rate of dividend nor to a reduction of capital effected before the sixteenth day of April, one thousand nine hundred and twenty-six.

Section 16 has nothing to do with the taxation of premiums on shares. The principle under this section is that, irrespective of the amount received by the shareholder in the event of a reduction or redemption of any class of the capital stock, if there is any undistributed income on hand, the amount so received, to the extent to which the share-

holder would be entitled to participate in the undistributed income on a total distribution thereof at the time the reduction is made, shall be deemed to be a dividend and to be income received by the shareholder.

Subsection 2 of section 16 makes an exception in the case of a stock which, by the instrument authorizing its issue, is not entitled to participate in the assets of the company beyond the amount paid thereon plus any fixed premium and a defined rate of dividend. It seems fair and reasonable that the holder of a stock, not entitled to share in the undistributed income of the company in the event of a total distribution thereof, should not be required to pay an income tax on the amount which he receives in reimbursement of the capital invested by him in the company. This shareholder however would, in my opinion, have to pay the tax on the dividend received by him at the time of the reduction or redemption; this dividend is, I think, an income within the meaning of the law. With regard to the premium, the case, to my mind, is governed by section 17, which says:

17. Where a corporation, having undistributed income on hand, redeems its shares at a premium paid out of such income, the premium shall be deemed to be a dividend and to be income received by the shareholder.

The report of the Directors of Massey-Harris Company Limited for the year ending on the 30th of November, 1929 (exhibit 5), shows, as we have seen, that the premium of 10% paid on the 7% cumulative preference shares of the company, when they were redeemed, came out of the surplus account, made up of accumulated earnings or profits.

The word "shall" in section 17 is imperative and must be so interpreted: see Interpretation Act, R.S.C., 1927, ch. 1, section 37 (24). The text of section 17 is unambiguous.

I agree with counsel for the appellant when he says that the mere fact of calling premium that which is not a premium does not make it a premium. But I believe that the company was right in considering that the amount of \$10 which it paid on each of its 7% preferred shares, over and above the par value thereof, was a premium and in calling it so. And the fact that these preferred shares were in virtue of the supplementary letters patent redeem-

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able at a premium of \$10 and that the company could not redeem them at a lesser price does not, in my opinion, alter the situation.

The Massey-Harris Company Limited, not being authorized to impair its capital (R.S.C., 1927, ch. 27, section 110), when redeeming its 7% cumulative preference shares at a premium, could only pay this premium out of its profits or earnings, and this is what it has apparently done.

The fact that the 7% cumulative preference shares of Massey-Harris Company Limited sold, on the Toronto Stock Exchange, between February and April, 1929, at prices varying from 109 to 112½ does not appear to me to be material.

There remains the question of interest. The premium of \$29,000 was received by the estate of Sir Lyman Melvin Jones on or about the 15th of May, 1929; it should have been included in the Income Tax Return made by the appellant on the 31st of March, 1930. The taxpayer had until the 30th of April, 1930, to make the return and the interest on the amount of the assessment, at the rate of 6% per annum, began to run from that date: sections 33 and 48 of the Income War Tax Act. The Commissioner of Income Tax, however, assessed the estate of Sir Lyman Melvin Jones for one-half of the said premium and Mrs. Eallien Crawford Brown for the other half. The latter appealed and on the 26th of October, 1933, the Commissioner notified her solicitors that the appeal was allowed. On the 6th of November, 1933, a new notice of assessment was sent to the estate of Sir Lyman Melvin Jones in which was included the total premium of \$29,000. I believe, in the circumstances, that the appellant ought to pay the interest on one-half of the amount of the income tax levied on the said premium from the 30th of April, 1930, date on which the tax became exigible, and on the total amount of the said income tax from the 6th of November, 1933, date on which the whole premium was assessed against the estate.

There will be judgment dismissing the appeal of the appellant and confirming the decision of the Minister and *ipso facto* the assessment, with this variation, however, that the interest on the income tax levied on the afore-

said premium of \$29,000 shall be calculated as hereinabove stated.

The respondent will be entitled to his costs against the estate of the said Sir Lyman Melvin Jones.

Judgment accordingly.

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BETWEEN:

HIS MAJESTY THE KING..... PLAINTIFF;
AND
WILLIAM C. SHELLY..... DEFENDANT.

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Revenue—Special War Revenue Act, s. 87—Isolated act by person not a manufacturer or producer by trade—Sales Tax not payable.

Held: That the Special War Revenue Act, R.S.C. 1927, c. 179, does not impose any consumption or sales tax upon a person who, not being a manufacturer by trade, manufactures or produces, for his own use and with no intent of disposing of it by sale or otherwise, an object or article, which is not used in connection with any trade or business.

INFORMATION exhibited by the Attorney General of Canada, to recover from the defendant a certain sum for consumption or sales tax, under the Special War Revenue Act (R.S.C. 1927, c. 179).

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

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

C. M. O'Brian, K.C., for the plaintiff.

C. W. Craig, K.C., and *L. Ladner, K.C.*, for the defendant.

ANGERS J. now (May 15, 1935) delivered the following judgment:

This is an action for the recovery of a consumption or sales tax in the sum of \$1,453.50, together with penalty interest thereon at the rate of two-thirds of one per cent per month from August 1, 1930, to October 31, 1933, namely, the sum of \$377.91, and further penalty interest at the same rate from October 31, 1933, to the date of payment. The action is brought under the provisions of the Special

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War Revenue Act, R.S.C., 1927, chapter 179, and amendments thereto.

The defendant is a retired merchant and lives in the city of Vancouver, in the province of British Columbia.

In the years 1929 and 1930 the defendant built for his personal use a yacht which was called the *Cora Marie*. The yacht was launched in February, 1930, and was registered with the registrar of shipping at Vancouver, B.C., on or about April 17, 1930.

Admissions were made at the trial which may be summarized as follows:

the defendant built the *Cora Marie* which was completed in all respects on June 15, 1930;

the cost of the vessel, exclusive of fittings and furnishings, was \$145,350;

the defendant sold the vessel in the fall of 1932;

the defendant was assessed for sales tax in respect of this vessel on the 20th of August, 1931;

a confirmatory notice of assessment was given to him on the 26th of August, 1933;

demand of payment on behalf of the Crown was duly made on the defendant and payment was refused;

the defendant was not and is not in the business of building boats or ships and the construction of the vessel *Cora Marie* was an isolated transaction;

the ship was not built for purposes of sale but for the personal pleasure of the defendant;

the defendant hired the workmen to do the work, paid their wages, purchased and paid for the materials and rented the place where the building operations were carried on;

the defendant sold the ship in the fall of 1932 for \$80,000 cash and a boat which he subsequently sold for \$6,000.

A document in the handwriting of defendant's solicitor containing these admissions was by consent filed as exhibit 1.

No evidence was adduced by either party at the trial.

The only question to determine is whether or not the defendant, in building a yacht for his personal use in the circumstances hereinabove set out, is to be considered a manufacturer or producer within the meaning of the Special War Revenue Act.

Under section 86 of the Act, as amended by 18-19 Geo. V, ch. 50, s. 3; 19-20 Geo. V, ch. 57, s. 5, and 20-21 Geo. V, ch. 43, s. 2, there is imposed a consumption or sales tax of one per cent on the sale price of all goods (*inter alia*) "produced or manufactured in Canada, payable by the producer or manufacturer at the time of the sale thereof by him."

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"Sale price" is defined in subsections (a) and (b) of section 85.

Section 87, the first paragraph whereof was introduced into the statute by 13-14 Geo. V, ch. 70, s. 6, deals with cases where there is no fixed price of sale and where it is difficult to determine the value of the goods for the consumption or sales tax; the material portion of the section, as far as the present case is concerned, is as follows:

Whenever goods are manufactured or produced in Canada under such circumstances or conditions as render it difficult to determine the value thereof for the consumption or sales tax because

- (a)
- (b)
- (c)
- (d) such goods are for use by the manufacturer or producer and not for sale;

the Minister may determine the value for the tax under this Act and all such transactions shall for the purposes of this Act be regarded as sales.

Subsection 2 of section 87 was inserted in the Act by 21-22 Geo. V, ch. 54, s. 12, which only came into force on the 3rd of August, 1931, subsequent to the date on which the yacht *Cora Marie* was completed; the said subsection is therefore inapplicable to the present case.

The Act contains no definition of the words "manufacturer" and "producer," with the exception, however, of the statement in subsection (f) of section 85 which can hardly be called a definition and which moreover has no relevancy to the issue herein.

It was submitted by counsel for defendant that his client was not a manufacturer or a producer within the meaning of the Act, for two reasons: firstly, because the word manufacturer or producer is not an adequate term to express the builder of a ship; secondly, because the word manufacturer or producer as used in the Act connotes manufacturing or producing in the way of a business and does not refer to an isolated transaction.

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"Producer" is defined:

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In the Oxford Dictionary

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

In the Imperial Dictionary

One who or that which produces or generates.

"Manufacturer," on the other hand, is defined as follows:

In the Oxford Dictionary

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

In the Imperial Dictionary

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

As the verb "manufacture" is used in some of the definitions of the word "manufacturer," it is perhaps not inexpedient to quote the definitions of the verb, which are thus worded:

In the Oxford Dictionary

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

In the Imperial Dictionary

1. To make or fabricate from raw materials, and work into forms convenient for use, especially by more or less complicated processes; as, to manufacture cloth, nails or glass.

2. To work into suitable forms for use; as, to manufacture wool, cotton, silk or iron.

I think that the builder of a yacht is a manufacturer or producer in the broad sense of these words.

Counsel for the defendant submitted that the builder of a ship is in a position analogous to that of a man who builds a house. In support of this proposition, counsel relied on the definition found in *Words and Phrases Judicially Defined*, Vol. 5, manufacturer, p. 4356, under the heading "Repairer of vessel," where it is said:

The term "manufacturer," within the meaning of Laws 1880, c. 542, s. 3, exempting manufacturers from certain taxes, does not include a

builder and repairer of vessels. Undoubtedly, using the word in its broadest sense, the builder and repairer of a vessel or a house, even, might be called a manufacturer. In either case such builder takes the raw material, and by the hand, or by machinery and tools, fashions it into form and shape for use. But this is not the ordinary and general meaning to be given to the word, and it is such general and ordinary meaning which words are to receive in the construction of statutes. *People v. New York Floating Dry Dock Co.* (N.Y.), 63 How. Prac. 451, 453.

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I feel unable to agree with this contention. I can see no analogy between a shipwright and a builder of houses. I do not think that the verb "manufacture" can apply to immovables, i.e., to buildings in general and their accessories. The verb "manufacture," as the verb "fabricate," applies essentially, I would even say solely, to movables, i.e., to effects or goods of every nature and description.

Counsel also relied on the judgment in the case of *The People of the State of New York v. The New York Floating Dry Dock Company*, cited in the extract from Words and Phrases Judicially Defined hereinabove reproduced. This judgment was appealed and affirmed. (1)

In my opinion, the import of the judgment of the Court of Appeals in the case of *The People of the State of New York v. The New York Floating Dry Dock Company* is not as broad and absolute as the definition contained in Words and Phrases Judicially Defined would seem to intimate. The action was one for the recovery of taxes claimed to be imposed by chapter 542 of the Laws (of the State of New York) of 1880; paragraph 3 of the statute in question enacts (*inter alia*) that:

Every corporation, joint-stock company, or association whatever, now or hereafter incorporated, organized, or formed under, by, or pursuant to law in this state or in any other state or country, and doing business in this state, except only savings banks and institutions for savings, life insurance companies, banks, foreign insurance companies, manufacturing or mining corporations, or companies wholly engaged in carrying on manufacture, or mining ores within this state, and agricultural and horticultural societies, associations or corporations, which exceptions, however, shall not include gas companies, trust companies, electric and steam heating, lighting and power companies, shall be liable to and shall pay a tax, as a tax upon its franchise or business, into the state treasury annually, to be computed as follows:

Miller, J., in delivering judgment for the Court of Appeals, after stating that the defendant company was incorporated "for the purpose of constructing, using and providing one or more dry-docks, or wet-docks, or other

(1) See 92 New York Reports, Court of Appeals (Sickels 47) 487.

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conveniences and structures for building, raising, repairing and coppering vessels and steamers of every description," said (at p. 488):

The act under which the defendant was incorporated was of a special character, and the specification of the business which the defendant was authorized to carry on, under its charter, which states the general purpose and object of the incorporation, does not bring it within the provision of section 3 of said Act of 1880, which exempts manufacturing corporations from its provisions as to taxation. The term, 'manufacturing corporation,' cannot, we think, be considered as comprehending the business of the defendant, if the words employed are interpreted according to the common understanding of such language.

While the act provides for the constructing, using and providing one or more dry- or wet-docks or other conveniences and structures for the purposes named, its main object evidently is building, raising, repairing and coppering vessels. The *principal portion of the work* which the corporation is authorized to perform *relates to the improvement of vessels which have already been constructed, and not to the construction of the same*, and taking all the parts enumerated together they cannot be considered as embraced within the term 'manufacturing,' and, if regarded separately, we think, they do not come within the definition of the term employed. According to Webster a manufacturer is one who works raw materials into wares suitable for use. The constructing, using and providing of one or more docks, as used in the act of 1880, is no more a manufacturing within the meaning of that word than would be the building of warehouses and elevators for the carrying on of the business of warehousemen or the erection of buildings or residences.

The judgment of the Court of Appeals is not quite as formal and explicit as that of the Court of first instance. Besides the Act on which it is based is materially different from the one with which we are concerned. The taxpayer, in the case of *The People of the State of New York v. The New York Floating Dry Dock Company*, was seeking to be exempted from taxation and, for that purpose, to be brought within the limits of an exception. The courts are not as a rule disposed to widen the scope of an exception; it is well settled law that exceptions must be construed strictly. However it may be, I may say, with all due respect, that I do not consider myself bound by this judgment and that, if it purports to decide that a builder of vessels is not a manufacturer within the common and usual acceptance of the word, I simply cannot agree with it.

The second reason invoked by counsel for the defendant is that his client is not a manufacturer or producer as described in the Act, inasmuch as the words manufacturer or producer in the statute connote manufacturing or producing in the way of a business, which would exclude an

isolated transaction, such as the building of a yacht by the defendant for his personal use.

The question, I must admit, is rather delicate and it offers more difficulty than the other; its solution may be far-reaching, as it is liable to affect a large number of people.

Was it the legislators' intention to tax only the manufacturers and producers who manufacture or produce in the way of trade, or was the tax imposed by section 87 aimed at persons producing or manufacturing for their own personal use? This is the first question which I have to determine.

The Supreme Court of Canada in the case of *Bank of Nova Scotia v. The King* (1) held that a bank, which maintained a stationery department, in which it had a printing plant with which it printed its ledger sheets, forms, note-paper, etc., required for its banking business, was, in respect of this printed material, a manufacturer or producer within the meaning of the Act and therefore liable to a consumption or sales tax on the value of the articles so printed.

The following remarks of Anglin, C.J., who delivered the judgment of the Court, are interesting (p. 179):

We agree with the learned President of the Exchequer Court that as a printer, lithographer or engraver, which produced, for its own use and not for sale, the goods in question, viz., stationery supplies for its head office and branches, the bank was a producer within the meaning of that term, as used in clause (a) of s. 86 of the Special War Revenue Act, R.S.C. 1927, c. 179, and that the goods in question were produced in Canada by it within the meaning of that clause.

We cannot find anything in the statute to support the view put forward by counsel for the appellant that its application is confined to a manufacturer or producer whose business is manufacturing or producing for sale. That construction of the Act would involve the exclusion from our consideration of clause (d) of s. 87, which, in our opinion, was introduced to remove any doubt that the statute was intended to apply to a case such as that at bar.

Another decision to the effect that the manufacturer using for his own purpose articles produced or manufactured by him is bound to pay the consumption or sales tax on these articles was rendered by the Supreme Court of Canada in the case of *The King v. Fraser Companies*

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(1) (1930) S.C.R., 174.

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Limited (1). The defendant, Fraser Companies Limited, was a manufacturer of lumber for sale; it consumed a portion of its lumber in building operations carried on over a period of years; the lumber so consumed, taken from stock in the company's yards, had been produced and manufactured in the ordinary course of the company's business of manufacturing for sale; it had not been produced or manufactured especially for the purpose for which it was used. Smith, J., delivering the judgment of the majority of the Court, said (p. 493):

The view taken in the court below (that the lumber consumed by the defendant in building operations was produced in the ordinary course of business for sale and not specifically for use by the defendant within the meaning of section 87 (*d*)) would result in the introduction of an exception to the general rule that all goods produced or manufactured are to pay a tax, and would amount to a discrimination in favour of a particular consumer. As an example, it is not unusual for a manufacturer engaged in the production and manufacture of lumber for sale to engage at the same time in the business of a building contractor. He manufactures his lumber for sale, and, as a general rule, would not manufacture any specific lumber for use in connection with his building contracts, but would simply take lumber for these purposes from the general stock manufactured for sale, and might thus, under the view taken in the court below, escape taxation on all lumber thus diverted from the general stock manufactured for sale.

Another case in which the same principle was sanctioned, although the action was dismissed on another ground, is that of *The King v. Henry K. Wampole & Co.* (2). I may quote from the notes of Anglin, C.J., speaking for the majority of the Court, the following remarks (p. 496, *in fine*):

My construction of clause (*d*) of section 87 is that the "use" by the manufacturer or producer of goods not sold includes any use whatever that such manufacturer or producer may make of such goods, and is wide enough to cover their "use" for advertising purposes by the distribution of them as free samples, as is the case here. I am, therefore, with great respect, unable to agree in the reasons assigned by the learned trial judge for dismissing this petition (1931, Ex.C.R. 7).

and at page 497:

If the cost or value of these goods used as samples has already been a subject of the sales tax in this way, it would seem to involve double taxation if they should now be held liable for sales tax on their distribution as free samples. But for the admission of paragraph 4, however, I should certainly have been prepared to hold that the "use" by the company of goods manufactured by it as free samples for advertising purposes is a "use" within clause (*d*) of section 87 of the Special War Revenue Act, R.S.C. 1927, ch. 179.

The first case cited is the most in point. In the other cases the defendants were admittedly manufacturers or producers within the purport of the Special War Revenue Act and subject to the consumption or sales tax under section 86 of said Act. The only question in dispute was whether the use made by the defendants of their products, lumber for construction purposes in the one case and samples for advertising purposes in the other, fell within the meaning of that word as used in subsection (d) of section 87.

In the case of the *Bank of Nova Scotia v. The King*, it is idle to say that the bank, as such, was not a manufacturer or producer. The Supreme Court however, affirming the judgment of the Exchequer Court in its conclusion, held that the bank, having a department where it printed all the stationery required for its banking operations, was to be considered, under subsection (d) of section 87 (previously subsection 13 of section 19BBB of the Special War Revenue Act, 1915, 5 Geo. V, ch. 8, as enacted by 13-14 Geo. V, ch. 70, s. 6), with regard to its printing plant or department, a manufacturer or producer.

Does the same principle apply in the case of an isolated act by a person who is not a manufacturer or producer by trade? Must a man building, as in this case, a yacht, or building any other object or article, for instance a truck, a rig, or, on a smaller scale, a pair of skis, a table, a tool, for his personal use, with no idea of selling it, be considered a manufacturer or producer for the purpose of the Act? I must admit that I have been unable to find any decision or authority on the point, although I have spent considerable time in looking up the jurisprudence dealing with consumption or sales tax.

After reading sections 85, 86 and 87 separately and in conjunction with one another and giving the matter careful consideration, I have reached the conclusion that subsection (d) of section 87 does not apply to an isolated act like the one with which we are concerned; I do not think that it was the intention of the legislators to impose a tax on a person who, not being a manufacturer by trade, manufactures or produces, for his own use and with no intent of disposing of it by sale or otherwise, an object or article, which is not used in connection with any trade

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or business. If it was the legislators' intention to impose such a tax, I think, they should have said so clearly. If there is ambiguity in a taxing statute, the ambiguous provision must be interpreted favourably to the taxpayer; if there exists any doubt, the taxpayer must have the benefit of the doubt.

I may add, although this consideration may be of lesser importance and weight, that presumably the defendant paid, indirectly perhaps but paid nevertheless, the consumption or sales tax on all the materials used in the construction of the *Cora Marie* and that in charging a tax on the value of the vessel he would be called upon to pay a double tax on at least the value of such materials.

For all these reasons, I believe that the action is unfounded and that it must be dismissed. The defendant will be entitled to his costs against the plaintiff.

Judgment accordingly.

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 * June 25
 * June 28.

IN THE MATTER OF TRADE MARK APPLICATION NUMBER
 D. 2304.

BETWEEN
 THEODORE FRANK ROSE APPELLANT;
 AND
 THE COMMISSIONER OF
 PATENTS AND HUGH CARSON } RESPONDENTS.
 CO. LTD. }

Practice—Appeal from Commissioner of Patents—Trade Mark and Design Act—Exchequer Court Rules Nos. 34 and 35.

Held: That an appeal from the refusal of the Commissioner of Patents to register an industrial design under the *Trade Mark and Design Act* must be by way of petition and not by notice of motion.

APPEAL from the decision of the Acting Commissioner of Patents rejecting an application for the registration of an industrial design.

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

E. C. Charleson for Appellant.

No one for Commissioner of Patents.

C. C. Gibson for Hugh Carson Co. Ltd.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (June 28, 1935) delivered the following judgment:

This is an appeal from the decision of the Acting Commissioner of Patents rejecting the application of one Rose for the registration of a certain industrial design of what is ordinarily called a radiator cover, in the application designated as a Radio Windbreaker.

The applicant, in his application, describes the design as consisting of "a curtain for the front grille of a car radiator of shield-like shape centrally split from the upper end and adapted to fold to open its open position and form lapels and having stud-like fasteners along the edges."

In plain language the design is that of a cover, made of some suitable material, for the radiator of an automobile, in the precise shape of the front of the radiator whatever that may be, split in the centre vertically and closed and opened by what is known generally as zipper fasteners, the whole being fastened to the outer edges of the radiator with stud-like fasteners, or dome-fasteners. When partially opened at the top the inner edges of the two sections of the cover unfold and form lapels and these are fastened backwards by buttons of the same sort to the outer portions of the cover. Covers dropping downwards from the top, covers on rollers, and solid or unbroken covers attached in one way or other to the whole front of the radiator, it was agreed by counsel, were well known, and in use long before Rose's design was sought to be registered.

The Assistant Commissioner refused the registration on the ground that he was unable to determine who, under the statute, was the proprietor of the design disclosed in the application. Accompanying the application was an affidavit made by Ralph H. Forshay in which he states that he executed the design for Auto Products Co. Ltd., for a consideration. This would show the proprietorship of the design in Auto Products Co. Ltd., if in any person, and not in Rose the applicant, and accordingly on that ground the registration was refused. An explanation was subsequently made to the effect that by error the name of Auto Products Co. Ltd. had been employed instead of

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Rose, and an assignment in writing of the design from Forshay to Rose was filed with the Commissioner. The Assistant Commissioner, on a reconsideration, refused the application on the ground that he was unable to determine who was the proprietor disclosed in the application.

The appeal is by way of notice of motion which is, I think, fatal in itself. Sec. 45 of the *Trade Mark and Design Act* contemplates a suit by any person aggrieved by any omission, without sufficient cause, to make any entry in the register of industrial designs. Rules 34 and 35 require that such a suit be instituted by petition and notice of the filing of the petition must appear in the Canada Gazette. Accordingly the motion must be dismissed. There is some doubt as to who is the proprietor of the design, and also whether the design discloses fit subject matter for registration. These issues, and others suggested, seem to be of substance, and if the applicant still desires to prosecute his appeal it must be in the manner prescribed by the statute and by the Rules. The matters in issue will be more satisfactorily disposed of in that way rather than by affidavit and statement of counsel.

Mr. Gibson appeared on the motion on behalf of Hugh Carson Co. Ltd., opposing the same, but did not raise the procedural point on which I dismiss the motion, and there will be no order as to costs. I do not propose to express any opinion on the points raised by Mr. Gibson against the motion.

Judgment accordingly.

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 Jun. 1.
 Jul. 24.

BETWEEN:

THE CROSLY RADIO COR-
 PORATION

PLAINTIFF;

AND

CANADIAN GENERAL ELECTRIC
 CO. LTD.....

DEFENDANT.

Patents—Infringement—Invalidity—Subject matter—General commercial adoption—Evidence of invention.

Plaintiff's patent No. 342,173 relates to refrigerators and claim 12, which is typical, claims:—

12. In a domestic refrigerator, a cabinet, a cooling unit located in the upper portion of said cabinet to set up a circulation of

refrigerated air therein, said cabinet having insulated walls about the door opening, a door for said cabinet having an insulated body hinged to the cabinet so as to abut the front of the cabinet when closed, and having a projecting portion extending into the cabinet when closed, the inner surface of the door being formed outwardly from the inner edge of the projecting portion so as to form a compartment surrounded by the projecting portion, said compartment located at least in part below the cooling unit so as to be available to the circulatory air in the cabinet, and shelves mounted on said door and lying at least in part within the cabinet.

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Held: There is no subject matter in plaintiff's patent. It is merely a structural departure from the conventional form of a well known article and involves no invention.

2. That evidence of general commercial adoption of a certain device is not conclusive of invention.

ACTION by plaintiff to have it ordered and adjudged that defendant is infringing its patent, no. 342,173.

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

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

H. K. Thompson for defendant.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (July 24, 1935) delivered the following judgment:

This is an action for infringement of patent no. 342,173, granted to the plaintiff, the assignee of Constance Lane West. The specification describes generally the invention in the following words:—

This invention relates to a refrigerating unit, and has to do particularly with cabinet construction in combination with a cooling unit of a mechanical refrigerating system for providing additional food space maintained at a temperature different from the normal temperature in the main food compartment.

Heretofore in the fabrication of refrigeration boxes it has been customary to provide an inwardly tapering breaker strip for the box opening which co-operated with an inwardly tapering insulated portion of the door, usually called a pan. In some cases the breaker strip is formed around the pan portion of the door and in other cases is formed both around the opening of the box and around the pan. Regardless of the particular construction it is customary in the standard type of refrigerated box to define one surface of the cubical content capacity of the box by the inner face of the pan.

It is the object of the present invention to replace the standard door with the inwardly extending pan with a door wherein the thickness or insulating part thereof extends outwardly past the flange of the door and the inwardly extending or pan portion is annular in form so as to provide a hollow food space in line with or extending outwardly of the

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usual breaker strip. One of the objects of this construction is the provision of approximately an extra cubic foot of food space without changing the dimensions of the standard refrigerator box. In other words, the slight bulge on the door will in no way change the space within the kitchen or other room within which the box is designed to fit, so that any standard refrigerator door can be replaced by the door embodying the present invention without any change in the position of the box. Another important feature is the location of the food space at a point relative to the cooling unit whereby the temperatures maintained in this extra food space will be at a higher range than the temperature existing in the refrigerator proper.

Other features of the invention will be brought out in the specification and claims.

The claims relied upon are the following:—

9. In a domestic refrigerator, a cooling unit in the upper portion of the cabinet for setting up a definite path of refrigerated air in a path at right angles to the door, a breaker strip around the cabinet opening, an auxiliary chamber within the door and in the general plane of the breaker strip, said auxiliary chamber being in front of the cooling unit and substantially the height of the door and so positioned as to set up a slower and auxiliary path of air circulation relative to said main path of air circulation.

10. In a domestic refrigerator, a cabinet, a cooling unit in the cabinet for setting up circulation of refrigerated air therein, said cabinet having insulated walls about the door opening therein, a door having an insulated body hinged to the cabinet so as to abut the front of the cabinet when closed, and having a projecting portion extending into the cabinet when the door is closed, the inner surface of the door being formed outwardly from the inner face of the projecting portion forming a compartment surrounded by the projecting portion, said compartment extending to a point where it opens unrestrictedly on the cooling unit, whereby circulation of refrigerated air is set up in the compartment, and shelves mounted on said door and lying at least in part within the compartment.

11. In a domestic refrigerator, a cabinet, a cooling unit in the cabinet for setting up circulation of refrigerated air therein, said cabinet having insulated walls about the door opening therein, a door having an insulated body hinged to the cabinet so as to abut the front of the cabinet when closed, and having a projecting portion extending into the cabinet when the door is closed, said projecting portion containing insulation, the inner surface of the door being formed outwardly from the inner face of the projecting portion forming a compartment surrounded by the projecting portion, said compartment extending to a point where it opens unrestrictedly on the cooling unit, whereby circulation of refrigerated air is set up in the compartment, and shelves mounted on said door and lying at least in part within the compartment.

12. In a domestic refrigerator, a cabinet, a cooling unit located in the upper portion of said cabinet to set up a circulation of refrigerated air therein, said cabinet having insulated walls about the door opening, a door for said cabinet having an insulated body hinged to the cabinet so as to abut the front of the cabinet when closed, and having a projecting portion extending into the cabinet when closed, the inner surface of the door being formed outwardly from the inner edge of the projecting portion so as to form a compartment surrounded by the projecting portion,

said compartment located at least in part below the cooling unit so as to be available to the circulatory air in the cabinet, and shelves mounted on said door and lying at least in part within the cabinet.

Figure 1 of the patent drawings is below reproduced.

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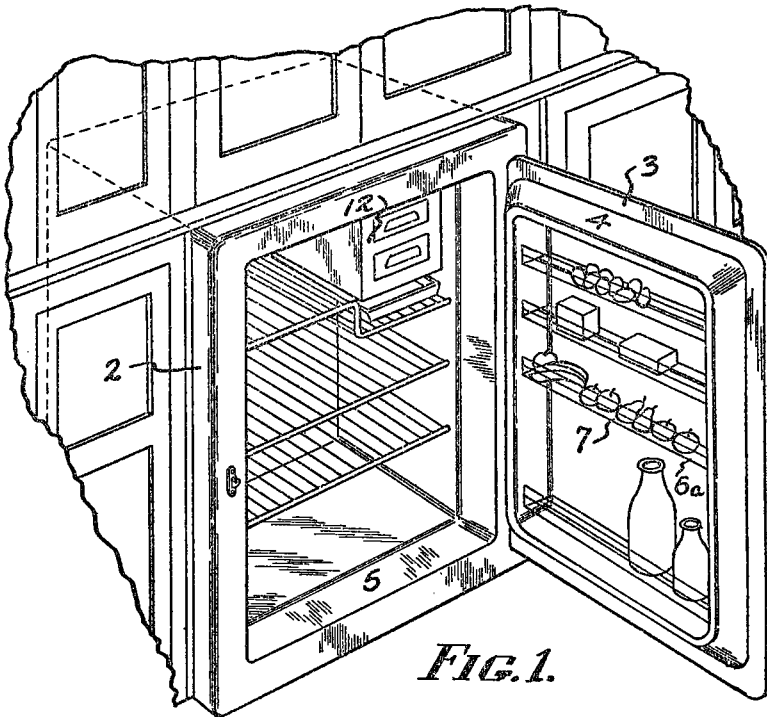


FIG. 1.

The vital characteristic of the alleged invention for which monopoly is here claimed may be fully gathered from the description quoted from the specification, the claims relied upon, and the drawing. If there is invention, it relates only to the recessed door as an element in a combination. There is no other feature of the plaintiff's refrigerator which distinguishes it from the standard mechanical refrigerators in use prior thereto and which had a flat vault-like door. Certain other features of this refrigerator were mentioned as contributing to subject matter but they are not, I think, of substance and I do not propose discussing them; in fact it did not appear to me that they were seriously pressed. There is but one substantial point for decision here, and that is whether or not there is invention in the idea of recessing the inner face of an insulated door in a domestic refrigerator so as

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to provide a hollow food space therein with suitable shelving arrangements, and without materially adding to the exterior dimensions of the refrigerator.

The facts may be stated briefly. In June, 1930, Constance Lane West conceived the idea of recessing the inner wall of the doors of domestic refrigerators so as to provide additional refrigerated food space, with shelving, and it is claimed that this additional space would be particularly desirable and useful for the storage of small articles of food that are frequently required in any household. Her husband, a consulting engineer in the refrigerating art, soon made drawings of a refrigerator embodying this idea, much the same as the drawings in the patent. In due course a patent was applied for. Later Mr. West approached the plaintiff with a view of selling the invention to that company which were already manufacturers of refrigerators. It appears the plaintiff was at once impressed with Mrs. West's refrigerator door and it soon acquired the patent in suit, paying therefor quite a substantial sum, and very soon the plaintiff proceeded to manufacture and market refrigerators which embodied the alleged invention, under the trade name of "Shelvador." In 1933, the plaintiff sold 67,000 of Shelvador as compared with 14,000 of the standard type which they had been making, the flat door type, the year before; in 1934 there were sold 125,000 of Shelvador, and it was stated that the sales for 1935 were equally promising.

There is no doubt that the West door at once found favour with the buying public. I think it must be conceded that the West door structure possessed a new and useful feature not found in the standard domestic refrigerators at that time on the market. I do not mean to say that the utility in West could be described as great, because the utility claimed, even according to the plaintiff's evidence, lies in the fact that the space in the recessed door is useful for the storage of small articles of food, and that additional space is limited. Again if there be invention in West, I do not think anticipation is to be found in any of the prior art cited, nor do I think that there was any prior user of it. In commercial refrigerators, and in the early domestic refrigerating chambers of one kind or other,

shelving or receptacles may have been placed on the inside of doors, or what was the equivalent of doors, but I am inclined to think that they should not be held as anticipations of West when considering the modern domestic electrical refrigerator. I may also add here that if there is invention in West then, I think, it is absolutely clear that the defendant's structure infringes the plaintiff's patent.

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The difficult question for decision here is whether there is invention in West. This case has given me considerable anxiety, but, with some hesitation, and notwithstanding the very able arguments of both Mr. Smart and Mr. Biggar in support of the patent, I have reached the conclusion that there is not subject matter in the patent in suit; there is not in it, in my opinion, the quantity or quality of the inventive faculty to support a monopoly.

Whatever may be said in support of invention here, it is entirely in the idea of having a recessed door containing a limited food space, instead of a flat door without that space. That is the essential feature of West. There was no problem in carrying out the idea. Invention may lie in an idea even if there is no invention in the way in which it is carried out. See Lord Moulton in *Hickton's Patent Syndicate v. Patents and Machine Improvements Co. Ltd.* (1). It is also correct, I think, to say that a scintilla of invention is sufficient to support a patent for a new and useful manufacture. It is immaterial from the point of view of the validity of a patent whether the invention is a great one, or a small one. Then, a thing may be new and useful, and commercially successful, but that cannot be regarded as conclusive of invention. A discovery may be new and useful but that does not necessarily establish that there has been any exercise of the inventive faculty. It has been often stated that while it is important to encourage inventions because of their possible influence upon trade and manufacture, yet it is equally important that manufacturers or traders, or the public generally, should not be hampered by the granting of patents where there has been no exercise of the inventive faculty at all.

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Was it invention to conceive the idea of constructing an insulated refrigerator door, recessed on the inner wall, so that it would have some additional storage space? In deciding whether or not there is invention in West we have to decide a question of fact, and we can get little or no assistance in wandering into other cases to see what question of fact was there decided. The authorities give one little assistance, for they merely illustrate the difficulties which arise in almost every patent action. The line which separates things invented from things otherwise produced is not capable of being concisely defined and frequently it is very difficult to decide whether or not there is subject matter in a patent. Here, I am not convinced that it called for the exercise of the inventive faculty to conceive of West. However popular, or new and useful the West door is, it seems to me that it does not merit monopoly, and it would seem to be extending the right to a monopoly beyond reasonable limits to say that no one but Mrs. West, or her assignee, could construct a refrigerator door of the type described. A refrigeration chamber is space enclosed, made air-tight and insulated, and of course, provided with some refrigerant. The door refrigerating space in West is constructed substantially in the same way as the space in the body proper, and the chief difference is as to size, and particularly depth. In constructing a recessed door there is the application of practically the same idea as in the box of the body proper, that is to say, you build around the recess. It is conceded that there was no difficulty in constructing a door in this way so as to co-operate with the refrigerating space in the main portion of the cabinet. Mr. Money, one of the plaintiff's engineers, stated that apart from the recess and the racks the West door was substantially the same as the standard flat door, with "some difference round the edge but no substantial difference," to quote his own words. The flat door of the standard type of refrigerators lends itself readily to a limited recess like West, because of its normal thickness. I would hardly expect it to be suggested that there would be invention in hanging shelves on the inner wall of a flat door, either at the expense of diminishing the size of the box in the body of the cabinet, or by giving some additional total space by some special form of door

construction. Mr. Money stated that he had heard of some such suggestion a year and a half before he had heard of West, and I would be surprised if it had not been suggested many times. I find it difficult to believe that if one could conceive of the idea of placing shelves on the inner side of a flat door—and I do not see how any interested person could avoid doing so—that it would be an inventive step to recess the inner wall of the door and slightly bulge the outer wall, in order to get shelving space.

A favourite form of argument of counsel in supporting invention in a patent is to put the question: Why did not some one else suggest this before? Asking such a question does not necessarily carry one far in deciding whether or not there is invention in any particular case. If it were known that there were a well defined need and demand for a particular improvement, that the solution had long been sought, and that considerable experimental work had been done in that connection, the question would have some force. It is hardly profitable to speculate here as to why no one had earlier suggested, or sought to patent, the idea found in West. I am not at all convinced that there is occasion for surprise that the West door did not earlier come into use. One looks for structural improvements and alterations in comparatively new articles, such as mechanical refrigerators, only after considerable experience in the use of such things. And it was perhaps not unnatural that the suggestion of West first came, so far as we know, from a woman experienced in the use of such things, and not from her husband, an engineer engaged wholly in the refrigerator art for nearly ten years, and who, we are told, was very skeptical at first as to the utility of his wife's suggested refrigerator door.

After careful consideration I have arrived at the conclusion that there is no subject matter in West. It is, in my opinion, merely a structural departure from the conventional form of a well known article, and involved no invention. It lacks that "impalpable something," as one case puts it, which distinguishes things invented from things otherwise produced. The plaintiff's action is therefore dismissed with costs.

Judgment accordingly.

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BETWEEN:

VASENOLWERKE DR. ARTHUR
 KÖPP AKTIENGESELLSCHAFT. } APPELLANT;

AND

THE COMMISSIONER OF PAT-
 ENTS AND CHESEBROUGH MFG. } RESPONDENTS.
 CO.

Trade Mark—"Vaseline" and "Vasenol"—Calculated to deceive—Unfair Competition Act—Motion to limit trade mark "Vaseline".

An application for the registration of "Vasenol" as a trade mark in connection with the sale of hygienic and antiseptic skin powder, wound and baby powder, foot powder, toilet powder, soaps, bandaging material, cold cream and baby cream, was refused by the Registrar of Trade Marks. At the hearing of an appeal from such refusal the Chesebrough Manufacturing Company, Consolidated, owner of the trade mark "Vaseline," appeared as objecting party.

Applicant also moved to have the register amended so that the trade mark "Vaseline" should be limited to certain wares and should exclude those named in applicant's application, on the ground that Chesebrough has not used its mark in connection with these wares.

Held: That the marks "Vasenol" and "Vaseline" are similar and that the registration of the word Vasenol would be calculated to deceive and would be in conflict with the word mark Vaseline.

2. That for the purposes of the Unfair Competition Act the wares for which Chesebrough is registered in Canada, and the wares for which the applicant seeks registration in Canada, are similar.
3. That it is sufficient that the articles sold by each party fall within the same general description of wares, to refuse registration of vasenol for the powder applications of the applicant.

APPEAL from the refusal of the Registrar of Trade Marks to register the trade mark "Vasenol." The applicant also moved to limit the trade mark "Vaseline."

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

G. E. Maybee for the appellant.

O. M. Biggar K.C. and *R. S. Smart K.C.* for Chesebrough Mfg. Co.

No one appeared for the Commissioner of Patents.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (July 31, 1935) delivered the following judgment:

This is a motion by way of appeal from the refusal of the Registrar of Trade Marks to register the trade mark "Vasenol," applied for by the above named applicant, a corporation organized under the laws of Germany and having its chief place of business in Leipzig, Germany. The applicant states that it is "commercially concerned in the manufacture and sale of remedies, medical, pharmaceutical, hygienic and cosmetical preparations and toilet articles." The applicant further states that it has used for many years the trade mark Vasenol in connection with the sale of "hygienic and antiseptic skin powder, wound and baby powder, foot powder, toilet powder, soaps, bandaging material, cold cream and baby cream," and it is in connection with the sale of such articles the applicant desires registration in Canada of the word mark "Vasenol." The trade mark "Vasenol" first came into use, by the applicant or its predecessors, in 1903, in Germany, where it was first registered in connection with the sale of such goods and subsequently in most European countries, several South American countries, and in other countries as well, but not in any English speaking countries. Any printed matter appearing on the containers of the applicant's wares would seem to be in the German language, and its advertising matter seems to be limited to German language journals. The wares of the applicant have never been sold in Canada.

The objecting party is the Chesebrough Manufacturing Company, Consolidated, a corporation organized under the laws of the State of New York, and hereafter to be referred to as "Chesebrough." This company, or its predecessors in business, have been using the trade mark "Vaseline" for upwards of sixty years to denote its manufactures, and in many countries of the world. In 1879 it registered Vaseline in Canada as a specific trade mark to be applied to the sale of "a certain product of petroleum of certain medicinal or toilet articles or preparations in which said product is incorporated." In 1908 Chesebrough registered Vaseline as a general trade mark to be used in connection with the sale of petroleum jelly, ointments, lubricants, toilet articles and medicinal preparations, and that trade mark has continuously since appeared in the trade

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mark register, in Canada. Vaseline is registered as a trade mark in many of the countries of Europe, South America, Asia, Africa, throughout the whole British Empire, in the United States, and elsewhere. However, the principal markets for the goods manufactured and sold by Chesebrough under its mark are the North American continent, the British Isles and the British Dominions, and speaking generally, English speaking countries. The average value of the products sold by Chesebrough, under its trade mark, during the last ten years has exceeded the sum of \$3,500,000 per annum, and its average expenditure for advertising during that period is said to exceed \$400,000 per annum. It is almost unnecessary to state that the trade mark Vaseline is well known in very many countries of the world but particularly in English speaking countries.

An affidavit made by Robert S. Gill, Vice-President of Chesebrough, was produced on the hearing of the motion, and Mr. Gill therein states that the mark Vaseline was invented and adopted as a trade mark, in 1870, by Robert A. Chesebrough, the founder of Chesebrough, and has been in use ever since. At first it was used as a trade mark for highly refined petroleum jelly, which Robert A. Chesebrough then manufactured. In 1884, when Mr. Gill entered the employ of Chesebrough, he states it was then, under its trade mark Vaseline, manufacturing and selling white petroleum jelly, yellow petroleum jelly, pomade, camphor-ice, cold cream, hair tonic, soap, oil of petroleum perfumed, perfumed white zinc ointment, and a number of other petroleum jelly products. He also states that Chesebrough has always been zealous in the protection of its exclusive right to the use of the trade mark Vaseline to distinguish its products from those of other manufacturers. In a few countries, he states, Chesebrough has been denied such exclusive right owing to the domestic laws of such countries, but in Great Britain, the United States, and many other important countries, Chesebrough's exclusive right in its trade mark has been successfully asserted and the registration or use by others of similar words for similar ware, capable of being confused with the word Vaseline, has been prevented, among others, the

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words "Vasogene," "Vistroleum," "Vasano," "Velv-o-rene," "Vazinol," "Vaza," "Vassar," "Vasa-jell," "Vaz-o-lyn," and "Velvolatum." In England, in 1898, on the application of one Pearson, it was sought to register the word "Vasogen." As I understand it, the virtual result of the application to register this word was its refusal, on the grounds of its resemblance to "Vaseline," though the controversy largely related to another important point. The case is to be found reported in 18 R.P.C. at page 191, and 19 R.P.C. at page 342. I am not sure whether Mr. Gill by his affidavit meant to distinguish between "Vasogen" and "Vasogene." I might here add that it would appear from the material before me, that since 1884 Chesebrough has added to its list of manufactured products sold under the trade mark Vaseline and that now the same are twenty-three in number.

The applicant's motion concerns not only an appeal from the refusal to register the word Vasenol for the articles mentioned in its application, but it seeks also to amend the register concerning the trade mark Vaseline, so that Chesebrough's registration of Vaseline should be limited to the following wares: petroleum jelly, hair tonic and pomade, oxide of zinc ointment benzoinated, and camphor-ice, and should exclude hygienic and antiseptic powder, wound and baby powder, foot powder, toilet powder, soaps, bandaging material, cold cream and baby cream. This feature of the applicant's motion is made upon the ground that the register does not accurately express or define the existing rights of Chesebrough, because it has not used its mark in connection with the last mentioned list of wares, being the wares for which the applicant seeks registration for its mark. This means that the applicant contends that Chesebrough is only entitled to the use of its mark Vaseline in respect of the wares which presently it sells in Canada. I perhaps should state the specific grounds upon which the applicant urges that its application to register Vasenol should be allowed. They are set out in the notice of motion as follows: (1) The applicant's said trade mark is not within the meaning of the Unfair Competition Act similar to the trade mark Chesebrough Manufacturing Company (Consolidated) Reg. No. 52 Folio 12639 cited

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against the said application of Vasenolwerke Dr. Arthur Köpp Aktiengesellschaft. (2) The wares in connection with which the applicant's mark is used are not within the meaning of the Unfair Competition Act similar to the wares to which the said trade mark of Chesebrough Manufacturing Company (Consolidated) is applied. (3) That applicant's said trade mark is registrable by virtue of the provisions of Section 28 (1) (d) of the Unfair Competition Act.

Before proceeding further this would be a convenient stage at which to discuss two or three points which are directed mainly towards the plea of acquiescence by Chesebrough, in the use abroad by the applicant, of its mark. It is stated in an affidavit made by Dr. Arthur Köpp, managing director of the applicant company, that the trade mark of the applicant and that of Chesebrough have been used side by side, without conflict, confusion or deception, in about forty different countries, in most of which Vasenol is registered, and in some of which both Vaseline and Vasenol are registered, and that Chesebrough has never objected to or opposed the use or registration of the applicant's mark in such countries. It is contended that the concurrent use of both marks in such countries should operate as a bar to any opposition from Chesebrough in respect of the applicant's application to register Vasenol in Canada. Mr. Gill in his affidavit states that Chesebrough has never had any notice of any application to register the trade mark Vasenol in any country in which the English language is commonly in use, except in South Africa and Palestine, in which two countries certain applications for registration of Vasenol have recently been made and are being opposed by Chesebrough; the applications have not yet been disposed of. Mr. Gill also states in this affidavit that in many foreign countries where the English language is not commonly used the products of Chesebrough are not identified solely by the mark Vaseline. In many of such countries the products bear, for example, the compound name Vaseline-Chesebrough. I do not think that all this of itself deprives Chesebrough of the right to object to the registration of the applicant's mark in Canada. In the first place I should remark that whether or not the

two marks are in concurrent use in forty countries abroad, without conflict, can hardly be established satisfactorily by the affidavit evidence of a single interested party. One would wish to know more than appears in Dr. Köpp's affidavit, before accepting his conclusion here. Then, it does not seem reasonable to say that if Chesebrough has not taken proceedings against the applicant, in all the countries where the applicant uses its mark, that this means that Chesebrough has acquiesced in the right of the applicant to do what it has been doing. Failure to resist registration or infringement in countries abroad would not, I think, be a bar to proceedings against registration of Vasenol in Canada, except perhaps under an unusual state of facts. Upon the facts before me it would be impossible to hold that there has been such acquiescence on the part of Chesebrough, in respect of what the applicant has been doing abroad, as to preclude it from opposing the motion here.

It was also urged against Chesebrough that it had at one time consented to the registration of the word "Vasano." It appears that an application for the registration of this word mark was made in England, in 1928, and was at first opposed by Chesebrough, but the opposition was withdrawn upon an undertaking being given by the applicant that the mark would be limited in its use to goods prepared for use in the treatment of sea-sickness and like ailments. I think no comment whatever is necessary in respect of this point. Chesebrough consented to the registration, I assume, in the belief that the use of that mark, so limited, was not liable to cause confusion with the use of its mark in England.

The Registrar refused registration of Vasenol, on the ground that the word itself was similar to Vaseline, and that the wares on which Chesebrough applied its mark were similar to the wares to which the applicant proposed to apply its mark, in Canada. I think the Registrar reached the proper conclusion.

There are two points to decide, first, are the words Vaseline and Vasenol if applied to similar wares, so similar as to cause confusion, and secondly, whether the wares mentioned by the applicant in its application are similar

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to those made and sold by Chesebrough. If those wares are not similar within the intendment of the statute, then the applicant would, I apprehend, be entitled to registration. If they are similar then the question for decision is whether the two marks in question are so similar as to be in conflict and liable to cause confusion. Sec. 26 (1) (d) and (f) states what marks shall be registrable and the relevant portions are as follows:—

26. (1) Subject as otherwise provided in this Act, a word mark shall be registrable if it

(d) would not if sounded be so descriptive or misdescriptive to an English or French speaking person;

(f) if not similar to, or to a possible translation into English or French of, some other word mark already registered for use in connection with similar wares;

Sec. 28 (1) (d) is to the following effect:—

28 (1) Notwithstanding anything hereinbefore contained:—

(d) A word or group of words, which the applicant or his predecessor in title, without being guilty of any act of unfair competition, has already caused to be duly and validly registered as a trade mark in the country of origin of such registration, shall, although otherwise unregistrable by reason of its or their form, sound or meaning, be registrable under this Act provided . . . (iii) that it is not in conflict with any mark already registered for similar wares; . . .

Sec. 2 (k) and (l) define what may be construed as similar words, or similar wares, and they are as follows:

2. (k) "Similar," in relation to trade marks, trade names or distinguishing guises, describes marks, names or guises 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;

(1) "Similar," in relation to wares, describes categories of wares which, by reason of their common characteristics or of the correspondence of the classes of persons by whom they are ordinarily dealt in or used, or of the manner or circumstances of their use, would, if in the same area they contemporaneously bore the trade mark or presented the distinguishing guise in question, be likely to be so associated with each other by dealers in and/or users of them as to cause such dealers and/or users 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;

Now, I think, the wares manufactured and sold by the applicant and Chesebrough respectively, under their respective registered trade marks, are similar; they have common characteristics, the purposes for which they are to be used are much alike, and they probably would be

dealt in and distributed to the consuming public through the same trade channels. The applicant describes generally its manufactures and sales, as I already observed, as "remedies, medical, pharmaceutical, hygienic and cosmetic preparations and toilet articles," much as Chesebrough describes its products. For the purposes of the Unfair Competition Act I think it can fairly be said that the wares for which Chesebrough is registered in Canada, and the wares for which the applicant seeks registration in Canada, are similar.

I have little hesitation in saying that, in my opinion, the word marks "Vasenol" and "Vaseline" are similar; the registration of the word Vasenol would be calculated to deceive and would be in conflict with the word mark Vaseline already registered in Canada, and particularly would this be so in Canada, where printed labels, directions, descriptive and advertising matter, would likely be largely in the English language. I think there is a very great similarity between the two words, both to the ear and the eye; they sound much alike if not pronounced distinctly and carefully, and they look considerably alike if not read with care. It is undesirable to cause even a liability to confusion or deception. While the applicant's mark was duly and perhaps validly registered in Germany, the country of origin of such registration, still it is not entitled to registration in Canada because it would be in conflict with a mark already registered there for similar wares.

Before concluding I should observe perhaps that the applicant urged that Chesebrough was not now entitled to the registration of the word mark Vaseline for toilet soap because that article was not sold in Canada by Chesebrough. The applicant's evidence on this point is only to the effect that one Charles was informed by the manager of a store in Toronto that he believed Vaseline toilet soap was not sold in Canada. It is made and sold in the United States, and a sample of it was produced in evidence, but it is not clear from the material before me, whether it is presently being sold in Canada, but I do not think that this is of such importance as to require me to direct that oral evidence be heard to establish the fact one way or

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the other. Vaseline is registered for toilet articles, and we know that toilet soap is made and sold by Chesebrough, and that it is possible that it may be sold in Canada. I should not like to say how persistent and regular must be the sale of any particular ware in Canada, which is made abroad, to maintain a Canadian registered trade mark to be there used in connection with such a ware. I should hardly think that a registered trade mark should be removed from the register, or amended, solely because any particular ware, well known to be made abroad in the country of origin, and sold under that trade mark, is not sold in Canada in some years. If the trade marks here in question are similar and the wares are similar, that, I think, is sufficient ground to refuse the application to register Vasenol for soap; if Vaseline toilet soap is sold in the United States, and possibly elsewhere, and Vaseline is registered in Canada for toilet soap that, I think, alone should be sufficient ground for refusing the registration of Vasenol for soap in Canada.

Mr. Maybee at the end of his argument stated that his client would be willing to limit its application to the powder articles mentioned therein if I entertained any difficulty concerning the balance of them. As is stated in one of the affidavits of Mr. Gill, Chesebrough does not sell toilet or remedial preparations in powder form, but such preparations are used for purposes very similar to those for which some of the Chesebrough preparations are used, and they are distributed through the same channels of trade, and the manner and circumstances of their use are very much the same. Mr. Gill, in his affidavit, states that Chesebrough's "petroleum jelly products are used in substantially identically the same way as baby cream," and its "zinc ointment is definitely recommended for nursery use and is commonly used in the care of small children." It is useless to refine too much as to the precise similarities and distinctions between the several wares made by Chesebrough and the applicant; what is desired is the avoidance of any conflict or confusion between the two trade marks in question, in the same market, for the protection of the public. I think it is sufficient that they fall within

the same general description of wares to refuse registration of Vasenol for the powder preparations of the applicant.

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The motion is therefore refused with costs.

Judgment accordingly.

ON APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT

BETWEEN

ROBIN HOOD MILLS LIMITED }
et al (DEFENDANTS) }

APPELLANTS;

AND

PATERSON STEAMSHIPS }
LIMITED (PLAINTIFF) }

RESPONDENT.

Shipping—Loss of Cargo—Limitation of Liability—Merchant Shipping Act (Imperial) 1894—Charter party—Deviation in voyage—Burden on party claiming limitation of liability to disprove fault or privity to the particular loss or damage.

Respondent's steamship *Thordoc*, under charter to appellants, on a voyage from Port Arthur, Ontario, to Montreal, Quebec, with a cargo of wheat and flour owned by appellants, grounded on the shore of Lake Superior and became, with her cargo, practically a total loss. Respondent brought action for limitation of liability under s. 503 of the *Merchant Shipping Act (Imperial) 1894*. The decrease in limitation of liability was granted and appellants appealed from such judgment. Appellants contended that the *Thordoc* was not in all respects seaworthy for the contractual voyage because no certificate of adjustment of a compass, newly installed six weeks before the commencement of the voyage, was obtained by respondent. The Court found that the compass had been properly adjusted by a competent person and that a formal certificate of adjustment was not necessary.

The contract of carriage was for "loading at the lakehead * * * for Montreal." Appellants contended that Port Arthur, when designated by the appellants as the port of loading, became the port of departure at the "lakehead" under the charter party and that a deviation to Fort William, Ontario, was an unreasonable one, and, therefore, respondent cannot set up the exceptions found in the charter party.

The respondent company is a subsidiary of the N. M. Patterson Grain Company Ltd., which owns all the stock of respondent company except that required for directors shares. One Hall was general manager of respondent company. He ordered the *Thordoc* on its voyage up the lakes to take on board lifeboats at Sault Ste. Marie to be delivered at Fort William, that being the port to which the *Thordoc* was then bound. While en route to Fort William the *Thordoc* was directed by one Sutherland to load appellants' grain

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at Port Arthur before proceeding to Fort William to deliver the lifeboats. Sutherland was chief clerk of the grain company and also secretary and treasurer and a director of the respondent company, his duties in respect to it being largely secretarial. He never directed the movements of ships unless instructed by Hall, except on this occasion, when he did so without communicating with Hall. The *Thordoc* proceeded to Fort William, and about four hours later returned to one of the permissible routes pursued by cargo steamers en route from Port Arthur to Montreal. About three hours later it stranded due to improper navigation. The Court found that the action of Sutherland in directing the deviation of the *Thordoc* to Fort William was not the action of respondent company.

Held: That the fault or privity of a shipowner which is a company, within the meaning of s. 503 of the *Merchant Shipping Act*, must be the fault or privity of somebody for whom the company is liable because his action is the very action of the company itself.

APPEAL from the decision of the Local Judge in Admiralty for the Quebec Admiralty District, allowing plaintiff's action for limitation of liability.

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

C. R. McKenzie, K.C. for appellants.

V. M. Lynch-Staunton for respondent.

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

The judgment of the Court was delivered by

THE PRESIDENT (Angers J. concurring):

This is an appeal from a decision of Demers L.J.A., Quebec Admiralty District, wherein, in an action brought by the respondent in limitation of liability under sec. 503 of the *Merchant Shipping Act (Imperial) 1894*, he found the respondent entitled to succeed. That section is in these words:

The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say)—(b) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship; * * * be liable to damages beyond the following amounts; (that is to say) * * *

This was an enactment for the peculiar protection of ship-owners. Limitation of liability, as has been frequently stated, is founded upon considerations of public policy and

not of justice, and the statute is to be construed according to the fair and natural meaning of their words, as in the case of other Acts of Parliament. The intention of the legislature in all the Acts which have dealt with this subject has been to relieve shipowners, to some extent, from the consequences of the negligent acts of persons employed by them, and for which they had not been in any way to blame, that is to say, they must be innocent of the occurrence causing the loss. It is not the purpose of the statute to relieve the shipowner of liability for damage or loss caused by the negligence of persons employed by him; its purpose is to limit the amount of that liability, unless the same occurred by reason of his actual fault or privity.

In November 1929, the British steamship *Thordoc*, a cargo ship of some 2,000 tons, owned by the respondent and registered at Fort William in the Province of Ontario while proceeding under charter on a voyage from Port Arthur to Montreal, with a cargo of wheat, flour, etc., owned by the appellant, grounded at Point Porphery on the north shore of Lake Superior and became, with her cargo, practically a total loss. The contract of carriage was for "loading at the lakehead on or about October 30th (1929) for Montreal."

The appellant subsequently commenced an action against the respondent in the Superior Court for the District of Montreal, in the Province of Quebec, claiming \$146,326.29 as damages occasioned to its cargo by the stranding of the *Thordoc*. In April 1932, judgment was rendered in that action condemning the respondent to pay to the appellant the amount claimed. An appeal being taken to the Court of King's Bench (Appeal Side) the judgment of the Superior Court was affirmed as to the respondent's liability for damages, and the amount. Later, the respondent launched this action in limitation of liability, and the learned trial Judge,—who also heard and determined the action for damages in the Superior Court of Quebec—held that the respondent was entitled to a decree limiting its liability in respect of the damages mentioned to the statutory amount of \$38.92 for each ton of the registered tonnage of the *Thordoc*.

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In the action for damages the learned trial Judge found for the plaintiff, the appellant here, on the ground that the ship was not in a seaworthy condition to perform the contract of carriage in that a new compass recently installed on the ship had not been properly or fully adjusted, and that, prior to the material time, no certificate of such compass adjustment had issued to the owners in conformity with their usual practice, before she left Port Arthur, and also on the ground that the ship had deviated from the contractual voyage from Port Arthur to Montreal. From this judgment there was an appeal, as already mentioned, and on the first ground the appellate court concurred in the judgment of the learned trial Judge; as to the question of deviation, while the majority of the Court of Appeal appear to have expressed the opinion that the deviation was not responsible for the stranding of the *Thordoc*, and that therefore there was no liability on this account, yet the formal judgment appears to discard this point.

In the present action the learned trial Judge held, further evidence having been given upon the point, that the compass having been adjusted by a competent person, the issuance of a certificate therefor was unnecessary and that the owners were relieved of any fault or privity as to the seaworthiness of the ship in so far as the efficiency or reliability of the compass was concerned; and he appears to have felt himself bound by the expressed majority opinion of the Court of Appeal on the question of deviation, and I would infer from the reasons for judgment of the learned trial Judge that, if he were then pronouncing upon the actual fault or privity of the owners as to the deviation he would not be against the contention of the owners, namely, that notwithstanding the deviation the owners were entitled to a decree in limitation of liability; at least that is my understanding of it though no reasons are given for that conclusion. The learned trial Judge expressed no opinion as to whether or not the deviation, in point of fact, was with the fault or privity of the owners, a point strongly urged by Mr. McKenzie for the appellant on the hearing of this appeal. The decision of the learned trial Judge granting a decree in limitation of liability would

seem therefore to proceed upon the ground that the stranding of the *Thordoc* occurred by reason of the "improper navigation or management of the ship" and by that I assume it is meant that the stranding occurred by reason of the "fault or error" of the servants or employees of the owners, and without the actual fault or privity of the owners in fact or in law.

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The principal grounds put forward in support of this appeal are two in number and apparently they were the main grounds advanced by the appellant in its action for damages before the Superior Court of Quebec. The first to be mentioned is whether or not the owners of the *Thordoc* exercised due diligence to make the ship in all respects seaworthy for the contractual voyage, and this point arises on account of some question regarding the reliability of one of the ship's compasses. It appears that a new compass had been installed on the ship about six weeks prior to the stranding, pursuant to the instructions of the general manager of the respondent company. One Inkster regularly adjusted all the compasses of the respondent's ships plying on the Great Lakes, and also those of Canada Steamship Company, a large ship owning concern also operating on the Great Lakes and on the River St. Lawrence. Inkster was on board the *Thordoc* when this new compass was installed and he then adjusted the same, and he testified in this action that he thought the adjustment sufficient for the ship's use. In the action for damages Inkster seems to have testified—or at least he was so understood—that it was customary for him to give a certificate of any compass adjustment to the owners of the ship, but he had not done so in this instance until long after the stranding, when at the suggestion of a solicitor of the respondent, he did so. In that action the learned trial Judge seems to have thought that the failure to issue such a certificate was a matter of substance, and because of this he found that the compass had not been properly adjusted when she left Port Arthur, and therefore, I assume, that the ship was, in this respect, unseaworthy and not properly equipped for the contractual voyage. In the action here on appeal, Inkster testified that it was not his custom to give such a certificate to the

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owners, and that the only evidence of any adjustment of a compass of any particular ship was his rendering an account to the owners for his services in that connection, which he did in this case, and the learned trial Judge accepted this evidence. In his reasons for judgment from which there is this appeal he stated:

The whole litigation on this point comes to this—were the proprietors negligent in using the compass without a certificate from the adjuster? If I had only the first testimony of the adjuster, I would say ‘yes’, but in this case, the adjuster swears that his practice was not to send a certificate to the company but to the Captain of the ship. I accept without hesitation the evidence of the officers of the company who swear that this was not the practice; that what they always received was the bill for work done. Receiving this bill from a competent man, they had, in my opinion, every reason to believe that the work was done and properly done. For these reasons, I consider that they are entitled to the demand of limitation they pray for, and that judgment should be given accordingly.

With this conclusion I agree. The issuance of a certificate from the compass adjuster to the shipowners was not the practice, and I am unable to perceive any reason for holding that the owners should be prejudiced by the failure to give such a certificate; I see no substance whatever in the contention that the issuance of a formal certificate of adjustment of a ship’s compass to the owners was at all necessary. I therefore agree with the view of the learned trial Judge on this point and it will not be necessary to return to it again; it is not, in my opinion a ground for refusing a decree in limitation of liability.

An important issue arising in this case is the effect of the deviation upon the contract of carriage, and whether or not it was with the fault or privity of the owners. The appellant contends: That Port Arthur, when designated by the appellant as the port of loading, became the port of departure at the “lakehead” under the charter party; that there was an obligation on the part of the shipowners to proceed directly, or with reasonable deviation only, from Port Arthur to Montreal; that the deviation—in the interests of the ship alone the appellant contends—to Fort William was an unreasonable one, and changed the character of the contemplated voyage so essentially that the shipowners cannot be considered as having performed their part of the charter party or bill of lading contract, but something quite different, and therefore cannot set

up the exemptions expressly or impliedly to be found in the charter party, or the bill of lading, and which were only applicable to the voyage contracted for by the parties, unless they can prove that if there had been no deviation the same loss would have happened—something, I might say, quite impossible. Such cases as *Joseph Thorley Ltd. v. Orchis Steamship Co. Ltd.* (1) and *Tate & Lyle Ltd. v. Hain Steamship Co. Ltd.* (2) were cited. The objection to a deviation is, it appears, not that the risk is increased, but simply that one of the parties to the contract has voluntarily substituted another voyage for that which has been insured. The appellant contends that there is no distinction between large deviations and small deviations, only between deviations not excused by law and such as are so excused. But in this action, one in limitation of liability, the question also arises, assuming the deviation to be an unreasonable one, whether the deviation was with the actual fault and privity of the owners. If not they must succeed and that question may first be considered. The evidence in any way relevant to this point should therefore be carefully reviewed.

The respondent is a subsidiary company of, and owned by, the N. M. Patterson Grain Company Ltd. Mr. N. M. Patterson is president of both companies, the head office of each being at Fort William. A Mr. Hall, who was deceased at the time of the trial of the damage action, was vice president and general manager of the steamship company at the times material here. Patterson testified that Hall had to do with "everything in connection with the ordering of the boats, chartering cargoes, hiring crews and the general operation of the company." There was no assistant manager to Hall. On the upward voyage of the *Thordoc* to the head of the lakes, Hall directed the master to take on board at Sault Ste. Marie four lifeboats to be delivered at Fort William for storage during the winter, Fort William being the port to which the *Thordoc* was then bound. While en route to Fort William the *Thordoc* was subsequently directed by one Sutherland first to load at Port Arthur, chiefly because the appellants' grain, etc., was then in railway cars at Port Arthur and

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(1) (1907) 1 K.B. 660.

(2) 49 Ll. L. Rep. 123.

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subject to demurrage, which demurrage before loading had accumulated to \$326, and the appellant's representative there was apparently pressing for an immediate loading of the cargo to avoid further demurrage. I think the *Thordoc* had also been delayed in some way on her upward voyage. In these circumstances Sutherland, so he states, took it upon himself to direct the *Thordoc* first to Port Arthur for loading, instead of to Fort William to deliver the lifeboats. Sutherland was the chief clerk of the grain company, and was closely associated with Patterson in the grain company's business for twenty years, but he was also the secretary and treasurer of the steamship company, and he was a director as well and had been since its organization. Sutherland's duties in respect of the steamship company were, according to Patterson, largely secretarial, such as keeping the records of the company's meetings. So far as I can gather both companies occupied the same office facilities, and Hall seems to have made some use of the clerical staff of the grain company. I suspect the truth is that certain of the clerical and secretarial staff were common to both companies, and that Sutherland was chief clerk in the office common to both organizations. Sutherland stated that he never directed the movements of ships unless directed by Hall, but the occasion in question would be apparently an exception.

In response to an enquiry by the master of the *Thordoc*, when her loading was completed, Sutherland directed that he proceed to Fort William and there discharge the lifeboats before proceeding on the voyage to Montreal with his cargo, and this the master did. Both Patterson and Hall at the time were in Winnipeg, where both the grain company and the steamship company had branch offices, and where Hall had a staff. A private wire connected the Winnipeg and the Fort William offices, and it was stated in evidence that when Hall was in Winnipeg it was usual for the head office to consult him in respect of all steamship matters. Although Hall was readily accessible to Sutherland by means of this private wire, it appears he did not communicate with Hall before directing the *Thordoc* to proceed to Fort William.

I should perhaps add that all the shares of the steamship company were owned by the grain company with the exception of about five qualifying shares held by directors of the steamship company. Sutherland at the organization of the steamship company was allotted one qualifying share, for which he never paid anything; the certificate of this share was never delivered to Sutherland and presently remains in the stock register endorsed by Sutherland in blank, which is of course quite a usual proceeding. Sutherland was, I assume, a paid servant of the grain company, but it does not appear from the evidence whether he was in receipt of any salary or wage from the steamship company; it is improbable that he was having in mind the relationship between the two companies, and their occupancy of the same office. It is probable that whatever services Sutherland performed for the steamship company were at least intermittent, and generally of an unimportant nature; he seems to have been, next to Patterson, the active individual in the grain company's business at Fort William, and such duties would, I assume, ordinarily consume his full working time.

In conformity with the instructions mentioned the *Thordoc* proceeded to Fort William and there unloaded the lifeboats at the respondent's premises. This would not be a deviation intermediate between Port Arthur and Montreal, but it involved proceeding a short distance west of Port Arthur, thence up the River Kaministiquia to Fort William, a distance of somewhere between twenty and thirty miles, inclusive of the return voyage to a point immediately off Port Arthur. The cities of Port Arthur and Fort William are however contiguous. The *Thordoc* departed from Port Arthur at nine o'clock in the evening for Fort William and between three and four hours thereafter had returned to one of the normal or permissible sea routes pursued by cargo steamers en route from Port Arthur to Montreal; some three hours after that the *Thordoc* stranded at Port Porphery, owing, it is said by the trial Judge, to "improper navigation or management of the ship," that is, by the ship's officer in charge at the time and the wheelsman, which finding, in my opinion, would seem fully warranted. From the time of the ship's

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departure from Port Arthur to the moment of the stranding, there had been no appreciable change in the weather, which apparently was quite favourable in every respect. Such are the relevant facts in regard to the deviation, and to the occurrence of the stranding, and I hope I have fully and accurately narrated them.

The question as to whether the action of Sutherland in directing the deviation of the *Thordoc* to Fort William is to be construed as the action of the shipowners falls for decision. In order that a shipowner may be entitled to limit his liability it is necessary in all cases that he should establish that the loss or damage in question arose without his actual fault or privity, and difficult questions frequently arise where vessels are owned by corporations. An important case on this point, and referred to by counsel, is that of *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* (1). A cargo of benzine on board ship was lost by a fire caused by the unseaworthiness of the ship in respect of the defective condition of her boilers. The shipowners were a limited company and the managing owners were another limited company. The managing director of the latter company was the registered managing owner and took the active part in the management of the ship on behalf of the owners. The owners relied on sec. 502 of the *Merchant Shipping Act 1894* (1) as relieving them from liability, and they denied the allegation of unseaworthiness. The judgment of the Judicial Committee was delivered by Haldane L.C., and it will be convenient to quote from the same at some length because of his statement of the facts, and of the law there laid down. The Lord Chancellor said:—

My Lords, in that state of things the loss of the cargo took place, and the case came before Bray J., who tried it, and Bray J. found a number of facts. He found these facts after hearing the evidence on both sides, and I think that his findings of fact were justified. They were these: The first was that the ship when she left Novorossisk was unseaworthy by reason of defects in her boilers. The second finding of fact was that the stranding on the Botkill Bank, just off the mouth of the Scheldt, was caused by the want of steam, which in its turn was caused by the unseaworthy condition of the boilers; and he found the same causes as regards the subsequent stranding in the Scheldt itself. Then in the third place he found that the loss was not caused by any negligence or want of precautions on the part of the engineers, because he does not

(1) (1915) A.C. 705 at 711.

find it proved that anything they could have done could have altered the consequences. He found that the loss of the cargo was caused by the unseaworthiness of the ship due to the condition of the boilers. Then there are other findings which are findings of mixed fact and law. One of these is that the duty of supervision remained with the managing owners, and that the fault of the managing owners was a fault that affected the company itself.

My Lords, that last question gives rise to the real question of law which occurs in this case. Taking the facts to be as the learned judge has found them, what is the consequence as regards the liability of the appellants? The appellants are a limited company and the ship was managed by another limited company, Messrs John M. Lennard & Sons, and Mr. J. M. Lennard, who seems to be the active director in J. M. Lennard & Sons, was also a director of the appellant company, Lennard's Carrying Company, Limited. My Lords, in that state of things what is the question of law which arises? I think that it is impossible in the face of the findings of the learned judge, and of the evidence, to contend successfully that Mr. J. M. Lennard has shown that he did not know or can excuse himself for not having known of the defects which manifested themselves in the condition of the ship, amounting to unseaworthiness. Mr. Lennard is the person who is registered in the ship's register and is designated as the person to whom the management of the vessel was entrusted. He appears to have been the active spirit in the joint stock company which managed this ship for the appellants; and under the circumstances the question is whether the company can invoke the protection of s. 502 of the *Merchant Shipping Act* to relieve it from the liability which the respondents seek to impose on it. That section is in these words: "The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely,—(2) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship".

Now, my Lords, did what happened take place without the actual fault or privity of the owners of the ship who were the appellants? My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company. My Lords, whatever is not known about Mr. Lennard's position, this is known for certain, Mr. Lennard took the active part in the management of this ship on behalf of the owners, and Mr. Lennard, as I have said, was registered as the person designated for this purpose in the ship's register. Mr. Lennard therefore was the natural person to come on behalf of the owners and give full evidence not only about the events of which I have spoken, and which related to the seaworthiness of the ship, but about his own position and as to whether or not he was the life and soul of the company. For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not

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to be liable at all, have been an action which was the action of the company itself within the meaning of s. 502. It has not been contended at the Bar, and it could not have been successfully contended, that s. 502 is so worded as to exempt a corporation altogether which happens to be the owner of a ship, merely because it happens to be a corporation. It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself. It is not enough that the fault should be the fault of a servant in order to exonerate the owner, the fault must also be one which is not the fault of the owner, or a fault to which the owner is privy; and I take the view that when anybody sets up that section to excuse himself from the normal consequences of the maxim respondeat superior the burden lies upon him to do so.

Well, my Lords, in that state of the law it is obvious to me that Mr. Lennard ought to have gone into the box and relieved the company of the presumption which arises against it that his action was the company's action. But Mr. Lennard did not go into the box to rebut the presumption of liability and we have no satisfactory evidence as to what the constitution of the company was or as to what Mr. Lennard's position was. The memorandum and articles of association were not put in. The only evidence was that of the secretary, Mr. Simpson, who told the Court that he was secretary not only to the company but also to the managing company, and the inference to be drawn is that the officials of the two companies were very much the same and transacted very much the same business. Under the circumstances I think that the company and Mr. Lennard have not discharged the burden of proof which was upon them, and that it must be taken that the unseaworthiness, which I hold to have been established as existing at the commencement of the voyage from Novorossisk, was an unseaworthiness which did not exist without the actual fault or privity of the owning company. My Lords, if that is so, then the judgment of the majority of the Court of Appeal and of Bray J. was right.

This means that the question for consideration in each case is one of fact; where the loss or damage occurs with the actual fault or privity of a person for whom the company is liable because his action is the very action of the company itself, the company will not be entitled to limit its liability; in each case it will be for the company which seeks to limit its liability to establish that the individual who had the effective direction and control of the company's affairs was not at fault or privy to the particular loss or damage. I would refer to MacLachlan on Merchant Shipping, 7th Ed. p. 96: *The Charlotte* (1), *The Warkworth* (2).

In the facts here I hardly think it can be said that Sutherland was the person who had the effective direction

(1) (1921) 9 Ll. L.L.R. 341.

(2) (1883) 9 P.D. 20.

and control of the business affairs of the respondent, nor was he the person to whom was entrusted the management of the *Thordoc* or any other ship belonging to the steamship company. He was technically a holder of one share in the grain company and therefore in the same sense a part owner of the *Thordoc*; ordinarily the actual fault or privity of a part-owner will not deprive his co-owners of the right to limit their liability. Sutherland was only nominally a director of the steamship company; but he was also secretary of that company and apparently a clerk of some sort as well, all of which positions involved little or no responsibility and had no relation to the real management and operation of the company's affairs which were entirely under the direction and control of Hall. The position of a director, or that of secretary of the company, did not clothe Sutherland with any authority in respect of the management of the ships belonging to the respondent. In the case of *George Whitechurch Ltd. v. Cavanagh* (1) Lord McNaughton said:

Then comes the question: Is the company bound by the representations of their secretary? That must depend upon what authority the secretary had or was held out as having. Now, the duties of a company's secretary are well understood. They are of a limited and of a somewhat humble character. "A secretary," said Lord Esher, "is a mere servant. His position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all."

At most it seems to me, that in so far as the steamship company is concerned, and in the true business sense, Sutherland acted merely as a casual servant of that company, and then performing only minor duties. The grain company was not the manager of the steamship company though it was the sole owner. There was a close association between the two companies, and perhaps the grain company may be regarded as the dominating influence, but it still remains they were separate corporations, under separate management, and engaged in different classes of business. The intervention of Sutherland in the important affairs of the shipping company, outside the occasion in question, would appear only to be rare, and then at the instance and direction of Hall. Hall was the individual clothed with authority by the steamship

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company to direct and manage its important and serious business affairs and bind the owners. I do not think it can be held that the direction to land first at Port Arthur instead of proceeding to Fort William as directed by Hall, and then to proceed from Port Arthur to Fort William after the loading, was in fact with the actual fault or privity of the owners. It would follow therefore that the respondent is entitled to maintain its decree in limitation of liability.

That would seem to dispose of the appeal. Mr. Lynch-Staunton, however, further contended that, in view of the fact that after the *Thordoc* had completed the deviation to Fort William she had resumed the contract line of route, and there being no connection between the deviation and the particular negligence which occasioned the loss, the shipowners are entitled to the decree in limitation of liability sought even if Sutherland's action in respect of the deviation was to be construed as that of the shipowners; and he also contended that in any event the deviation was a reasonable one for which the owner was exempted under the *Water-Carriage of Goods Act*. There is much to be said I have no doubt in support of both contentions. However, in my view of the case, as so far expressed, it is not necessary to pronounce any opinion upon either of these two very controversial points.

The appeal is therefore dismissed with costs.

Judgment accordingly.

Reasons for judgment of Demers J.:

This is an action in limitation of liability.

Before and at the time of the disaster hereinafter mentioned, the Plaintiff, Paterson Steamships Limited, was the owner of the steamship *Thordoc*, a British vessel registered at Fort William, in the Province of Ontario.

On or about the 9th day of November, 1929, the *S.S. Thordoc*, when proceeding from Port Arthur to Montreal with a cargo of flour, wheat, shorts and oats, grounded on Point Porphery in

Lake Superior and became a constructive total loss and the said cargo was severely damaged.

The Defendant, Robin Hood Mills Limited, on the 13th day of January, 1931, commenced an action in the Superior Court for the District of Montreal, such action bearing No. F-83113 of the records of such Court, whereby the said Defendant claimed the sum of \$146,326.29 as damages occasioned to its cargo and resulting from the said stranding.

Judgment was rendered on the said action on the 13th day of April, 1932, condemning the Plain-

tiff, Paterson Steamships Limited, to pay to the Defendant, Robin Hood Mills Limited, the amount claimed, with interest and costs.

The said judgment was appealed to the Court of King's Bench, Appeal Side, on the 13th day of May, 1932, the record of such appeal being No. 379 of the records of the Court of King's Bench, and judgment was rendered on such appeal on the 30th day of November, 1933, confirming as to its conclusions the judgment of the Superior Court hereinabove mentioned.

The said stranding of the *S.S. Thordoc* occurred by reason of the improper navigation or management of the ship.

By its special defence, the Defendant alleges two faults:

(a) That the Plaintiff's vessel *Thordoc*, while proceeding on her voyage to Montreal, deviated from her course and voyage and proceeded to the Port of Fort William, in the Province of Ontario thereby constituting a deviation in law and in fact, and further deviated by not proceeding on the usual and direct course to the Port of Montreal, in the Province of Quebec.

(b) That in addition and furthermore the stranding of the *Thordoc* and the resultant damage was due to her unseaworthiness in that her compass was not properly adjusted.

It appears also by Exhibit D-4, page 4, filed by Defendant, that the case in the Superior Court has turned also on those two questions, and that there was no debate as to the actual fault or privity of the owners.

By the judgment of the Superior Court (same exhibit), it appears that the action was maintained for the two reasons alleged in the defence in this case:

"CONSIDERING," said the Court, "that Defendant has not

proved that the compass of its ship was properly adjusted when she left Port Arthur;

"CONSIDERING also that the ship deviated from the voyage to Montreal."

This judgment was confirmed in Appeal and this is the decision of the Court of Appeal:

"RENVOIE le dit apel, CONFIRME le dit jugement, mais par l'unique motif que sans que l'Appelante ait établi avoir à ce sujet fait la diligence voulue, son navire était impropre à la mer (unseaworthy), qu'ainsi elle ne peut prétendre à l'immunité qu'elle invoque et qu'il lui faut en conséquence et selon la loi, répondre de la cargaison qui lui avait été confiée; l'autre motif du jugement *a quo*, celui d'un déroutement, étant écarté."

Both parties have filed memoranda on both questions; in its factum, the Plaintiff contending that there was *chose jugée* by the judgment of the Court of Appeal as to deviation, and its Answer was amended accordingly.

The Defendant, seeing that Amendment, filed a supplementary factum by which for the first time it asked that if *res judicata* is pleaded, the present Plaintiff must be bound by the whole judgment, with the result that having been condemned to pay damages, it is not entitled to maintain the present action in limitation, and that the pretension of section 504 of the *Merchants' Shipping Act* is not available to the Plaintiff as it is not qualified under the term of such section.

It seemed that up to that time this question had not been raised, and Defendant took for granted that the action for limitation existed.

I will take up this new issue immediately. Article 503 gives the right without any condition; 504 provides for the cases where there are many claimants.

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Temperley's Merchant Shipping Acts, 4th Edition, page 328, states that this right may be claimed by direct action, by defence, or by counter-claim. Usually, he says, in the High Court it is invoked by the defence or counter-claim.

Counter-claim is an action, and by our practice, when you have the right to counter-claim, you have the right to a direct action.

In the United States, where they have a similar statute with sections similar to 503 and 504 of the *Merchant Shipping Act*, (Parsons on Shipping and Admiralty p. 121), the question today is not disputed. (233 U.S. 346; 58 Corpus Juris, p. 661, No. 1149).

In France, where they have the right to abandon the ship, this right exists also after contestation as to the responsibility. (PARDESSUS, tome 3, No. 633).

This demand presumes generally that the claim is admitted. The fact is that the counter-claim is made in case the principal demand is maintained.

If the parties had agreed that the damage was by bad navigation, and that the damage was for the amount now claimed, that would not preclude an action in limitation, even if there was only one claim.

The right to limit responsibility exists, in my opinion, even after judgment granting damages, provided the question of limitation was not raised. Such is the jurisprudence in the United States. (*Monongahela & Hurst* 200 Fed. 711).

I am, therefore, of opinion that there is no *chose jugée* in favour of Defendant, the point of the actual fault of the owner having never been raised in the previous action.

As to deviation, the Court of Appeal has, in my opinion, pronounced on this point and has discarded this ground of responsi-

bility admitted by the first judgment.

I am inclined to think that though the matter in controversy is not the same, there is *res judicata*, the matter in issue being the same. (American & English Encyclopedia of Law, Vol. 24, page 711, 780 and 781).

The notes of Honourable Mr. Justice Letourneau are no part of the judgment of the Court. The practice in Appeal is for one Judge only to sign the judgment of the Court. Even if the notes of the Judges were consulted, you would see in the notes that three Judges, to wit, the majority of the Court, declare formally that if there is no damage resulting from deviation, this ground cannot be alleged against the parties.

Moreover, the claim I am asked to reduce is founded on the final judgment as modified by the Court of Appeal and it is now the title of Defendant.

I do not feel that in this case I am free to reconsider the question. I do not mean to say that, in another case, seeing the judgment of the Privy Council in the case of the *Paterson Steamships Limited & The Canadian Co-operative Wheat Producers*, where the Privy Council states that our *Water Carriage of Goods Act* cannot be understood or construed except in the light of the shipowner's common law liability, I would not reconsider the question.

Neither is it to be understood that if I had to pronounce on the actual fault of the owner as to deviation, my opinion would be adverse to the owners, on the contrary.

In a word, as this case stands, I am of opinion that the judgment of the Court of Appeal should be followed.

The question remains then — has the Plaintiff in this case made proof that there was no actual

fault of the proprietor as to the compass?

It has been decided that the compass was not properly adjusted, though the adjuster was competent.

The whole litigation on this point comes to this—were the proprietors negligent in using the compass without a certificate from the adjuster?

If I had only the first testimony of the adjuster, I would say "yes," but in this case, the adjuster swears that his practice was not to send a certificate to the company but to the Captain of the ship.

I accept without hesitation the evidence of the officers of the

company who swear that this was not the practice; that what they always received was the bill for work done. Receiving this bill from a competent man, they had in my opinion, every reason to believe that the work was done and properly done.

For these reasons, I consider that they are entitled to the demand of limitation they pray for, and that judgment should be entered accordingly.

As to costs, seeing the declaration of the adjuster in the first case, I consider the contestation was reasonable, and that the defence are, according to the practice, entitled to the costs of this action.

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BETWEEN:

BLAKEY & COMPANY, LIMITED.. SUPPLIANT;

AND

HIS MAJESTY THE KING RESPONDENT.

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Revenue—Customs Act—British Preferential tariff—Order-in-Council passed under one statute rendered null and void when that statute repealed unless repealing statute contains a saving clause—Recovery of money paid under compulsion.

Pursuant to an Order in Council dated 18th August, 1931, passed under the authority of s. 43 of the Customs Act, R.S.C. 1927, c. 42, the Minister of National Revenue valued for duty purposes hats imported into Canada from Great Britain by the suppliant, by virtue of which valuation a special duty was imposed and became payable, together with the ordinary customs duty on the amount of said special duty and together with the resulting increased sales tax and excise tax on the amount of both said added duties. By 23-24 Geo. V, c. 7, ss. 1 of s. 43 of R.S.C. 1927, c. 42, was repealed and another section substituted therefor became law on November 25, 1932. The Minister continued to impose and collect the said added duties and taxes on hats imported by suppliant. Suppliant claimed that by virtue of c. 7, 23-24 Geo. V, the hats imported by it were entitled to entry under the British Preferential tariff and that the Minister had no authority to fix their value for duty and to impose and collect the duties, sales tax and excise tax.

Held: That the repeal of an act, or clause of an act, authorizing the passing or adoption of Orders in Council, regulations or by-laws, has the effect of repealing or voiding the Orders in Council, regulations or by-laws passed or adopted under the authority of such act or clause, unless there be in the repealing act a stipulation preserving their validity notwithstanding the repeal.

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2. That Orders in Council, regulations and by-laws are subordinate to the act and when the act is repealed the Orders in Council, regulations and by-laws made thereunder, unless otherwise expressly provided, lapse.
3. That the Order in Council of the 18th August, 1931, is inconsistent with s. 43, c. 7, 23-24 Geo. V, in the case of goods entitled to entry into Canada under the British Preferential tariff, and therefore null and void.
4. That the payment by the suppliant of the duty and other taxes imposed by the Minister was not voluntary but compulsory and therefore suppliant is entitled to recover the money so paid.

PETITION OF RIGHT by the suppliant claiming a declaration that certain duties and taxes collected by the Minister of National Revenue were collected without authority and that same be returned to suppliant.

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

H. D. Anger and *A. M. Latchford* for the suppliant.

Glyn Osler, K.C., and *D. Guthrie* for the respondent.

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

ANGERS J., now (November 9, 1935) delivered the following judgment:—

The suppliant, Blakey & Company Limited, is a wholesale dealer in men's hats; it has its head office in the City of Toronto, in the Province of Ontario. In pursuance of its business, it imports hats into Canada from Great Britain.

In its petition of right the suppliant alleges in substance that:—

Prior to November 25, 1932, pursuant to Orders in Council passed under the authority of section 43 of the Customs Act (R.S.C. 1927, chap. 42), the Minister of National Revenue valued for duty hats imported by the suppliant, by virtue of which valuation a special duty of \$1.50 per dozen hats was imposed and became payable, together with the ordinary customs duty on the amount of said special duty and together with the resulting increased sales tax and excise tax on the amount of both said added duties;

by section 1 of chapter 7 of the Statutes of Canada of 1932, said section 43 of the Customs Act was repealed and

substituted by another one which came into force on November 25, 1932;

by virtue of said substituted enactment all Orders in Council passed prior thereto ceased to have effect in so far as they related to goods entitled to entry into Canada under the British Preferential tariff and thereupon it was not competent for the Governor in Council to thereafter authorize the said Minister to value goods so entitled nor competent for the said Minister to continue to impose or collect said added duties and taxes;

notwithstanding said substituted enactment the Minister has continued and still continues to impose and collect from suppliant the said added duties and taxes on goods imported by him and entitled to entry under said preferential tariff;

pursuant to the regulations of the Minister and under the compulsion thereof and of customs officers entrusted with their enforcement, and in order to avoid the penalties provided for non-payment, including that of seizure or detention, and to obtain its goods, the suppliant was and is compelled to pay said added duties and taxes;

from November 25, 1932, to September 30, 1934, the suppliant has been compelled to pay said special duty of \$1.50 per dozen hats in the sum of \$1,971.50, ordinary customs duty thereon in the sum of \$408.49, sales tax on both said added duties in the sum of \$144.56 and excise tax on both said added duties in the sum of \$65.33, a total of \$2,587.78, to the refund of which the suppliant is entitled.

The suppliant, by his petition, prays for:—

(a) a declaration that from and after the 25th of November, 1932, all power of the Governor in Council to authorize the Minister of National Revenue to value goods entitled to entry into Canada under the British Preferential tariff and all power of the said Minister to so value and to impose and collect special duty, ordinary customs duty on said special duty and sales and excise tax on either of said duties did cease and determine;

(b) a reference to determine the amount collected from suppliant for said duties and taxes;

(c) judgment for the amount found to be due to claimant, with costs.

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In answer to the suppliant's petition, the respondent says in substance that:—

during the period from November 25, 1932, to September 30, 1934, the Minister of National Revenue, pursuant to an Order in Council passed on August 18, 1931, under the authority of section 43 of the Customs Act (R.S.C. 1927, chap. 42), fixed the value for duty of hats imported by the suppliant at the export or actual selling price thereof to the suppliant plus \$1.50 per dozen and there was imposed by virtue of such valuation in addition to duties, sales tax and excise tax on the value so established a special or dumping duty of \$1.50 per dozen hats together with the ordinary customs duty, sales tax and excise tax on the said sum of \$1.50 per dozen hats;

the amendment to section 43 made by 22-23 Geo. V, chap. 7, s. 1, did not repeal, annul or otherwise affect the validity of the Order in Council of the 18th of August, 1931, and subsequent to the date of the coming into force of said amendment, viz., November 25, 1932, and up to September 30, 1934, the Minister of National Revenue was and still is empowered by the said Order in Council to fix the value for duty of the hats imported by the suppliant at the export or actual selling price thereof to the suppliant plus \$1.50 per dozen and to impose and collect the duties, sales tax and excise tax which the suppliant claims therein were improperly imposed and collected;

the suppliant has from time to time voluntarily and with full knowledge of the facts paid the said duties, sales tax and excise tax and cannot now recover back the same.

The suppliant, in its reply, avers that it did not make any payment of duty or taxes voluntarily but that each payment was made under compulsion and under protest.

The parties agreed upon the facts and, at the trial, written admissions were filed as exhibit 1, the material statements whereof read as follows:—

1. During the period extending from the 25th of November, 1932, being the date of the coming into force of the Statute 23-24 George V, chapter 7, to the 30th of September, 1934, being an arbitrary date selected by the suppliant for the preparation of its claim at the inception of these proceedings, the suppliant from time to time imported hats from Great Britain entitled to entry into Canada under the British Preferential tariff

2. On the 18th of August, 1931, on a report from the Minister of National Revenue, an order was made by the Governor in Council, under

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the authority of section 43 of the Customs Act, as amended by section 4 of chapter 2 of the Statutes of 1930, Second Session, authorizing the Minister of National Revenue to fix the value for duty of hats (and certain other articles not here in question) and providing that the value so fixed should be deemed to be the fair market value thereof, notwithstanding any other provisions of the Customs Act. The said order in council was duly published in the *Canada Gazette*. . . .

3. On the 18th of August, 1931, under authority granted by the said order in council the Minister of National Revenue fixed the value for duty of hats (and certain other articles not here in question) at the export or actual selling price to the importer in Canada, plus \$1.50 per dozen and caused to be issued, for the guidance of Customs and Excise officers, appraisers' bulletin No. 3734. . . .

4. During the period extending from the 25th of November, 1932, to the 30th of September, 1934, and thereafter, the hats imported by the suppliant were valued for duty in accordance with the terms of the said order in council and order of the Minister of National Revenue. During the period extending from the 25th of November, 1932, to the 28th of February, 1934, and also during the period extending from the 15th of June, 1934, to the 30th of September, 1934, and thereafter, the suppliant paid customs duties, sales tax, and excise tax, at the rates from time to time in force on the total value so established, and in addition thereto the said \$1.50 per dozen hats as a special or dumping duty.

5. * * * * *

6. No claim is made by the suppliant for customs duties, sales tax or excise tax paid in respect of the hats imported during the period extending from the 28th of February, 1934, to the 15th of June, 1934, for the reason that during the said period the Department of Customs did not require payment of the said special duty and taxes, but reserved the right to require payment of the same by amended entries.

7. Upon certain of the customs entries in respect of the said hats there were endorsed the words "duty paid under protest on hats." Attached hereto as Schedule "D" (should be "E") is the first one of the said customs entries endorsed as aforesaid dated the 8th of February, 1934, and thereafter all customs entries were similarly endorsed except five in number.

8. Previous to the said 8th of February, 1934, no protest was endorsed on any of said customs entries.

Copies of the Order in Council of the 18th of August, 1931, of the order of the Minister of National Revenue pursuant thereto bearing the same date, of the appraiser's bulletin No. 3734 and of the customs entry of the 8th of February, 1934 (bearing the words "Duty paid under protest on hats") are annexed to the admissions as schedules A, B, C and E respectively; they offer no particular interest.

Paragraph 9 of the admissions relates the procedure which had to be followed by the suppliant in order to

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obtain possession of the goods imported by it; it may be summed up briefly as follows:—

upon receipt of an advice note of the carrier that the goods had arrived "in bond," the suppliant had to attend the Customs Office with this advice note and two copies of the vendor's invoice duly certified; the suppliant then had to complete the Departmental entry form (B. 1), showing the goods, the invoice value thereof, the ordinary customs duty thereon, the said special duty and the ordinary customs duty thereon, and excise and sales taxes on the said invoice value and the sum of all said duties; the customs officers then checked the documents to ascertain that the rate of ordinary and special duties and excise and sales taxes were correctly stated and that the said duties and taxes were correctly computed; after the interval required for such checking, the suppliant again had to attend the Customs Office and he was then required to pay the total of said duties and taxes; upon such payment being made, the customs officer issued a delivery warrant (Department form C. 1) authorizing the carrier to deliver the goods to the suppliant.

Section 43 of the Customs Act in force on the 18th of August, 1931, when the Order in Council with which we are concerned was passed, read thus:—

43. (1) If at any time it appears to the satisfaction of the Governor in Council on a report from the Minister that goods of any kind are being imported into Canada, either on sale or on consignment, under such conditions as prejudicially or injuriously to affect the interests of Canadian producers or manufacturers, the Governor in Council may authorize the Minister to fix the value for duty of any class or kind of such goods, and notwithstanding any other provision of this Act, the value as fixed shall be deemed to be the fair market value of such goods.

(2) Every order of the Governor in Council authorizing the Minister to fix the value for duty of any class or kind of such goods, and the value thereof so fixed by the Minister by virtue of such authority, shall be published in the next following issue of the *Canada Gazette*.

This section 43 was enacted by 21 Geo. V, chap. 2, s. 4 (assented to on the 22nd of September, 1930) to replace section 43 of chapter 42 of the Revised Statutes of Canada, 1927.

By 23-24 Geo. V, chap. 7 (assented to on the 25th of November, 1932) subsection 1 of section 43 was repealed and the following substituted therefor:—

43. (1) If at any time it appears to the satisfaction of the Governor in Council on a report from the Minister that goods of any kind not

entitled to entry under the British Preferential tariff or any lower tariff are being imported into Canada either on sale or on consignment, under such conditions as prejudicially or injuriously to affect the interests of Canadian producers or manufacturers, the Governor in Council may authorize the Minister to fix the value for duty of any class or kind of such goods, and notwithstanding any other provision of this Act, the value so fixed shall be deemed to be the fair market value of such goods.

It was argued on behalf of suppliant that the repeal of an act or clause of an act authorizing the passing or adoption of Orders in Council, regulations or by-laws has the effect of repealing or voiding the Orders in Council, regulations or by-laws passed or adopted under the authority of such act or clause, unless there be in the repealing act a stipulation preserving their validity notwithstanding the repeal. This contention seems to me well founded. Orders in Council, regulations and by-laws are subordinate to the act and when the act is repealed the Orders in Council, regulations and by-laws made thereunder, unless otherwise expressly provided, lapse. An Act of Parliament which is repealed must be considered (except as to transactions past and closed) as if it had never existed.

See *Watson v. Winch* (1); *Surtees v. Ellison* (2); *Kay v. Goodwin* (3); *Lemm v. Mitchell* (4); *City of St. Catharines v. Hydro-Electric Power Commission* (5); *Attorney-General v. Lamplough* (6); *The Queen v. The Inhabitants of Denton* (7); *Bélanger v. The King* (8); *The King v. National Fish Co.* (9); *Institute of Patent Agents v. Lockwood* (10); *Re Drewry* (11).

Counsel for respondent submitted that, when an act or clause of an act is repealed and another one substituted therefor, the Orders in Council, regulations and by-laws made under the act or clause repealed remain in force. This is true in so far as they are not inconsistent with the substituted enactment (section 20 of the Interpretation Act, R.S.C. 1927, chap. 1); if they are, they become null and void. The Order in Council of the 18th of August, 1931, is inconsistent with subsection (1) of section 43, as enacted

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| (1) (1916) 1 K.B., 688, at 690. | (6) (1878) 3 Ex.D., 214, at 222. |
| (2) (1829) 9 B. & C., 750, at 752. | (7) (1852) 18 Q.B., 761, at 770 and 771. |
| (3) (1830) 130 E.R., 1403, at 1405. | (8) (1916) 54 S.C.R., 265. |
| (4) (1912) A.C., 400, at 406. | (9) (1931) Ex.C.R., 75, at 82. |
| (5) (1927-28) 61 O.L.R., 465, at 475; (1928) 62 O.L.R., 301. | (10) (1894) A.C., 347, at 360. |
| | (11) (1917) 36 D.L.R., 197, at 199. |

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by 23-24 Geo. V, chap. 7, in the case of goods entitled to entry into Canada under the British Preferential tariff, as were the hats imported by the suppliant from Great Britain.

The only conclusion to draw is that the Crown has, since the 25th of November, 1932, date on which the statute 23-24 Geo. V, chap. 7, repealing subsection (1) of section 43 of the Customs Act, as enacted by 21 Geo. V, chap. 2, s. 4, and substituting therefor the subsection (1) which has since been on the statute book, was assented to and came into force, collected duties on hats imported by the suppliant from Great Britain to which it was not entitled.

The next question to be determined is whether the suppliant has the right to recover these duties from the respondent. In my opinion, it has if the payment were not voluntary but were made under compulsion.

The suppliant, in order to get his goods, had to comply with the requirements of the Customs Act, particularly with regard to the payment of duties; on its failure so to do, the goods were liable to forfeiture and seizure; the provisions of the Act in this respect are imperative and compulsory: see (*inter alia*) sections 19, 20, 21, 22, 23, 27, 112, 245 and 246.

I do not think, in the circumstances, that it can be said that the payments were voluntary, not even those made prior to the 8th of February, 1934, which is the date on which the words "duty paid under protest on hats" were for the first time endorsed on a customs entry (see paragraph 7 of admissions). Protests made prior to the 8th of February would have been of no more avail than the ones made subsequent thereto; considering the evident determination of the Minister of National Revenue to impose and collect, on hats imported from Great Britain after the 25th of November, 1932, duties and taxes computed on the basis of the value for duty fixed by the Minister on the 18th of August, 1931, under the authority of the Order in Council of the same date, notwithstanding the amendment made to section 43 of the Act by 23-24 Geo. V, chap. 7, protests were not only useless, but, in my opinion, they were unnecessary.

The question of the recovery of payments illegally exacted by the creditor and made by the debtor under compulsion has formed the subject of many decisions; it seems

to me convenient to make a brief review of those which are most in point.

In the case of *Maskell v. Horner* (1), the plaintiff, who for a number of years had carried on business as a dealer in produce in the vicinity of Spitalfields Market, sought to recover from the defendant, owner of the market, tolls which had been unlawfully demanded under threat of seizure and which he had paid to the latter under protest during several years, it was held by the Court of Appeal as follows:

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1. Affirming the decision of Rowlatt J. on this point, that the plaintiff did not pay under a mistake either of law or fact, but because he found that other sellers were paying tolls and he did not wish to be involved in litigation with the defendant, and that the plaintiff could not recover under this head of claim; but

2. (Pickford L.J. doubting), reversing the decision of Rowlatt J. on this point, that the circumstances of the payments and the conduct of the plaintiff throughout the period of years showed that he only paid to avoid seizure of his goods and never made the payments voluntarily, or intended to give up his right to the sums paid or close the transaction, and that he was entitled to recover under this head of claim the sums paid during the last six years immediately preceding this action, the earlier payments being barred by the Statute of Limitations.

At page 118 Lord Reading, C.J., expresses his opinion thus:

If a person with knowledge of the facts pays money, which he is not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift, and the transaction cannot be reopened. If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received. The money is paid not under duress in the strict sense of the term, as that implies duress of person, but under the pressure of seizure or detention of goods which is analogous to that of duress. Payment under such pressure establishes that the payment is not made voluntarily to close the transaction (per Lord Abinger C.B. and per Parke B. in *Atlee v. Backhouse*, 5 M. & W. 633, 646, 650). The payment is made for the purpose of averting a threatened evil and is made not with the intention of giving up a right but under immediate necessity and with the intention of preserving the right to dispute the legality of the demand (per Tindal C.J. in *Valpy v. Manley*, 1 C.B. 594, 602, 603).

Lord Reading, after referring to the cases of *Parker v. Great Western Ry. Co.* (2) and *Great Western Ry. Co. v. Sutton* (3), adds (p. 119):

This principle of law is so well settled that it cannot be challenged, and I find nothing in *Brisbane v. Dacres* (5 Taunt. 143) to the contrary. Indeed the general proposition of law is not disputed; but it was con-

(1) (1915) 3 K.B., 106.

(2) (1844) 7 Man. and G. 253.

(3) (1869-70) L.R. 4 H.L. 226, 249.

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tended, and the learned judge found, that the plaintiff had not brought himself within it, mainly because (1) the payments were not accompanied by a declaration or assertion to the defendant that the plaintiff did not intend to give up his right to recover the money, and (2) the protests for a period of years had degenerated into a sort of grumbling acquiescence and were ineffective. I doubt whether Rowlatt J. intended to find that there must be anything in the shape of an express notice or declaration to the defendant of the plaintiff's intention to keep alive his right to recover. It is clear, and was indeed admitted at the Bar, that no express words are necessary and that the circumstances attending the payments and the conduct of the plaintiff when making them may be a sufficient indication to the defendant that the payments were not made with the intention of closing the transactions. I do not think that the mere fact of a payment under protest would be sufficient to entitle the plaintiff to succeed; but I think that it affords some evidence, when accompanied by other circumstances, that the payment was not voluntarily made to end the matter.

Another recent case which offers a great deal of interest is that of *T. & J. Brocklebank, Ltd., v. The King* (1). The head-note states the facts concisely but clearly and I think I had better quote it:

The Defence of the Realm Acts and Regulations did not empower the Shipping Controller to require, as a condition of a licence to sell a British ship to a foreign firm, that a percentage of the purchase money should be paid to the Ministry of Shipping.

Where, therefore, such a condition had been imposed by the Shipping Controller and the proportion of the purchase money had been paid by the vendors to the Ministry:—

Held, that the imposition of the condition was illegal, and that the payment was not a voluntary payment.

Attorney-General v. Wilts United Dairies Ltd. (1921, W.N. 252; 1922, W.N. 217; 37 Times L.R. 884, 38 *ibid.* 781) applied.

In his judgment Avery J. says (p. 652):

I have now to consider whether the money in this case was paid under compulsion within the meaning of the authorities or whether it was a voluntary payment as contended on behalf of the Crown. The case of *Maskell v. Horner* (1915, 3 K.B. 106, 118), which was relied on by the suppliants, does not, in my opinion, govern this case.

The learned judge then cites the passage of the judgment of Lord Reading hereinabove reproduced and continues:

That passage must be read in connection with the facts of that case, which was decided on the ground that the tolls had been paid under threat of seizure of the plaintiffs' goods and to avert that threatened evil, and the judgments had no reference to the case of money extorted by a person *colore officii*.

On behalf of the Crown it was contended that the payment in this case was not made under protest, and the judgment of Walton J. in *William Whiteley, Ltd. v. The King* (101 L.T. 741) was relied on; but an express protest is not necessary if the compulsion is apparent from the circumstances of the case: *Maskell v. Horner*. The learned judge in *Whiteley's* case, while holding that money paid to the Commissioners of

(1) (1924) 1 K.B., 647.

Inland Revenue under threat that, if not paid proceedings would be taken for penalties, was not recoverable as money paid under compulsion, was careful to distinguish the case of money extorted by a person for doing what he is legally bound to do without payment, and upon this point the case of *Morgan v. Palmer* (2 B. & C. 729) is a direct authority. It may be said that the Shipping Controller was not legally bound to grant a licence, but in granting or refusing it, he was bound, I think, to exercise a judicial discretion and not to impose a condition of payment which was unlawful: *Rex v. Athay* (1758, 2 Burr. 653) and *Parker v. Great Western Ry. Co.* (1844, 7 Man. & G. 253, 292, 293). The money in the present case was not paid under any mistake of fact, nor was it, in my opinion, paid under any mistake of law, but adapting the words of Littledale J. in *Morgan v. Palmer* (2 B. & C. 729, 739) the suppliants were merely passive and submitted to pay the sum claimed as they could not otherwise procure the licence, and subject to the further point taken by the Attorney-General under the Indemnity Act, 1920 (10 & 11 Geo. 5, c. 48), I think the suppliants would be entitled to recover the sum claimed as money received to their use.

An appeal was taken from the judgment of Avery, J. resulting in a reversal on another point irrelevant to the issue herein (1). The judges of the Court of Appeal agreed with the trial judge that the payment had not been a voluntary one. Bankes, L.J., at page 61, makes the following observations:

The learned judge came to the conclusion after considering the evidence, and the authorities which were cited to him and to us, that the payment was not a voluntary one. I entirely agree with this view. The payment is best described, I think, as one of those which are made grudgingly and of necessity, but without open protest, because protest is felt to be useless. I do not propose to go through the evidence or to discuss the authorities, as upon the materials before the Court it seems to me impossible to disturb the judge's conclusion on this point.

Scrutton, L.J., who also sat in Appeal, arrived at the same conclusion (p. 67):

Further, I am clear that the payment by the petitioners in this case was not a voluntary payment so as to prevent its being recovered back. It was demanded by the Shipping Controller *colore officii*, as one of the only terms on which he would grant a licence for the transfer. It was a case where in Abbott C.J.'s language in *Morgan v. Palmer* (2 B. & C. 729, 735, 739): "One party has the power of saying to the other 'that which you require shall not be done except upon the conditions which I choose to impose,'" or, in the language of Littledale J. in the same case, "The plaintiff was merely passive, and submitted to pay the sum claimed, as he could not otherwise procure his licence." In fact here the petitioners made several inquiries and protests as to the legality of the claim.

See also the remarks of Sargant, L.J., in the same sense at page 72.

The case of *Morgan v. Palmer* (2) was an action of assumpsit for the recovery of a sum paid by the plaintiff, a

(1) (1925) 1 K.B. 52.

(2) (1823-24) 2 B. & C. 729.

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publican in the borough of Great Yarmouth, to the defendant as mayor of that borough and claimed by the latter as having become due to him on granting to the plaintiff his annual licence as a publican. At the trial before Garrow, B., a verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench. The Court held that the payment made by the plaintiff to the defendant was not voluntary so as to preclude the plaintiff from recovering the money.

Abbott, C.J., says (p. 734):

It has been well argued that the payment having been voluntary, it cannot be recovered back in an action for money had and received. I agree that such a consequence would have followed had the parties been on equal terms. But if one party has the power of saying to the other, "that which you require shall not be done except upon the conditions which I choose to impose," no person can contend that they stand upon anything like an equal footing. Such was the situation of the parties to this action. The case is therefore very different from *Brisbane v. Dacres*, and our judgment must be in favour of the plaintiff.

Littledale, J., dealing with the same subject, expresses a similar opinion (p. 738):

Then comes the objection, that this was a voluntary payment. In *Bilbie v. Lumley* (2 East, 469), *Brisbane v. Dacres*, and *Knibb v. Hall* (D1 Esp. 84), both parties might, to a certain extent, be considered as actors. Here, the plaintiff was merely passive, and submitted to pay the sum claimed, as he could not otherwise procure his licence. I think, therefore, that he is entitled to recover it back in this action.

Another action of assumpsit to recover money received by the defendant, in which the question of compulsory payment arose is that of *Parker v. The Great Western Ry. Co.* (1). By the acts of Parliament under which a railway company was incorporated, it was provided that the charges for the carriage of goods should be reasonable and equal to all persons and that no reduction or advance should be made in favour of or against any person. The company acted as carrier for the public and issued scales of charges for carriage of goods, including collections, loading, unloading and delivery of parcels. The company also carried goods for other carriers to whom it made certain allowances as an equivalent for the trouble of collection, loading, unloading and delivery of parcels, these being performed by the carriers. In its dealings with plaintiff, a particular carrier, the company refused to make such allowances but

was willing to perform for him the things which formed the consideration for such allowances.

Tindal, C.J., dealing with the right of the plaintiff to recover the amount paid to defendant in excess of the regular charges to carriers, says (p. 292):

But it remains to be considered whether the money so paid can be recovered by the plaintiff, in this action.

It was argued for the defendants that it cannot; for, that the payments were made voluntarily, with a full knowledge of all the circumstances; and that the plaintiff was not compelled to make those payments, but, in each case, must be considered as having made a contract with the company to pay them a certain sum of money as the consideration for the carriage of his goods; and that, having made such contracts, he cannot now retract, and recover the money paid in pursuance of them. In support of this argument, *Knibbs v. Hall* (1 Esp. N.P.C. 84), *Brown v. McKinally* (1 Esp. N.P.C. 279), *Bilbie v. Lumley* (2 East, 469), and *Brisbane v. Dacres* (5 Taunt. 143) were cited. On the other side, it was urged, that these could not be considered as voluntary payments; that the parties were not on an equal footing; that the defendants would not, until such payments were made, perform that service for the plaintiff which he was entitled by law to receive from them without making such payments; and that, consequently, he was acting under coercion; and in support of this view of the case, *Dew v. Parsons* (2 B. and Ald. 562, 1 Chitt. Rep. 295), *Morgan v. Palmer* (2 B. & C. 729, 4 D. & R. 233), and *Waterhouse v. Keen* (4 B. & C. 200, 6 D. & R. 257) were referred to.

We are of opinion that the payments were not voluntary. They were made in order to induce the company to do that which they were bound to do without them; and for the refusal to do which, an action on the case might have been maintained, as was expressly decided in the case of *Pickford v. The Grand Junction Railway Company* (10 M. & W. 399).

In the case of *Hooper v. The Mayor and Corporation of Exeter* (1), in which the plaintiff was seeking to recover from the defendants harbour dues exacted in respect of exempted articles, Lord Coleridge, C.J., said (p. 458):

From the case cited in the course of the argument it is shewn that the principle has been laid down that, where one exacts money from another and it turns out that although, acquiesced in for years such exaction is illegal, the money may be recovered as money had and received, since such payment could not be considered as voluntary so as to preclude its recovery.

The doctrine concerning the recovery of money paid under compulsion was ably and fully expounded by the Appellate Division of the Supreme Court of Ontario in *re Pillsworth v. Town of Cobourg* (2). The head-note is as follows:

The plaintiff, believing that certain taxes imposed upon his land by the council of the municipality in which he lived were illegally imposed under the Local Improvement Act (as was found to be the fact), declined to pay them, but subsequently paid them under protest in order to rid

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(1) (1887) L.J. 56 Q.B., 457.

(2) (1930) 65 O.L.R., 541.

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his land of the burden of the taxes, which he was obliged to do in order to obtain a loan of money upon a mortgage of the land:—

Held, that the plaintiff, being in immediate need of the loan and not being able to obtain it for a year or more if he brought an action to have the registration in the municipal treasurer's office of these taxes declared a cloud on his title, was under such compulsion as prevented the payment made by him under protest from operating as a voluntary payment, and was entitled to recover the money paid.

The strict rules of the earlier cases have been substantially modified by more recent decisions, such as *Mackell v. Horner* (1915), 3 K.B. 106, and *Pople v. Town of Dauphin* (1921), 31 Man. R. 125, 60 D.L.R. 30.

Masten, J.A., who delivered the judgment of the Court, made a review of the more recent decisions, which indeed throws much light on the subject (p. 545 *et seq.*).

The following cases may be consulted with profit: *Pople v. Dauphin* (1); *Campbell v. Halverson* (2); *Cushen v. City of Hamilton* (3); *North v. Walthamstow Urban Council* (4); *Atlee v. Backhouse* (5); *Steele v. Williams* (6). See also Halsbury's Laws of England, 2nd edition, vol. 7, p. 279, para. 390.

After careful consideration of the facts and of the law, I have reached the conclusion that the payment by the suppliant of the special duty, the ordinary customs duty thereon and the sales tax and excise tax on either of said duties at issue was not voluntary but compulsory and that the suppliant is entitled to the relief sought by his petition.

There will be judgment declaring that from and after the 25th of November, 1932, all power of His Majesty's Governor in Council to authorize the Minister of National Revenue to value goods entitled to entry into Canada under the British Preferential tariff and all power of the said Minister to so value and to impose and collect special duty, ordinary customs duty on said special duty and sales and excise tax on either of said duties ceased and determined.

If the parties cannot agree, within fifteen days from the date hereof, upon the amount of the special duty, of the ordinary customs duty thereon and of the sales and excise tax on either of said duties paid by the suppliant between

(1) (1921) 60 D.L.R., 30.

(2) (1919) 49 D.L.R., 463.

(3) (1902) 4 O.L.R., 265, at 267.

(4) (1898) L.J., 67 Q.B., 972.

(5) (1838) 3 M. & W., 633, at 645.

(6) (1853) 8 Ex., 625.

the 25th of November, 1932, and the 30th of September, 1934, inclusive, there will be a reference to the Registrar of this Court for inquiry and report.

The suppliant will be entitled to its costs.

Judgment accordingly.

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AND

MONTREAL STOCK EXCHANGE.... DEFENDANT.

AND

HIS MAJESTY THE KING, ON THE
 INFORMATION OF THE ATTOR-
 NEY-GENERAL OF CANADA..... } PLAINTIFF;

AND

EXCHANGE PRINTING COMPANY.. DEFENDANT.

Revenue—Sales Tax—Newspapers—Stock exchange sheets—Special War Revenue Act, R.S.C. 1927, c. 179, Schedule III.

Held: That sheets or papers printed and circulated semi-daily and weekly among subscribers by the defendants herein are “newspapers” within the meaning of Schedule III of the Special War Revenue Act, R.S.C. 1927, c. 179, and therefore not subject to the sales tax imposed by that statute.

ACTIONS by the Crown to recover certain amounts alleged to be due by the defendants for sales tax.

The actions were tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

F. P. Varcoe, K.C. for the Crown.

L. A. Forsyth, K.C. and *G. F. Osler* for the defendants.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (May 3, 1935) delivered the following judgment:

In these two Informations it is claimed by the plaintiff, that in the period 1920 to 1927 inclusive, the first named defendant printed, produced or manufactured and sold, printed matter and thereby became liable to the sales tax imposed by the Special War Revenue Act, R.S.C. 1927,

chap. 179, sec. 86, and similarly the second named defendant for the period of 1931 to 1934 inclusive.

The provisions of the Special War Revenue Act which are relevant to the controversy here may at once be mentioned. Sec. 86 provides that "there shall be imposed, levied and collected a consumption or sales tax of six per cent on the sale price of all goods, (a) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof" and (b) "imported into Canada payable by the importer or transferee who takes the goods out of bond for consumption . . ." By sec. 85 (f) the expression "producer or manufacturer" is to be construed as including "any printer, publisher, lithographer or engraver. . . ." Sec. 89 (1) is to the effect that the tax imposed by sec. 86 of the Act shall not apply to the sale or importation of articles mentioned in Schedule III of the Act, and the Schedule includes "newspapers and quarterly, monthly, bi-monthly, and semi-monthly magazines and weekly literary papers unbound . . . and material used exclusively in the manufacture or production thereof."

The facts may be briefly stated. For the period 1920 to 1927, the Montreal Stock Exchange, hereinafter called the "Exchange," printed twice daily, in the forenoon and afternoon, whenever the Exchange was in session, a two-page paper which it will be convenient hereafter to refer to as a "sheet," or "sheets," giving the daily transactions of the Exchange, and also a similar sheet giving the daily transactions of the Montreal Curb Market, hereinafter to be called the Curb, the purpose being to give a complete daily record of all sales on the Exchange, and the Curb, that is, the volume of shares bought and sold and the price quotations of such transactions. There were also published two weekly sheets of four pages each, being as I understand it, a résumé of the week's transactions on the Exchange, and on the Curb, respectively. The name of one sheet was "Montreal Stock Exchange," the other being "Montreal Curb Market," each bearing the precise date of issue. From the exhibits put in evidence it would appear that the daily sheets contained printed matter on both sides. Frequently these sheets would contain notices as to the payment of dividends, passing of dividends, an-

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nual or special meetings, loss of certificates, and generally matters of special importance relative to companies listed on the Exchange, and which would be of interest to Exchange members and subscribers; I assume that this practice also applied in the case of the daily sheets publishing Curb transactions, and the companies whose shares were dealt in on the Curb, though of this I am not quite sure. These printed sheets were in the main delivered by hand to subscribers, and the subscription price exacted and paid was at the rate of \$6 per quarter if two sheets were taken by a subscriber; the subscription price declined as the number of sheets subscribed for by each person increased; the sheets were not obtained by members of the Exchange or the Curb, as a privilege of membership in either body. Other subscribers, relatively small in number, included outside exchanges in Canada and the United States, banks, trust companies, and statistical institutions, to whom the sheets were mailed by letter-post. Subscriptions would be sold to any person on application whether or not he was a member of the Exchange or the Curb.

With the period from 1927 to 1931 we are not concerned as the sales tax was apparently paid in that period. For the period, 1931 to 1934, the sheets mentioned and described were printed and circulated by the defendant Exchange Printing Company, a corporation whose stock was owned by the Exchange, and whose directors were in effect selected by the directors or the governing body of the Exchange. The defendant Exchange Printing Company did and does job-printing work for customers unassociated with the Exchange or Curb, and upon such work the sales tax was paid. The sheets, in this period, were printed and circulated by the Exchange Printing Company to subscribers, on the terms, and in the manner, as when the Exchange, in the earlier period, printed and circulated the same.

It will be seen therefore that the point for determination is whether the sheets published formerly by the Exchange, and now by the Exchange Printing Company, are "newspapers" within the meaning and intent of the Act; if they are, it is agreed, the plaintiff must fail. I was referred to many dictionary meanings of the word "newspaper." Webster's New International Dictionary defines "newspaper" as "a paper printed and distributed, at stated in-

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tervals, . . . to convey news, . . . and other matters of public interest." The Encyclopaedia Britannica, 11th Ed., Vol. 19, states that "the word 'newspaper' as now employed, covers so wide a field that it is difficult, if not impossible, to give it a precise definition," and it gives the definition of "newspaper" contained in the English "Newspaper Libel and Registration Act," as "any paper containing public news, intelligence or occurrences, or any remarks or observations therein printed for sale, and published periodically, or in parts or in numbers at intervals. . . ." The Concise Oxford Dictionary defines "news" as "tidings, new information, fresh events reported," and "newspaper" as a "printed publication." Any assistance that is to be derived from any other of the cited standard dictionaries is much to the same effect.

The definition given to "newspaper" in other statutes I do not find helpful, and as stated by Duff J., in *Miln-Bingham Printing Co. Ltd. v. The King* (1), the usage of that word in other statutes may be looked at, if the other statute happens to be *in pari materia*, but it is altogether a fallacy to suppose that because two statutes are *in pari materia*, a definition clause in one can be bodily transferred to the other. Under the Post Office Act, chap. 161, R.S.C. 1927, in order that newspapers may obtain the statutory postage rate they must conform to certain specifications, and for that purpose, and for that purpose only, a definition is given of a "newspaper" by sec. 23. In this case the sheets were almost wholly delivered by hand, in order to be useful to subscribers, and those forwarded by mail paid the letter postage. It is not required by law that newspapers be forwarded to subscribers through the post office. The Post Office Act does not therefore assist us.

It seems to me that the sheets in question here, printed and circulated semi-daily and weekly among subscribers, containing news of very great importance to subscribers, must fall within the designation of a "newspaper"; they contain news printed on paper at fixed intervals, for the information of subscribers, and for a consideration. To say this publication is not a newspaper is, I think, to disregard actual facts, and the common sense of the matter. The demand for it, twice daily, and at specific hours of the

day, distinctly mark it as a publication containing news, devoted to special interests, news that had to be quickly communicated after the transpiry of the events which comprise the subject matter printed in the sheets. A paper is none the less a newspaper because it is devoted primarily to special interests, or because it had a limited circulation, or because it is not ordinarily circulated through the mails. The special news contained in these sheets is also regularly printed on certain pages of the Montreal daily press, and this is ordinarily regarded as news, as, I think, it must be here.

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Another method, by which one might inquire if the sheets come within the definition of a "newspaper," would be to inquire what was intended by the legislature to fall within sec. 85 (f). I think that subsection read along with sec. 86 was intended to refer to articles or goods manufactured and carried in stock, by a printer, for sale to customers, such as, for example, legal forms, or bill-heads, which are frequently carried by other merchandisers, or the same articles produced or manufactured to order by a printer, to be delivered on completion to the person ordering the same. Such articles might appropriately be described as "goods," but I doubt if the sheets in question could be properly so referred to. In the former instances the sales tax might and likely would form a part of the cost to the purchaser or customer, but I do not think this was intended in the case of such publications as are here in question. I am not satisfied that the legislature had it in mind to impose a sales tax on publications of this kind, which, in the generally received sense of the word would not be regarded as "goods" or "articles" produced or manufactured, or imported, for consumption. In any event, it is very far from clear that the legislature intended to impose the sales tax upon the publications here in question, and for that reason the plaintiff should fail.

Accordingly, I am of the opinion that the printed publications here are "newspapers"; I feel quite confident that such was the intention of the legislature, and I cannot see that they can be designated as anything else. These two actions, heard together, are therefore dismissed with costs.

Judgment accordingly.

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CANADIAN GENERAL ELECTRIC COMPANY LIMITED	}	PLAINTIFF;
AND		
NATIONAL ILLUMINATION COM- PANY	}	DEFENDANT.

Practice—Service of statement of claim—Patent action—Registered firm in Province of Quebec—Exchequer Court Rules—Code of Civil Procedure—English practice.

Held: That service of the statement of claim at the place of business of defendant, a registered firm doing business in the Province of Quebec and owned by one G. who was not served with the statement of claim personally, constitutes good service and is regular, valid and legal.

MOTION to set aside the service of the statement of claim herein.

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

W. G. Pugsley, K.C. for the motion.

E. G. Gowling contra.

ANGERS J., now (October 7, 1935) delivered the following judgment:

Motion by the defendant asking that the service of the statement of claim be declared irregular, illegal, null and void and that the said statement of claim be dismissed with costs, *sauf recours*.

The action is one for infringement of letters patent for invention, with the usual conclusions.

The motion sets forth in substance: that National Illumination Company is a registered firm doing business in the Province of Quebec and not an incorporated company; that Arnold Goldstein is the registered owner of the said firm; that the said Arnold Goldstein was not served with the statement of claim either at his residence or personally at his place of business, as required by law; that the defendant suffers prejudice.

The motion is supported by Goldstein's affidavit stating that the facts alleged therein are, to the best of the deponent's knowledge and belief, true and correct.

In further support of the motion the defendant produced a duly certified copy of a declaration reading as follows:

I, the undersigned, Arnold Goldstein, bachelor, of the City of Montreal, declare that I have this day commenced to carry on the business of wholesaling and retailing electrical equipment, under the firm name and style of "National Illumination Co."

I declare that I am unmarried and that there is no one else associated with me in conducting the said business.

In witness whereof I have signed these presents at Montreal, this eleventh day of December, nineteen hundred and thirty-four.

(Signed) ARNOLD GOLDSTEIN.

Witnessed by:

(Signed) MAX CARMAISE, N.P.

The copy in question shows that the original of this declaration was filed and registered with the Prothonotary of the Superior Court of the Province of Quebec, District of Montreal, on the 12th of December, 1934, in compliance with Article 1834a of the Civil Code of the Province of Quebec.

It was argued on behalf of defendant that the action should have been taken against the registered owner, namely Arnold Goldstein, instead of National Illumination Company which is only a firm name. In support of this contention counsel for defendant cited the case of *Browne et al v. Taylor* (1), in which it was held as follows:

1. A commercial partnership is not a jural person or entity distinct from the several members who compose it. It cannot be a plaintiff in an action and as all the individual partners must be named as such in the writ, any one of them who does not reside in the province may be required to give security for costs.

This decision is in accordance with the requirements of Article 122 of the Code of Civil Procedure of the Province of Quebec, the material provisions whereof read as follows:

122. The writ must state the names, the occupation or quality and the domicile of the plaintiff, and the names and the present or last known residence of the defendant.

* * * * *

If a commercial partnership, having its principal place of business outside the district, is not registered therein, it may be summoned by its firm name, with mention of the place where such principal place of business is situated; but the judgment rendered against it is executory only against partnership property.

So long as a registered commercial partnership is not dissolved it may be sued under its firm name, but the judgment rendered against it is executory only against partnership property.

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There are no similar provisions in the rules of this Court and it has been the practice, perhaps not commendable, to designate in a statement of claim a partnership or a person carrying on business under a firm name solely by the firm name. I do not think that Article 122 of the Code of Civil Procedure applies and that a decision based thereon can be of any assistance.

My attention was drawn to rule 42 of the rules of this Court. This rule, which, in matters of patents of invention, copyrights, trade marks and industrial designs, is an exception to the general rule laid down in rule 2, provides that:

In any proceeding in the Exchequer Court respecting any patent of invention, copyright, trade-mark or industrial design, the practice and procedure shall, in any matter not provided for by any Act of the Parliament of Canada or by the Rules of this Court (but subject always thereto) conform to, and be regulated by, as near as may be, the practice and procedure for the time being in force in similar proceedings in His Majesty's Supreme Court of Judicature in England.

Rule 11 of Order XLVIII A of the Rules of the Supreme Court, 1883 (Eng.) enacts that:

Any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply.

This rule applies apparently to actions of any nature, including actions respecting patents of invention, copyrights, trade marks and industrial designs. I will venture to say nevertheless that, when the names of the partners or the name of the person carrying on business under a firm name can be ascertained, as was the case in the present instance, it seems to me advisable to mention them in the designation. However it may be, the motion before me does not take objection to the designation of the defendant but merely invokes the irregularity and illegality of the service of the statement of claim; this is the only question with which we are concerned.

It was urged on behalf of defendant that the statement of claim should have been served on the defendant personally in compliance with rule 64 of the rules of this Court, which is in the following terms:

Service upon a defendant of an office copy of the information or statement of claim is to be effected personally, except in the cases hereinafter otherwise provided for; but it shall not be necessary to produce the original information, statement of claim or petition of right at the time

of service. The affidavit of service may be in the terms of Form 15 in the Appendix to these Rules.

Counsel for defendant submitted susidiarily that, if personal service was not imperative, service should have been effected by leaving the statement of claim with a reasonable person at the defendant's domicile or ordinary place of residence, as required by Article 128 of the Code of Civil Procedure and that service at the place of business was only permitted in the absence of a regular domicile or ordinary residence. Article 128 of the Code of Civil Procedure, on which counsel for defendant relied, reads as follows:

128. Service must be made either upon the defendant in person, or at his domicile or at the place of his ordinary residence, speaking to a reasonable person belonging to the family.

In the absence of a regular domicile or ordinary residence, service may be made upon the defendant at his office or place of business, if he has one.

Counsel contended that, as the defendant had, at the time of the service, a regular domicile and place of ordinary residence, the statement of claim should have been left there and not at his place of business.

I do not think that Article 128 has any application in the present case.

It was argued on behalf of plaintiff that service at the place of business was valid and legal under the provisions of rule 66, which reads thus:

When partners are sued in respect of any partnership liability, the information, statement of claim or petition of right may be served either upon any one or more of the partners, or at the principal place (within the jurisdiction) of the business of the partnership upon any person having, at the time of service, the control or management of the partnership business there; and such service shall be deemed good service upon all the partners composing the firm.

The adoption by a person of a firm name does not constitute a partnership and National Illumination Company, although apparently a partnership, is not one in reality. But under rule 11 of Order XLVIII Aforesaid, a person carrying on business alone under a firm name is assimilated to a partnership. For this reason I believe that the service at the place of business was in order.

In the Code of Civil Procedure, where we find provisions concerning the service of an action on an individual (Article 128) and provisions concerning the service on a partnership (Article 139), there is no provision dealing with service on a person doing business alone under a firm

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name; still service of an action at the place of business in the latter case was held to be valid and legal by the Court of Review in the case of *Bourdon v. Bradshaw* (1), in which Lemieux J., rendering the judgment of the majority of the Court, said (p. 391):

Les personnes prenant une raison sociale et formant une société nominale, comme Bradshaw & Co., se constituent apparemment en société en nom collectif.

Cette raison sociale ou société nominale indique apparemment une pluralité de membres dans la raison sociale, et laisse généralement croire, par cette appellation ou autre que celle de son nom, qu'un individu faisant ainsi affaires est en société avec d'autres.

L'objectif de ces raisons sociales est de faire le commerce sous un nom particulier ou d'emprunt.

Je classe ces raisons sociales dans la catégorie des sociétés en nom collectif, et elles doivent être considérées et traitées comme telles, en matière d'assignation, c'est-à-dire, suivant l'article 139 C.P.C., qu'elles peuvent être assignées au bureau d'affaires de cette raison sociale.

For the reasons above stated I have reached the conclusion that the service of the statement of claim at the place of business of the defendant was regular, valid and legal.

The contention propounded by counsel for plaintiff that Arnold Goldstein was not a party to the action and that he had no right to appear therein is, in my opinion, unfounded. Goldstein is the registered owner of National Illumination Company and as such he has an interest in contesting the suit taken against it.

The motion is dismissed with costs against the defendant.

The defendant will have fifteen days from the date hereof to file a statement in defence.

Judgment accordingly.

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written orders of the Engineer, for which no price or prices are named herein, His Majesty the King, in consideration and subject as aforesaid, will pay to the contractor the actual and reasonable cost, as determined by the engineer, of such work, materials and things, with an additional ten per cent thereon for the use of tools, contractor's plant, superintendence and profits"—Work was commenced in November, 1927, and by November 20, 1928, most of the piles required for the work had been driven into position. On the latter date suppliant was instructed by the district engineer to stop work because of water having risen in the forms in which concrete was to be deposited and the piles were left unprotected. Due to the pressure of ice in the spring of 1929 certain sections of the piles were broken and rendered unserviceable. Suppliant was instructed by Respondent's engineer to remove the damaged piles. This proved very difficult and suppliant was authorized to shift the outer face of the quay five feet outside its original alignment. Suppliant's claim is for the cost of removing and replacing the broken piles.—*Held*: That the contract entered into by the parties is not a *contrat à forfait* according to the terms of the Article 1683 C.C.—2. That the engineer's certificate, required for the payment of works specified in the contract and of additional work not covered by the contract but ordered by the engineer, is not a condition precedent to the right of the contractor to be paid for work done to replace works executed in virtue of the contract which have been destroyed or damaged by an act of nature.—3. That certain memoranda, prepared for the guidance of the Minister of Public Works in determining whether suppliant's claim should be entertained or not, were privileged, on the ground that they were confidential reports, and not on the ground that their production would be prejudicial to the public interest. The privilege of exclusion of documents as evidence at the request of the Crown must not be extended beyond the requirements of public safety or convenience. **DUFRESNE CONSTRUCTION Co. v. THE KING**.....77

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of a plea of anticipation, depending upon the recollection of witnesses over a number of years, and implying fine distinctions or close diversities between two things, should be considered with great caution and should be disregarded unless established beyond a reasonable doubt, before it is accepted to defeat a patent under which a patented article is made, and particularly when it has gone into substantial use by the public.—

2. That in order to establish that a patent has been anticipated, any information as to the alleged invention given by any prior publication must, for the purpose of practical utility, be equal to that given by the subsequent patent. The latter invention must be described in the earlier publication that is held to anticipate it, in order to sustain the defence of anticipation.—3. That where the question is solely one of prior publication it is not enough to prove that an apparatus described in an earlier specification, could have been used to produce this or that result. It must also be shown that the specifications contain clear and unmistakable directions so to use it. It must be shown that the public have been so presented with the invention, that it is out of the power of any subsequent person to claim the invention as his own. *Canadian General Electric Co. Ltd. v. Fada Radio Ltd.* (No. 7026) (1927) Ex. C.R. 134 followed. *WILLIAM H. CORDS ET AL V. STEELCRAFT PISTON RING CO. OF CANADA ET AL.* 38 4. — *Patent Act—Patent Rules—Reference in one claim to a preceding claim in the same specification.—Held:* That the inclusion by reference in one claim, of one or more preceding claims, in the specification accompanying an application for Letters Patent for an invention, is permissible under the Patent Act. *A. C. COSSOR LTD. V. COMMISSIONER OF PATENTS* 22

5. — *Subject matter—Anticipation—Prior art—Specification—Disclosure—Company—Infringement of Patent—Officers—Liability.—Held:* That in order to establish that a patent has been anticipated, any information as to the alleged invention given by any prior publication must, for the purpose of practical utility, be equal to that given by the subsequent patent. The latter invention must be described in the earlier publication that is held to anticipate it in order to sustain the defence of anticipation.—2. Where the question is solely one of prior publication it is not enough to prove that an apparatus described in an earlier specification, could have been used to produce this or that result. It

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must also be shown that the specifications contain clear and unmistakable direction, so to use it. It must be shown that the public have been so presented with the invention, that it is out of the power of any subsequent person to claim the invention as his own.

—3. That the officers and directors of a company cannot be made liable for an infringement of a patent by the company, merely by reason of their position as officers and directors. *NORTHERN ELECTRIC CO. LTD. ET AL. V. JOHN CHARLES BURKHOLDER ET AL.*..... 127

PATENT ACT.

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PENALTY.

See CONTEMPT OF COURT.

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See TRADE MARKS, No. 2.

PLAINTIFF REQUIRED TO HAVE AN INTEREST IN ACTION BROUGHT.

See REVENUE, No. 3.

PRACTICE.

See PATENTS, No. 2.
See TRADE MARKS, No. 3.

PREMIUM PAID ON REDEMPTION OF CAPITAL STOCK OF CORPORATION TAXABLE AS INCOME.

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PRIOR ART.

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PRIVILEGED DOCUMENTS.

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RECOVERY OF MONEY PAID UNDER COMPULSION

See REVENUE, No. 1.

REFERENCE IN ONE CLAIM TO A PRECEDING CLAIM IN THE SAME SPECIFICATIONS.

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REGISTERED FIRM IN PROVINCE OF QUEBEC.

See PATENTS, No. 2.

REMOVAL OF BARGE FROM BERTH AT PIER BY CREW OF SHIP.

See SHIPPING, No. 2.

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1. BRITISH PREFERENTIAL TARIFF, No. 1.
2. CIVIL CODE, No. 3.
3. COMPANIES ACT, s. 98, No. 7.
4. CONSTITUTIONAL LAW, No. 2.
5. CUSTOMS, No. 2.
6. CUSTOMS ACT, Nos. 1 and 2.
7. DIVIDENDS PAID FROM RESERVE FUNDS BUILT UP OUT OF PROFITS SET ASIDE AS ALLOWANCES FOR DEPLETION AND DEPRECIATION OF COMPANY'S ASSETS TAXABLE AS INCOME, No. 7.
8. FOREIGN SHIP, No. 2.
9. INCOME, No. 7.
10. INCOME WAR TAX ACT, Nos. 6 and 7.
11. ISOLATED ACT BY PERSON NOT A MANUFACTURER OR PRODUCER BY TRADE, No. 4.
12. "MANUFACTURES," No. 3.
13. MERCHANT SHIPPING ACT, No. 2.
14. MINING COMPANY, No. 7.
15. NEWSPAPERS, No. 5.
16. NO EXEMPTION FROM LOCAL LAW FOR FOREIGN SHIP PUTTING INTO PORT UNDER CONSTRAINT, No. 2.
17. NON-RESIDENT SHAREHOLDER IN CANADIAN COMPANY, No. 7.
18. ORDER IN COUNCIL PASSED UNDER ONE STATUTE RENDERED NULL AND VOID WHEN THAT STATUTE REPEALED UNLESS REPEALING STATUTE CONTAINS A SAVING CLAUSE, No. 1.
19. PLAINTIFF REQUIRED TO HAVE AN INTEREST IN ACTION BROUGHT, No. 3.
20. PREMIUM PAID ON REDEMPTION OF CAPITAL STOCK OF CORPORATION TAXABLE AS INCOME, No. 6.
21. RECOVERY OF MONEY PAID UNDER COMPULSION, No. 1.
22. REVENUE LAWS, No. 2.
23. SALES TAX, Nos. 3 and 5.
24. SALES TAX NOT PAYABLE, No. 4.
25. SEIZURE, No. 2.
26. SPECIAL WAR REVENUE ACT, Nos. 4 and 5.
27. SPECIAL WAR REVENUE ACT REGULATIONS, No. 3.
28. STOCK EXCHANGE SHEETS, No. 5.
29. UNTRUE REPORT, No. 1.

REVENUE—Customs Act—British Preferential tariff—Order-in-Council passed under one statute rendered null and void when that statute repealed unless repealing statute contains a saving clause—Recovery of money paid under compulsion.—Pursuant to an Order in Council dated 18th August, 1931, passed under the authority of s. 43 of the Customs Act, R.S.C. 1927, c. 42, the Minister of

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National Revenue valued for duty purposes hats imported into Canada from Great Britain by the suppliant, by virtue of which valuation a special duty was imposed and became payable, together with the ordinary customs duty on the amount of said special duty and together with the resulting increased sales tax and excise tax on the amount of both said added duties. By 23-24 Geo. V, c. 7, ss. 1 of s. 43 of R.S.C. 1927, c. 42, was repealed and another section substituted therefor became law on November 25, 1932. The Minister continued to impose and collect the said added duties and taxes on hats imported by suppliant. Suppliant claimed that by virtue of c. 7, 23-24 Geo. V, the hats imported by it were entitled to entry under the British Preferential tariff and that the Minister had no authority to fix their value for duty and to impose and collect the duties, sales tax and excise tax.—*Held:* That the repeal of an act, or clause of an act, authorizing the passing or adoption of Orders in Council, regulations or by-laws, has the effect of repealing or voiding the Orders in Council, regulations or by-laws passed or adopted under the authority of such act or clause, unless there be in the repealing act a stipulation preserving their validity notwithstanding the repeal.—2. That Orders in Council, regulations and by-laws are subordinate to the act and when the act is repealed the Orders in Council, regulations and by-laws made thereunder, unless otherwise expressly provided, lapse.—3. That the Order in Council of the 18th August, 1931, is inconsistent with s. 43, c. 7, 23-24 Geo. V, in the case of goods entitled to entry into Canada under the British Preferential tariff and therefore null and void.—4. That the payment by the suppliant of the duty and other taxes imposed by the Minister was not voluntary but compulsory and therefore suppliant is entitled to recover the money so paid. **BLAKEY & Co. LTD. v. THE KING.. 223**

2. — *Customs—Customs Act, ss. 11, 185, 207—Seizure—Foreign ship—No exemption from local law for foreign ship putting into port under constraint—Untrue report—Merchant Shipping Act—Constitutional law—Revenue laws.*—The *Apouckmaouchea*, a ship owned by the claimant, Cashin, of St. John's, Newfoundland, the port of registry, cleared from Halifax, N.S., unladen, took on a cargo at St. Pierre and unloaded that cargo on to another vessel at a point some fourteen or fifteen miles off the coast of Nova Scotia. The ship then put into Halifax on account of

REVENUE—Continued

engine trouble; the claimant, Lewis, master of the ship, in reporting to the Collector of Customs at Halifax, as required by s. 11 of the Customs Act, c. 42, R.S.C. 1927, made an untrue report. Later the ship was seized by the Royal Canadian Mounted Police for an alleged violation of s. 185 of the Customs Act. On appeal from the decision of the Minister of National Revenue, confirming the seizure, claimants contended *inter alia* that s. 11 of the Customs Act was *ultra vires*.—*Held*: That for customs purposes, a vessel which is not registered in a Canadian port, even though a British vessel, must be considered a foreign vessel.—2. That putting into port under constraint does not carry any legal right to exemption from local law or local jurisdiction.—3. That the report required by s. 11 of the Customs Act is required to be made only after the vessel has entered a Canadian port, and the fact that disclosure is required of acts which may have occurred during the course of the voyage, outside of the territorial waters of Canada, does not render the enactment extra-territorial in its operation.—3. That the offence charged herein under s. 185 of the Customs Act is that of having made an untrue report.—4. That the Parliament of Canada, for the protection of the revenue, has the right to require a master coming into a Canadian port to make a full and complete statement, in his report, of the dealings in cargo which he had during the voyage which immediately preceded his arrival at the port. LAWRENCE V. CASHIN ET AL. v. THE KING..... 103

3. — *Sales Tax—Special War Revenue Act Regulations—“Manufacture”—Civil Code—Plaintiff required to have an interest in action brought.*—Suppliant is engaged in the business of dressing and dyeing furs for others and not for its own account. It paid to the respondent certain sums of money as sales tax imposed by the Special War Revenue Act 1915 and amendments thereto. The suppliant was prepaid or repaid by the customer, the tax so paid, being out of pocket only such amounts as certain customers failed to repay it. Suppliant brought suit to recover all money paid by it as sales tax, alleging such payments to have been made by mistake of law and of fact.—*Held*: That under s. 87 (c) of c. 179, R.S.C. 1927, it is the goods of the owner, manufactured by the labour of another, that are to be taxed as a sale; it is not intended the person performing the labour should be taxed for the goods so manufactured or produced.—2. That the suppliant, not

REVENUE—Continued

having paid the tax itself, but rather as an intermediary for and on account of its customers, has no right of action against the Crown to recover the same.—3. That the suppliant not having an interest in the money in question, as required by Article 77 of the Code of Civil Procedure of Quebec, cannot maintain the action against respondent. A. HOLLANDER & SON LTD. v. THE KING... 90

4. — *Special War Revenue Act, s. 87—Isolated act by person not a manufacturer or producer by trade—Sales tax not payable.*—*Held*: That the Special War Revenue Act, R.S.C. 1927, c. 179, does not impose any consumption or sales tax upon a person who, not being a manufacturer by trade, manufactures or produces, for his own use and with no intent of disposing of it by sale or otherwise, an object or article, which is not used in connection with any trade or business. THE KING v. WILLIAM C. SHEELLY 179

5. — *Sales Tax—Newspapers—Stock exchange sheets—Special War Revenue Act, R.S.C. 1927, c. 179, Schedule III.*—*Held*: That sheets or papers printed and circulated semi-daily and weekly among subscribers by the defendants herein are “newspapers” within the meaning of Schedule III of the Special War Revenue Act, R.S.C. 1927, c. 179, and therefore not subject to the sales tax imposed by that statute. THE KING v. MONTREAL STOCK EXCHANGE; THE KING v. EXCHANGE PRINTING Co..... 237

6. — *Income War Tax Act—Premium paid on redemption of capital stock of corporation taxable as income.*—*Held*: That the premium paid by a corporation upon the redemption of its capital stock, in excess of the par value of the stock, is income and taxable under the Income War Tax Act, R.S.C. 1927, c. 97. NATIONAL TRUST Co. LTD. v. MINISTER OF NATIONAL REVENUE..... 167

7. — *Income—Income War Tax Act, secs. 5 and 9B—Non-resident shareholder in Canadian company—Mining company—Companies Act, s. 98—Dividends paid from reserve funds built up out of profits set aside as allowances for depletion and depreciation of company's assets taxable as income.*—Suppliant owned shares of the capital stock of Crow's Nest Pass Coal Company Ltd., a Canadian mining company, which in 1933 distributed \$2 per share to its shareholders stating that “this payment is made from Depreciation and Depletion Reserve Funds of the company.” At this time there were no net annual operating profits available for dividends, nor was the com-

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pany in liquidation. The reserve funds had been built up by amounts set apart from profits as allowances for depreciation, and for depletion of the company's coal reserves, with the approval of the Minister of National Revenue, and in the exercise of his discretion under s. 5 (a) of the Income War Tax Act, R.S.C. 1927, c. 97. Pursuant to demand the company paid income tax on the money so distributed. Suppliant by its petition alleged that no tax is imposed by the Act in respect of the distributions so made, and prayed that the money paid as tax be refunded to it.—*Held*: That the dividends here paid were not distributions of capital but distributions of profits derived from the operations of the company and therefore taxable as income received as dividends.—2. That the true construction of s. 9B, ss. 2 (a), Income War Tax Act is that dividends in the hands of a non-resident shareholder shall pay the tax imposed, no matter from whence derived. **NORTHERN SECURITIES Co. v. THE KING 156**

REVENUE LAWS.

See REVENUE, No. 2.

SALES TAX.

See REVENUE, Nos. 3 and 5.

SALES TAX NOT PAYABLE.

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SEIZURE.

See REVENUE, No. 2.

SERVICE OF STATEMENT OF CLAIM.

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SHIPPING.

1. ACTION IN REM, Nos. 1 and 2.
2. BURDEN ON PARTY CLAIMING LIMITATION OF LIABILITY TO DISPROVE FAULT OR PRIVILEGE TO THE PARTICULAR LOSS OR DAMAGE, No. 2.
3. CHARTER PARTY, No. 3.
4. DAMAGE DONE BY SHIP, No. 1.
5. DEVIATION IN VOYAGE, No. 3.
6. IMPROPER NAVIGATION OF SHIP, No. 2.
7. JURISDICTION, Nos. 1 and 2.
8. LIMITATION OF LIABILITY, No. 3.
9. LOSS OF CARGO, No. 3.
10. MERCHANT SHIPPING ACT (IMPERIAL), 1894, No. 3.
11. OIL PUMPED OVERBOARD BY A SHIP CAUSING DAMAGE, No. 1.
12. REMOVAL OF BARGE FROM BERTH AT PIER BY CREW OF SHIP, No. 2.

SHIPPING—Jurisdiction—Action in rem—Oil pumped overboard by a ship causing damage—Damage done by a ship.—Plaintiffs were the owners of a large

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number of live lobsters lying in crates in the waters of the Strait of Canso, N.S., for refreshment purposes, while being transferred from Magdalene Islands, P.Q., to Gloucester, Mass. Defendant steamer run aground in the Strait of Canso and in order to lighten the ship a large part of its cargo of oil was pumped into the waters of the strait. Plaintiff claimed this was carried by the winds and tide to the resting place of the lobsters causing damage to the lobsters, crates and connecting lines. Plaintiff Outhouse also claimed for loss of freight—Defendant contended that the court was without jurisdiction to entertain the action.—*Held*: That damage by a ship means damage done by those in charge of a ship, with the ship as the noxious instrument. **DELMA C. OUTHOUSE ET AL. v STR. Thorshavn.... 120**

2. — *Jurisdiction—Action in rem—Removal of barge from berth at pier by crew of ship—Improper navigation of ship*—Plaintiffs' barge, with no one on board was lying at a berth next to a pier and moored to it. The crew of defendant ship removed the barge from her berth, which was then occupied by the ship, the barge being placed outside the ship in a foul berth, as a result of which the barge suffered damage. Plaintiff brought an action *in rem* to recover the amount of the damage. *Held*: That the improper navigation of the defendant ship carried out by her master's orders made her the instrument causing the damage to the barge, and that the claim for such damage may be enforced by an action *in rem*. **LINCOLN PULPWOOD Co. LTD. v. MOTOR VESSEL Rio Casma 123**

3.—*Loss of cargo—Limitation of liability—Merchant Shipping Act (Imperial) 1894—Charter party—Deviation in voyage—Burden on party claiming limitation of liability to disprove fault or privilege to the particular loss or damage.*—Respondent's steamship *Thordoc*, under charter to appellants, on a voyage from Port Arthur, Ontario, to Montreal, Quebec, with a cargo of wheat and flour owned by appellants, grounded on the shore of Lake Superior and became, with her cargo, practically a total loss. Respondent brought action for limitation of liability under s. 503 of the *Merchant Shipping Act (Imperial) 1894*. The decrease in limitation of liability was granted and appellants appealed from such judgment. Appellants contended that the *Thordoc* was not in all respects seaworthy for the contractual voyage because no certificate of adjustment of a compass, newly installed six

SHIPPING—Concluded

weeks before the commencement of the voyage, was obtained by respondent. The Court found that the compass had been properly adjusted by a competent person and that a formal certificate of adjustment was not necessary.—The contract of carriage was for "loading at the lakehead * * * for Montreal." Appellants contended that Port Arthur, when designated by the appellants as the port of loading, became the port of departure at the "lakehead" under the charter party and that a deviation to Fort William, Ontario, was an unreasonable one, and, therefore, respondent cannot set up the exceptions found in the charter party.—The respondent company is a subsidiary of the N. M. Patterson Grain Company Ltd., which owns all the stock of respondent company except that required for directors shares. One Hall was general manager of respondent company. He ordered the *Thordoc* on its voyage up the lakes to take on board lifeboats at Sault Ste. Marie to be delivered at Fort William, that being the port to which the *Thordoc* was then bound. While en route to Fort William the *Thordoc* was directed by one Sutherland to load appellants' grain at Port Arthur before proceeding to Fort William to deliver the lifeboats. Sutherland was chief clerk of the grain company and also secretary and treasurer and a director of the respondent company, his duties in respect to it being largely secretarial. He never directed the movements of ships unless instructed by Hall, except on this occasion, when he did so without communicating with Hall. The *Thordoc* proceeded to Fort William, and about four hours later returned to one of the permissible routes pursued by cargo steamers en route from Port Arthur to Montreal. About three hours later it stranded due to improper navigation. The Court found that the action of Sutherland in directing the deviation of the *Thordoc* to Fort William was not the action of respondent company.—*Held*: That the fault or privy of a shipowner which is a company, within the meaning of s. 503 of the *Merchant Shipping Act*, must be the fault or privy of somebody for whom the company is liable because his action is the very action of the company itself. **ROBIN HOOD MILLS LTD. ET AL. v. PATTERSON STEAMSHIPS LTD. 207**

SPARK PLUGGS MANUFACTURED BY PLAINTIFF RECONDITIONED AND SOLD BY DEFENDANTS.

See TRADE MARKS, No. 1.

SPECIAL WAR REVENUE ACT.

See REVENUE, Nos. 4 and 5.

SPECIAL WAR REVENUE REGULATIONS

See REVENUE, No. 3.

SPECIFICATION.

See PATENTS, No. 5.

STOCK EXCHANGE SHEETS.

See REVENUE, No. 5.

SUBJECT MATTER.

See PATENTS, Nos. 1, 3 and 5.

THIRD PARTY PROCEDURE.

See CROWN, No. 2.

TRADE MARKS.

1. APPEAL FROM COMMISSIONER OF PATENTS, No. 3.
2. CALCULATED TO DECEIVE, Nos. 2, 4 and 5.
3. EVIDENCE, No. 2.
4. EXCHEQUER COURT RULES 34 AND 35, No. 3.
5. EXPUNGING, No. 4.
6. ISOLATED CASES OF CONFUSION NOT SUFFICIENT TO WARRANT DIRECTION THAT TRADE MARK BE EXPUNGED, No. 2.
7. LICENSING OF TRADE MARK, No. 4.
8. MOTION TO LIMIT TRADE MARK "VASELINE," No. 5.
9. PETITION TO EXPUNGE, No. 2.
10. PRACTICE, No. 3.
11. SPARK PLUGS MANUFACTURED BY PLAINTIFF RECONDITIONED AND SOLD BY DEFENDANTS, No. 1.
12. TRADE MARK AND DESIGN ACT, No. 3.
13. UNFAIR COMPETITION ACT, No. 5.
14. "VASELINE" AND "VASENOL," No. 5.
15. WHETHER DEFENDANTS CONDUCT AN ACTIONABLE WRONG UNDER UNFAIR COMPETITION ACT, No. 1.
16. WHETHER PLAINTIFF'S TRADE MARK INFRINGED BY DEFENDANTS, No. 1.

TRADE-MARKS—*Spark Plugs manufactured by plaintiff reconditioned and sold by defendants—Whether plaintiff's trademark infringed by defendants—Whether defendants' conduct an actionable wrong under Unfair Competition Act.*—The plaintiff is a manufacturer of spark plugs for use in internal combustion engines and is the owner of a registered trademark consisting of the letters "A C." The defendants carry on the business of reconditioning several makes of spark plugs, including those manufactured by the plaintiff, and reselling them at reduced prices. The defendants do not purport to sell the reconditioned spark plugs as new ones but place the various makes of spark plugs, after recondition-

TRADE MARKS—Continued

ing, in individual cartons, and these into larger cartons in which they are sold. On the outside of all cartons are printed the words "Spark Plug—Reclaimed By—Canadian Spark Plug Service." The plaintiff brought action asking for an injunction restraining the defendants from reconditioning and reselling spark plugs manufactured by the plaintiff. The Court found that the defendants had always acted in good faith; that there was not at any time any attempt by defendants to pass off the spark plugs for anything else than second-hand spark plugs; that defendants never represented the spark plugs as new; that the spark plugs as reconditioned and resold by defendants were not new and could be described only as repaired spark plugs.—*Held*: That there is no prohibition on the resale of repaired articles to which the trade-mark of the original maker is applied, and for which he has been paid.—2. That there is a distinction between an article repaired and one really reconstructed, and here the defendants do not produce a new article but merely repair an old one and there is nothing in law to prevent them doing so.—3. That the business carried on by the defendants does not contravene s. 11 of the Unfair Competition Act, 1932, 22-23 Geo. V, c. 33, nor is it contrary to honest industrial and commercial usage, since there has been no infringement and no passing off. *A. C. SPARK PLUG Co. v. CANADIAN SPARK PLUG SERVICE ET AL.*..... 57

2.—*Petition to expunge—Calculated to deceive—Isolated cases of confusion not sufficient to warrant direction that trade-mark be expunged—Evidence.*—Peggy Sage Inc., owner of the trade-mark "Peggy Sage," whose goods had been sold in Canada since 1920, though the trade-mark had not been registered in Canada until June, 1933, sought to have expunged from the register the trade-mark "Peggy Royal," registered by the defendant in June, 1932, on the ground that at the time of registration it was calculated to deceive or mislead the public.—*Held*: That the trade-marks in question are not so similar as to be likely to cause confusion.—2. That there must be a reasonable probability of deception or confusion, and that isolated cases of confusion are not in themselves sufficient to warrant the direction that a registered trade-mark in substantial use, be expunged.—3. That evidence of witnesses purporting to give their opinions as to whether deception or confusion was calculated to occur by reason of the concurrent use of the names as trade-marks in connection with the goods

TRADE MARKS—Continued

in question is not permissible and must be rejected, since such evidence involves the precise point which the Court has to decide. *PEGGY SAGE INC. ET AL. v. SIEGEL KAHN CO. OF CANADA LTD.*... 70

3.—*Practice—Appeal from Commissioner of Patents—Trade Mark and Design Act—Exchequer Court Rules Nos. 34 and 35.—Held*: That an appeal from the refusal of the Commissioner of Patents to register an industrial design under the *Trade Mark and Design Act* must be by way of petition and not by notice of motion. *THEODORE FRANK ROSE v. COMMISSIONER OF PATENTS ET AL.*..... 183

4.—*Expunging—Calculated to deceive—Licensing of trade-mark.*—The respondent, a United States corporation, in July, 1932, registered the trade-mark "Peggy Sage" in the United States, and in June, 1933, registered the same mark in Canada. The N.W. Corporation, a United States company, owns all the capital stock of the respondent as well as that of N.W. Limited, a Canadian corporation. In October, 1932, an agreement was entered into between N.W. Limited, the Canadian company, and the respondent, whereby the respondent appointed the company its exclusive manufacturer and selling agent for the manufacture and sale in Canada and Newfoundland of certain named products under the *Peggy Sage* name and trade-mark, for 20 years from November 1, 1932. The company by the agreement recognized that the respondent owned the trade-marks and good-will of the business associated with those marks and agreed not to claim any ownership of such trade-marks. The petitioner claims that by entering into the agreement, the respondent parted with its right to its trade-mark and the same thus became vitiated and that it had no longer the right to use or register the mark in Canada. The petitioner also claimed that the company manufactured and sold the goods in Canada for its own account and that they were not the goods of the respondent, thus misleading dealers and users. The petitioner asked that the trade-mark be expunged.—The Court found that *Peggy Sage* products are manufactured and sold in Canada by the company as the manufacturing and selling agent of the respondent, and not as the goods of the company; that the registered trade-mark is used on such goods to indicate they are the goods of the respondent and not those of the company; that the public is not deceived by the conduct of the respondent or of the company; that no

TRADE MARKS—*Continued*

retailer or user of the respondent's products is led to believe the goods marketed are those of any person or concern other than the respondent.—*Held*: That there is no confusion or deception in the use by the company of the trade-mark *Peggy Sage*.—2. That there was no licensing, by the respondent, of the registered trade-mark in gross, in fact or in law, to the Canadian company. *Bowden Wire Ltd. v. Bowden Brake Company Ltd.*, 30 R.P.C. 45, 580 and 31 R.P.C. 385, distinguished. SIEGEL KAHN CO. OF CANADA LTD. v. PEGGY SAGE INC. 1

5.—“*Vaseline*” and “*Vasenol*”—*Calculated to deceive—Unfair Competition Act—Motion to limit trade-mark “Vaseline.”*—An application for the registration of “*Vasenol*” as a trade-mark in connection with the sale of hygienic and antiseptic skin powder, wound and baby powder, foot powder, toilet powder, soaps, bandaging material, cold cream and baby cream, was refused by the Registrar of Trade Marks. At the hearing of an appeal from such refusal the Chesebrough Manufacturing Company, Consolidated, owner of the trade-mark “*Vaseline*,” appeared as objecting party.—Applicant also moved to have the register amended so that the trade-mark “*Vaseline*” should be limited to certain wares and should exclude those named in applicant's application, on the ground that Chesebrough has not used its mark in connection with these wares.—*Held*: That the marks “*Vasenol*” and “*Vaseline*” are similar and that the registration of the word *Vasenol* would be calculated to deceive and would be in conflict with the word mark *Vaseline*.—2. That for the purposes of the Unfair Competition Act the wares for which Chesebrough is registered in Canada, and the wares for which the applicant seeks

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registration in Canada, are similar.—3. That it is sufficient that the articles sold by each party fall within the same general description of wares, to refuse registration of *Vasenol* for the powder applications of the applicant. DR. ARTHUR KÖPP v. COMMISSIONER OF PATENTS ET AL. 198

TRADE MARK AND DESIGN ACT.

See TRADE MARKS, No. 3.

UNFAIR COMPETITION ACT.

See TRADE MARKS, No. 5.

UNTRUE REPORT.

See REVENUE, No. 2.

WHETHER DEFENDANTS' CONDUCT AN ACTIONABLE WRONG UNDER UNFAIR COMPETITION ACT.

See TRADE MARKS, No. 1.

WHETHER PLAINTIFF'S TRADE MARK INFRINGED BY DEFENDANTS.

See TRADE MARKS, No. 1.

WORDS AND PHRASES

“*Uncontrollable action of nature which it would have been impossible to guard against.*” See DUFRESNE CONSTRUCTION CO. LTD. v. THE KING. 77

“*Manufacture.*” See HOLLANDER & SON LTD. v. THE KING. 90

“*Calculated to deceive.*” See PEGGY SAGE INC. ET AL. v. SIEGEL KAHN CO. 70

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“*Vaseline*” and “*Vasenol.*” See KÖPP v. COMMISSIONER OF PATENTS ET AL. 198