

1928

CANADA
LAW REPORTS

Exchequer Court of Canada

ARNOLD W. DUCLOS, K.C.
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1929

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 LOUIS ARTHUR AUDETTE.
(Appointed 4th April, 1912)

**LOCAL JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF
CANADA**

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

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

do **F. E. HODGINS**, Toronto Admiralty District—appointed 14th
November, 1916.

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

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

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

do **LOUIS PHILIP DEMERS**, Quebec Admiralty District—appointed 3rd
November, 1923.

DEPUTY LOCAL JUDGES:

do **W. A. GALLIHER**—British Columbia Admiralty District.
do Vacant—Nova Scotia Admiralty District.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE ERNEST LAPOINTE, K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE LUCIEN CANNON, K.C.

MEMORANDUM

During the period of these Reports, namely on the 8th day of May, 1928, the Honourable Mr. Justice Rogers, who was the Deputy Local Judge in Admiralty for the Nova Scotia Admiralty District, departed this life. During the same period the Honourable Mr. Justice Archer resigned as Local Judge in Admiralty for the Quebec Admiralty District, and on the 3rd of November, 1928, the Honourable Mr. Justice Demers was appointed Local Judge in his place.

CORRIGENDUM

The following foot-note should appear on page 103:

REPORTER'S NOTE: On March the 7th, 1928, a similar judgment was given in England on this question of the subject's right to plead a set-off to an information by the Crown. See *The Attorney-General v. Guy Motors Limited* (1928) W.N. 75; (1928) 165 L.T.J. 259.

ERRATUM

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

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A. To the Judicial Committee of the Privy Council:—

1. *Pope Appliance Corporation v. Spanish River Pulp & Paper Mills Ltd.* (1927) Ex. C.R. 28; (1928) S.C.R. 20. Appeal allowed.

B. To the Supreme Court of Canada:—

1. *The Adams & Westlake Coy. et al. v. E. T. Wright Ltd.* (1928) Ex. C.R. 112. Appeal dismissed.
2. *Canadian General Electric Co. v. Fada Radio Limited* (1927) Ex. C.R. 134. Appeal allowed, and appeal taken to Judicial Committee of the Privy Council.
3. *Detroit Rubber Products, Inc. v. Republic Rubber Co.* (1928) Ex. C.R. 29. Appeal dismissed.
4. *Gold Medal Furniture Mfg. Co. v. The Gold Medal Camp Furniture Mfg. Co.* (1928) Ex. C.R. 65. Appeal dismissed.
5. *Guettler v. Canadian International Paper Co.* (1928) Ex. C.R. 21. Appeal dismissed.
6. *Miller v. The King* (1927) Ex. C.R. 52. Appeal dismissed.
7. *Nieblo Manufacturing Co. v. Reid et al* (1928) Ex. C.R. 13. Appeal dismissed.
8. *Semet-Solway Co. v. Commissioner of Patents* (1927) Ex. C.R. 218. Appeal dismissed.

The following are still pending:—

1. *Clatworthy & Son Ltd. v. Dale Display Fixtures Ltd.* (1928) Ex. C.R. 159.
2. *Electrolytic Zinc Process Co. v. French's Complex Ore Reduction Co.* (1927) Ex. C.R. 94.
3. *Fraser Valley Milk Producers Association v. The Minister of National Revenue* (1928) Ex. C.R. 215.
4. *Minister of Railways & Canals v. Hereford Railway Co.* (1928) Ex. C.R. 223.

The following have been settled between the parties after notice of appeal filed:—

- Gerard Wire Tying Co. v. Cary Mfg. Co.* (1926) Ex. C.R. 170.
Gerard Wire Tying Co. v. Laidlaw Bale Tie Co. (1926) Ex. C.R. 193.
Maunsell v. The King (1925) Ex. C.R. 133.

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

THE SUN LIFE ASSURANCE COM- }
PANY OF CANADA..... } APPELLANT;

AND

THE SUPERINTENDENT OF INSUR- }
ANCE } RESPONDENT.

Insurance Act—Superintendent of Insurance—Jurisdiction

The Policy-holders of the appellant are divided into two classes, participating and non-participating, the former constituting about 90 per cent of the whole. This class is represented on the Board of Directors by four of the policy-holders, who meet with the shareholders' directors and have a vote on all business matters. At a meeting of the Board of Directors so constituted a sum of \$25,000 was recommended and voted to the Banting Research Foundation, which action of the Directors was approved of at an annual meeting of the company. In the annual statement of the company to the Minister of Finance this amount was charged as a matter of general expenditure under the head of public health and welfare. Under section 73, ss. 2, of the Insurance Act, the Superintendent of Insurance, of his own motion, amended this statement, making this amount a charge against the shareholders' surplus account alone. It was contended that he had no power to act as he did; that the contribution was not in conflict with the objects and powers of the company and was advantageous to the company's business.

Held, that the act of the superintendent aforesaid was *ultra vires* of the powers conferred upon him by the Insurance Act.

APPEAL by the company appellant from the ruling of the Superintendent of Insurance.

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

Eugène Lafleur, K.C. and *J. A. Ewing* for the appellant.

F. P. Varcoe for the respondent.

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The facts are stated in the reasons for judgment.

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THE PRESIDENT, now (30th July, 1927), delivered judgment.

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The Sun Life Assurance Company of Canada, a company having capital stock, made a contribution of \$25,000.00 to what is known as the Banting Research Foundation, established by private contributions so far as I know. The purposes of the Foundation have been specifically defined in the public appeal made for funds by the promoters of the Foundation, as being:

(a) To supplement the sum at present available, in the University of Toronto, for the support of the Banting and Best Chair of Medical Research.

(b) To establish a fund for the adequate financial support of such scientific workers as may have proposed definite problems of medical research, and for whom funds are not otherwise available. Such assistance may be given to persons working in the University of Toronto or elsewhere.

The life insurance policy-holders of this company are divided into two principal classes, participating and non-participating policy-holders. The former constitute about ninety per cent of all the policy-holders in the company, and are represented on the Board of Directors by four of that class of policy-holders, and elected by that class. The number of policy-holder directors must be at least one-third of the total number, which is fixed by the by-laws of the company. The qualification for a participating policy-holder director is that he be the holder of a policy or policies in the sum of \$4,000 and upwards, upon which no premiums are due. Every holder of a participating policy of \$2,000 and upwards, upon which no premiums are due, shall be a member of the company and may attend the general meetings of the company, but he cannot vote for the election of shareholders' directors, who are elected by the shareholders only. Policy-holders' directors may meet with the shareholders' directors and shall have a vote on all business matters. Under the provisions of the Insurance Act, the participating policy-holders participate to the extent of not less than ninety per cent of the profits derived, declared, and set apart, from that branch of the company's insurance business, and the shareholders are entitled to the balance. As a matter of fact, the shareholders of the company in ques-

tion have voluntarily reduced their participation in the declared profits of that class of business to five per cent, and the participating policy-holders are now receiving ninety-five per cent.

The contribution in question was initiated by a resolution passed by the Board of Directors in July, 1925, recommending the granting of the sum of \$25,000.00 to the Foundation. At the annual meeting of the company held in February, 1926, a resolution was passed approving and confirming, in general terms, all the acts and decisions of the Board of Directors during the year 1925.

The contribution was duly paid over to the Foundation, and charged as a general expense against all branches of the company's business, in proportion to the income of such branches of the company's business. There is in the accounting of the company, what is known as the shareholders surplus account, which is credited from time to time with the five per cent of the profits derivable from the participating policies branch, and any profits flowing from the non-participating branch, and other branches, of the company's business. In the annual statement of the company filed with the Minister of Finance for 1925, the contribution to the Foundation was charged as a matter of general expenditure just as I have indicated, under the heading of Public Health and Welfare Work. The Superintendent of Insurance amended this statement, so that the \$25,000.00 so contributed, was made a charge against the shareholders surplus account alone, and not as the directors had done, namely to distribute it as a charge against the different branches of the company's insurance business. In a word, the contribution was entirely deducted from the amount standing to the credit of the shareholders surplus account, instead of being charged against and distributed over the various branches, in the proportion of respective incomes. This had the effect of reducing the shareholders' surplus account and the companies liabilities by \$25,000 and increasing the company's surplus by the same amount, and the appeal before me is to restore the contribution to the place in the annual statement where the directors had placed it.

I perhaps might here say that the company claims that the change made in the annual statement by the Super-

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intendent, as already explained, was in excess of his powers and duties; that the contribution was not in conflict with the objects and powers of the company, particularly, in that it tended to promote the general public health and lessen mortality, which was advantageous to the company's business, and also that of its policy-holders and shareholders; and that the action of the directors in this respect having been approved by the shareholders and members of the company, the same could not be questioned by the Superintendent. Then I am urged to take into consideration the fact, that the surplus of the Sun Life Ass. Co., in 1925, was over \$21,000,000 out of which only \$74,000.00 had been paid out as contributions to public services of the nature in question, and this it is said amounts only to 34 cents out of every \$100.00 of surplus.

It is necessary now to examine the provisions of the Insurance Act with some care, particularly as to the powers and duties conferred upon the Superintendent of Insurance, and such of its provisions, as may assist in ascertaining the policy and purpose of the Statute and the means adopted for giving effect to that policy, in order to decide whether or not the Superintendent is given power in reference to the particular act here in issue. Sec. 37, enables the Governor-in-Council to appoint an officer to be called the Superintendent of Insurance, and his duties and powers are to be found in various sections of the Act. He is required, by sec. 38, to keep a record of the securities deposited by each company with the Minister; before the issuance of a license or a renewal of a license to a company, to report to the Minister whether the requirements of the law have been complied with, and that from the statement of the affairs of the company it is in a condition to meet its liabilities; to visit personally, or cause a duly qualified member of his staff, at least annually to visit the head office of each company, and examine the statements of the condition and affairs of each company; and to prepare an annual report showing the particulars of each company's business together with an analysis of each branch of its business. He is empowered by sec. 39, when deemed necessary, to visit the chief agency of any company, and to thoroughly inspect and examine into all its affairs, and to make all such further inquiries as are neces-

sary, to ascertain its condition and ability to meet its engagements, and whether it has complied with all the provisions of the Act applicable to its transactions. Sec. 41 is to the effect, that if it appears to the Superintendent that the assets of any company are insufficient to justify its continuance of business, having regard to sections 14 to 20 inclusive, or that it is unsafe for the public to effect insurance in it, he shall make a special report to the Minister on the affairs of such company, and the Act prescribes the action that the Minister, together with the Governor-in-Council, may take in the premises. If it appears to the Superintendent that the liabilities of any company, including matured claims and the full reserve or reinsurance value for outstanding policies estimated or computed on the basis mentioned in sec. 43 of the Act, exceed its assets, he is directed by sec. 44 to report the fact to the Treasury Board, which body, after hearing the company, may withdraw the company's license, or prescribe a period within which the company shall make good the deficiency, failing which the license shall be withdrawn. Sec. 20 is somewhat similar to sec. 44 and perhaps should be here mentioned. It enacts that subject to the powers and duties vested in and imposed upon the Treasury Board, if it appears from the annual statements, or from an examination as provided for by the Act of the affairs and conditions of any company carrying on the business of life insurance, that its liabilities to policy-holders in Canada, including matured claims, and the full reserve or reinsurance value for outstanding policies, as described by sec. 43, after deducting any claim the company has against such policies, exceed its assets in Canada, including the deposit in the hands of the Minister, the company may be called upon by the Minister to make good the deficiency, and upon failure to do so within a specified time, he may withdraw its license. By sec. 46 the Superintendent is empowered to address any inquiries to any insurance company, or any of its officers, relative to its assets, investments, liabilities, doings, or condition, or any other matter connected with its business or transactions, and the company is required to properly reply in writing to such inquiries, but, it is stated, this is for the purpose of carrying out the provisions of the Act. Sections 59 and 60 prescribe the powers of lend-

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ing and investment by Canadian Life Insurance Companies.

Sec. 69 provides that if upon the examination of the assets of any Canadian company licensed under the Act, it appears to the Superintendent, that the value placed by the company upon the real estate owned by it is too great, he may require the company to procure an appraisalment of the same by competent valuers, or he may procure such appraisalment himself, and if such appraised value, varies materially from the return made by the company, it may be substituted in the annual report prepared for the Minister by the Superintendent. If he is of the opinion that any amount secured by mortgage upon any real estate, is greater than the value of such real estate, or is not sufficient security for any loan and accrued interest, he may in the like manner procure an appraisalment, and if from the appraised value it appears that such real estate is not adequate security for the loan and interest, the Superintendent may write off from such loan and interest a sum sufficient to reduce the same to such an amount as may be fairly realizable from such security, and may insert such reduced amount in his annual report.

Sec. 73 is of special importance in the matter under consideration, inasmuch as the Act of the Superintendent appealed from, and the appeal asserted by the Sun Life Assurance Company, were made under the provisions of this section, and perhaps it might appropriately be mentioned almost in full:

73. (1) In his annual report prepared for the Minister under the provisions of paragraph (e) of section thirty-eight of this Act, the Superintendent shall allow as assets only such of the investments of the several companies as are authorized by this Act, or by their Acts of incorporation, or by the general Acts applicable to such investments.

(2) In his said report the Superintendent shall make all necessary corrections in the annual statements made by the companies as herein provided and shall be at liberty to increase or diminish the liabilities of such companies to the true and correct amounts thereof as ascertained by him in the examination of their affairs at the head office thereof in Canada, or otherwise.

(3) The Superintendent may request any Canadian company to dispose of and realize any of its investments acquired after the passing of this Act and not authorized by this Act, and the company shall within sixty days after receiving such request absolutely dispose of and realize the said investments, and if the amount realized therefrom falls below the amount paid by the company for the said investments, the directors of the company shall be jointly and severally liable for the payment to

the company of the amount of the deficiency: Provided that if any director present when any such investment is authorized does forthwith, or if any director then absent does, within twenty-four hours after he becomes aware of such investment and is able to do so, enter on the minutes of the Board of Directors his protest against the same, and within eight days thereafter gives notice of his protest by registered letter to the Superintendent, such director may thereby, and not otherwise exonerate himself from such liability.

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(4) An appeal shall lie in a summary manner from the ruling of the Superintendent as to the admissibility of any asset not allowed by him, or as to any item or amount so added to liabilities, or as to any correction or alteration made in any statement, or as to any other matter arising in the carrying out of the provisions of this Act, to the Exchequer Court of Canada, which court shall have power to make all necessary rules for the conduct of appeals under this section.

Sec. 75 is perhaps of some importance. It empowers the directors of a company, upon the authorization of its shareholders to reduce its paid up capital, providing it has been impaired, and this section, I would emphasize, states that the capital of a company shall be deemed to be impaired when its assets, exclusive of its paid up capital, are less than its "liabilities" calculated according to the requirements of the Act. In preparing its statement of "liabilities," sec. 43 prescribes the basis to be adopted by the companies in valuing their policies of insurance. Sec. 104 enacts that in the case of Canadian companies which have a capital stock, the directors may from time to time set apart such portion of the net profits as they deem safe and proper for distribution as dividends or bonuses, to shareholders, and holders of participating policies, ascertaining the part thereof, that is the portion of the amount set apart which has been derived from participating policies, and distinguishing such part from the profits derived from other sources; and the holders of participating policies shall be entitled to share in that portion of the profits so set apart which has been distinguished as having been derived from participating policies, to the extent of not less than ninety per cent thereof, etc.

The charter of the Sun Life Assur. Co. perhaps should be referred to. Sec. 15 enacts that any number of Directors of the said company, being a majority of the said Directors, shall have full power and authority to make, prescribe and order such by-laws, rules, regulations and ordinances as shall appear to them proper and needful, touching the rates and amounts of insurance and issuing

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of policies, the management and disposition of its stock, property, estate and effects, etc. This would all of course be subject to any general enactments regarding Insurance Companies. Sec. 17 states that there shall be weekly or semi-weekly meetings of the board of Directors, or a quorum, for the purpose of transacting and managing, the details of the business and affairs of the company.

From the provisions of the Act to which I have at length referred, it will be seen I think, that the important and substantial duties and powers, imposed and conferred upon the Superintendent, relate entirely to that of assuring those vitally interested, policy-holders, of the true financial condition of life insurance companies from time to time, their continuing ability to meet their liabilities to policy-holders, and their observance of the statutory requirements. Over and over again there are to be found sections which make it clear, that the duties imposed upon the Superintendent are to be directed to this end, and that is what one would expect to find. Investments must be made within the classes of securities authorized by the Act, and are subject to reduction in the annual statements at the instance of the Superintendent, if there has been a depreciation in such investments. Liabilities may be increased or diminished by the Superintendent to conform to the true and correct amount as ascertained by him in the examination of the affairs of the company, so as to reflect the real financial position of the company. Sec. 75 states that the capital of a company may be reduced on account of impairment of capital, and the capital of a company shall be deemed to be impaired, when its assets exclusive of paid up capital, exceed liabilities calculated according to the requirements of the Act. The liabilities referred to in this section must I think have been intended to refer to a company's liabilities to its policy-holders, as the only liabilities for which the Act prescribes a method of calculation, is that of liabilities under policies of insurance. Companies shall retain in Canada and under their own control, assets of a market value equal to their total liabilities to policy-holders in Canada. Sec. 64. (3). If a company's liabilities to policy-holders in Canada exceed its assets, the Minister may suspend the license of the company. Enquiry may be made by the Superintendent concerning any company's

affairs in order to ascertain, its condition and ability to meet its engagements. If the assets of a company are insufficient to justify the continuance in business of a company, or if it is unsafe for the public to effect insurance in it, the Superintendent must report the same to the Minister. It need occasion no surprise that the duties and powers of the Superintendent, as laid down by the Act, all point towards assuring himself, the Minister and the public, of the ability of insurance companies to meet their engagements, and their observance of the requirements of the Act. It is true of course, that while insurance companies may be private in their inception, they are affected with a public interest. In fact the charter of the Sun Life Ass. Co. is declared to be a public Act, but this was done I apprehend only because of the public interest in its liabilities to policy-holders, and not because of any interest in its shareholders. The public interest would appear to be abundantly and adequately safeguarded by so many of the provisions of the Act, including the wide supervisory powers given to the Superintendent to ensure observance of such safeguards that there would seem to be required, express and clear authorization to support the act of the Superintendent, which is here in question. If the Superintendent were given powers beyond this, he would virtually be in control of the administration of a company's affairs, which parliament I think never intended. He is not given an unregulated discretionary power concerning all the affairs of insurance companies. Such a power might conceivably be as objectionable and undesirable in the case of a public company, such as a life insurance company, as it would be to leave it altogether free from any control or regulation by a public officer. The acceptance of risks, and the making of investments within the authorized classes, the really vital and important thing in the administration of the affairs of a life insurance company, is left in the first instance entirely to the judgment and prudence of the management, and I cannot make myself believe that parliament ever intended to give to the Superintendent the power of regulating the smaller affairs and expenditures of the company, such as the one in question. That I think is left to the directors, shareholders and policy-holders to settle as best they can, and failing

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that, then the courts. An interesting discussion of our jurisprudence upon administrative powers, is to be found in the text book entitled, Law of the Constitution, by Dicey, Ch. 12, 8th Ed. Those who act under a jurisdiction given by an Act of Parliament must I think clearly show their jurisdiction. Furthermore I may point out that under the rule of statutory construction, *expressum facit cessare tacitum*, where there is express mention of certain powers, any power not mentioned is excluded.

Making contributions to public services of one kind or other, might be carried to a degree that would threaten the financial stability of a company, and be unjust and oppressive to policyholders and all interests and in such circumstances the intervention of the Superintendent might be justified. The extreme case need not however be considered here. If the directors appointed by the shareholders and policy-holders to direct the affairs of the company, decide that a contribution might be made to some public service, and it is not contrary to the express objects of the company, and does not suggest dissipation of the resources of the company or impairment of the security of any others of interest, when it may directly or indirectly relate to and conceivably might further the objects of the company, when bad faith is not suggested, when the same is not objected to by a single shareholder or policy-holder, to say that the Superintendent may of his own motion intervene when others of interest have not, is I think a thing that parliament never intended, nor do I think that such is the meaning of sec. 73 (2) and (4). I can find nothing in the Act of a positive nature suggestive of this power being reposed in the Superintendent, and I think the whole spirit of the Act would seem to negative the idea of such powers being conferred upon him. In my opinion one would require to do violence to the provisions of sec. 73, to hold that the Superintendent was there authorized to amend the annual statement of the company, as he did, and upon the facts and grounds disclosed. That section I think merely authorizes the doing of anything within the limits of his powers.

Having reached the conclusion that the Superintendent is not possessed of the statutory authority to amend the annual statement in the manner he did, under the facts

of this particular case, then the only other question that could arise, would be whether the expenditure was *ultra vires* of the company or not. This is a matter I think, that only a dissenting shareholder or policy-holder, or the Attorney-General may protest, and bring into the courts if necessary for adjudication, and they each may do this. Also see sec. 90 (1). It is I think for the Courts to determine whether or not an expenditure of this kind is *ultra vires* or not, and this can be done only at the instance, or on behalf, of one who has an interest to protect. Consequently I do not feel called upon to decide whether or not the contribution was *ultra vires* of the company; that point is really not before me. It is altogether a different question from that as to whether the Superintendent had authority to amend the annual statement as he did. Evidence was given to show that the expenditure in question was one conducive to the objects of the company, or incidental to the carrying on of its business or its proper management. That evidence however, I presume, was presented more to show the character and the reasons for the expenditure, and to elucidate and support the contention, that it was not one of the matters falling within the scope of the powers of the Superintendent to regulate. It is true that the charter of a corporation is the measure of its powers, and the enumeration of its powers implies the exclusion of all others, and ordinarily speaking the property and assets of a corporation belong to its shareholders, and cannot be devoted to any uses which are not in accordance with the purposes and objects of the corporation, as contained in its charter, unless possibly by unanimous consent. The expenditure in question is not justified by the company as being one made within any of the enumerated objects of the company, but as falling within the inherent powers of the company to do anything conducive to the objects of the company, or as being relative to its administration or management. And there is a distinction between the objects and the powers, of an incorporated company. The propriety of granting the contribution here is not contested, it is only said that it was charged improperly as a general expense, against all branches of the company's business, instead of against the shareholders surplus account only. I must assume upon the evidence, that the

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directors, the shareholders and the participating policy-holder members approved of the contribution, upon some ground or other. Then, as no dissentient shareholder or policy-holder has protested it, I think I am warranted in concluding that no persons, other than those just mentioned can now challenge the validity of the expenditure, more particularly when, as I have already said, I am unable to find anything in the Act which can be construed as prohibiting such an expenditure, or which empowers the Superintendent to treat it as he did.

The power of increasing or diminishing the liability in a company's annual statement to the true and correct amount, sec. 73 (2), I would think was intended to mean, that the Superintendent might add items which are really liabilities but which have been treated otherwise by the company, or some asset has been estimated in excess of its market value requiring an increase in the total of liabilities, or that the company's liabilities under its policies of insurance have not been calculated according to the Act, or something of that nature. I do not think it can mean that an expenditure which has been treated as an item of expense, such as that under consideration, and at the time of the making of the annual statement was fully paid and no longer a liability, can be charged up against the shareholders' surplus account or any other one account, by the Superintendent.

I am not unmindful of the fact that the profits accruing to certain policy-holders, constitute contractual rights, and that claims arising thereunder must be recognized and equitably discharged, but I do not think that the Superintendent has the power to determine and arbitrarily settle this by a readjustment of the annual return on his own motion. Perhaps I should observe that in respect of the distribution of profits to participating policy-holders, it is the directors, under sec. 104, that determine and set apart what portion of the net profits shall be made available for distribution as dividends or bonuses, to shareholders and participating policy-holders, ascertaining the part thereof derived from participating policies and distinguishing such part from the profits derived from other sources. They are not under any legal obligation to set aside the full and exact profits for dividend or bonus purposes. The amount

of profits available for distribution to shareholders and holders of participating policies, is to be determined in a safe and proper way. This again rather indicates, that the Superintendent is not authorized to intervene, in order to determine what the precise amount of a company's profits shall be made available for distribution to participating policy-holders, yet this would seem to be the effect of his amendment to the annual return. I think this is for the directors in the first instance to determine, but their action in this respect is open to attack by or on behalf of one of interest.

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Accordingly I am of the opinion that the appeal should be allowed, the ruling of the Superintendent set aside, and the annual statement restored to the condition it was in before the amendment in issue was made. As this is a case of first impression, involving the determination of the statutory powers of the Superintendent of Insurance, I think there should be no order as to costs.

Judgment accordingly.

NIEBLO MANUFACTURING CO., INC.... PLAINTIFF;
AND
DAVID J. REID ET AL..... DEFENDANTS.

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Sept. 14.
Oct. 22.

Patents—Invention—Prior art—Commercial success—Improvement

The patent in suit, dated the 16th December, 1924, was for golfing tees. One of these tees comprised a shank having a pointed end, and a disked or concaved ball-supporting member connected with and carried by the shank, and the other consisted of a cone shaped shank with a disk shaped member at the top to support the ball. The structure and function of the golfing tee was well defined and known in the prior art.

Held, that, where the patented device embodies most of the features, functions and contrivances of the prior art, the mere difference in some small structural details, does not constitute invention.

- 2. The fact that a device was somewhat of an improvement on the prior art and had resulted in commercial success, only afforded a presumption of its usefulness, and was not conclusive that such improvement constituted invention.

ACTION by plaintiff to have it declared that Canadian Patent No. 245,444 was valid and infringed by the defendants.

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

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

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

The facts are stated in the reasons for judgment.

AUDETTE J., now (22nd October, 1927), delivered judgment.

The plaintiff company bring their action against the defendants, for an alleged infringement of the Canadian Patent No. 245,444, bearing date the 16th December, 1924, granted to them, as assignee of the patentee, William Lowell.

The defendants by their statement in defence deny infringement and aver that the plaintiff's patent is null and void for want of subject-matter.

The grant contained in the patent is for certain new and useful improvements in Golfing Tees.

The second paragraph of the specifications states:

This invention related, generally, to *improvements* in that class of devices, known as tees for use upon the green of a golf course, and for the placing thereon of a golf ball, the device being very simple in its construction and being easily forced into its proper position upon the green, so as to be of immediate use, and to enable the player to dispense with the building up with wet sand of the usual tee.

Proceeding further on with the specifications we come to the claims which are in the following language, viz:—

What I do claim as my invention, and desire to secure by letters patent, is:—

1. A golfing tee comprising a shank having a pointed end so as to be readily pressed into the ground, and a dished or concaved ball-supporting member connected with and carried by said shank, and adapted to be arranged slightly above the ground, said shank being centrally disposed with relation to said ball-supporting member.

2. A golfing tee comprising a shank having a pointed end so as to be readily pressed into the ground, and a disk-shaped member connected with and carried by said shank, said member being dished or concaved in its upper surface, and surrounded by a marginal ball-retaining and supporting rim, said shank being centrally disposed with relation to said ball-supporting member.

3. A golfing tee comprising a cone-shaped shank having a pointed end so as to be readily pressed into the ground, and a dished or concaved ball-supporting member connected with and carried by said shank, and adapted to be arranged slightly above the ground, said shank being centrally disposed with relation to said ball-supporting member.

4. A golfing tee comprising a cone-shaped shank having a pointed end so as to be readily pressed into the ground, and disk-shaped member connected with and carried by said shank, said member being dish-shaped or concaved in its upper surface, and surrounded by a marginal ball-retaining and supporting rim, said shank being centrally disposed with relation to said ball-supporting member.

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From the wording of the specifications and of these claims it appears clearly that the patent covers two kinds of tees which may be simply referred to as exhibits No. 2 and No. 3 respectively, although only exhibit No. 2 is covered by the pleadings and is described in the drawings attached to the patent.

And while the alleged infringing tees manufactured and sold by the defendants are filed as exhibit No. 4 and exhibit No. 5, the statement of claim only attacks exhibit No. 4 as infringing plaintiff's exhibit No. 2—for the obvious reason that the defendants only began to experiment with No. 5 (or No. 1 on Discovery, also filed as exhibit No. 9) in the fall of 1926 and market it in the spring of 1927,—and the present action was instituted on the 16th December, 1926.

This matter was mentioned at trial, but no formal application was made to amend the pleadings accordingly—as might have been done under the practice. Therefore the consideration of the case, so far as the court is concerned, must be confined to the pleadings. Possibly in the result it does not make much difference; and the fate of one device may very properly follow the fate of the other.

Proceeding to the consideration of the merits of the case as submitted, two outstanding questions present themselves for determination by the court. One is as to whether or not the device in question, exhibit No. 2, covered by the patent and the pleadings is *per se* subject-matter as involving any ingenuity of invention, and the second is whether or not this device has been anticipated by the prior art. The case is really one of great simplicity involving a structure well defined in the prior art. Its present size, dimension and shape, as distinguished from those of the prior art, do not make it a device involving ingenuity or invention. *Haskell Golf Ball Co. Ltd. v. Hutchison* (1).

(1) (1908) 25 R.P.C. 194, at p. 204 *et seq.*

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Does not the present device or tee appear to be one which especially at that date, might well have occurred to an ordinary intelligent person without any exercise of that inventive faculty which is necessary as the ground for a patent. It is always necessary to consider the rights of the general public to avoid monopolies on such simple devices as would occur to any one. *Bonnard v. The London Omnibus Co.* (1).

On the question of prior publication, as establishing the state of the prior art, the defendants set up, *inter alia*, the plea arising out of the enactments of sec. 7 of the Patent Act, stating that when the patentee applied in Canada for his patent on the 24th November, 1923, more than two years prior to that date the device in question had been used, as disclosed by the evidence, on a public golf course, in the United States in June, 1921. Furthermore, in the United States, as appearing from exhibits C. and D., the patentee, although casting the net large enough to claim all that is claimed by the Canadian Patent, succeeded in getting a patent only for the rim. A rim is claimed also by the Canadian Patent, but whether the rim by itself is good subject-matter or not is immaterial as the defendants' device has no rim and nothing arises in that respect in the present case. However in the view I take of the case it is unnecessary to pass upon these two questions.

The patent is in itself very narrow and calls therefore for a narrow construction.

Dealing with these questions of anticipation and invention it is well to mention that there are to-day on the market between fifty and sixty kinds of artificial golf tees, and exhibit 6 is produced as an exhibition of some 15 of them, including that of the plaintiff's.

Witness Cumming saw tees like exhibit No. 14 about 10 years ago. Witness Hopeson has been selling golf tees for a good many years. Previous to 1924 his employers sold a number of varieties made in England and Scotland, of rubber and paper, principally rubber; some with weight attached, and some with a red flannel cord attached. There was also the rubber type, pyramid shape, which was set on top of the ground.

(1) (1919) 36 R.P.C. 279 C.A.; 38 R.P.C. 1.

Witness Ross Preston, one of the defendants, who was examined on Discovery and whose whole examination was read at trial by the plaintiff, being asked as to whether he had made a study of the old types of tees, testified as follows:—

A. Well, I might say before we manufactured tees at all, my partner, Mr. Reid, was presented with a game which I believe was sold under the name of "lawn-ball," and in that game they use as part of the implements of the game what they call a peg which is absolutely identical with what you might call the wooden tee on the market to-day, only it was of a much larger design.

Q. What game is that?—A. I believe it is a game which was introduced back in 1880 or 1890 and patented under the name of lawn-ball. We were presented with the game by a sports dealer in the city of Montreal and he mentioned at the time—he said there is what I consider the golf tee of to-day—it is the outgrowth of this peg for old lawn ball game I used when I was a boy.

B2, the Turner patent, dating as far back as 1882, provides also for a stake or peg, with a point going into the ground, larger at the upper end which provides a cup for receiving and supporting a ball—the whole as used in the game of "lawn pool." The game consisted in hitting the stake or peg with another ball and knocking this ball off.

True the golf tee is smaller, but it embodies all of these elements and it could hardly be contended that a patent could be maintained for a smaller size device, with a few variations—and to be used in an analogous manner for a game of ball.

Is not the plaintiff's device simply an old device used for a new but analogous purpose? If so, it is not patentable. The device of a peg pressed into the ground to hold a ball existed before the plaintiff's patent.

B3, Grant, American Patent, dated 12th December, 1899, is for a golf tee, made of a wooden shank, tapered to a point at the lower end, running into the ground, with a rubber tubing top in the shape of a cup into which the ball sits. Some of the language used in this patent resembles very much the language in the plaintiff's patent. The top parts are different in shape. The plaintiff's device may be considered an improvement, but there is no invention in a mere adaptation of an idea in a well-known manner for a well-known purpose, and here for an analogous purpose, without ingenuity, though the adaptation effects an im-

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provement which may supplant an article already on the market. *Carter v. Leyson* (1).

The plaintiff's device may be somewhat an improvement on the prior art and has resulted perhaps in commercial success; but this only affords the presumption of usefulness coupled with the marked increase in the number of people playing golf in our days and correspondingly increasing the demand for such devices. However, it does not follow by any means conclusively that the improvement lay in a discovery based upon an invention. *Charlesworth, Peebles and Co. v. British Thomson-Houston Co. Ltd.* (2); *Durable Electric Appliances Co. v. Renfrew Electric Products Co.* (3).

Exhibit B9, the Ellis Patent of 1893, discloses all the elements involved in the plaintiff's patent; that is you have a spike or shank and a top of conical shape upon which the ball is placed. Exhibit B10, the Kirkwood patent of 1896, discloses again all these elements designed or displayed somewhat differently; but the elements are all there: that is a spike or shank, pointed at the lower end, and with a somewhat larger top, cup shaped, to receive the ball.

Exhibit B11 embodies again the elements set forth in the plaintiff's patent which have just been mentioned; that is a concave superstructure or head with a pin or shank set under the same and which is "pushed into the ground."

Having thus in a summary way reviewed the prior art, we are forced to the conclusion that the plaintiff's patent embodies most of the features, functions and contrivances of the prior art, differing, however, somewhat in small structural details which come, I may say, within some of the language of the old patents and may be termed full equivalents and substantially the same. There is not in the plaintiff's patent or device any new element entering into it which cannot be found in the prior art. The general construction of all those tees are all of the same general character. They all perform the same function in practically the same manner. The plaintiff's device may

(1) (1902) 19 R.P.C. 473.

(2) (1925) 41 T.L.R. 259 at 262.

(3) (1926) 59 Ont. L.R. 527 at 534.

give a somewhat different form to the features disclosed in the prior art, but without giving to any of them any new function and without accomplishing any new result.

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The adaptation of old functions or contrivances to a new purpose, especially in the same class of article, would not constitute invention. Indeed, it cannot be successfully contended that the improvement claimed by the plaintiff's patent lies so much out of the track of the prior art and former use as to involve ingenuity of invention.

The plaintiff's patent, considering the state of the prior art, discloses no new function or invention which could amount to invention. The features and functions of the devices both of the prior art and of the plaintiff's patent are the same. Indeed, there is no sufficient invention in merely applying a well-known thing, in a manner or to a purpose which is analogous to the manner or to the purpose in or to which it has been previously applied. Nicolas on Patent p. 23, and cases there cited.

There is not in the present case any novelty in the mode of using the device as distinguished from the novelty of purpose. The present patent relies on the functions performed by well-known devices abundantly disclosed in the prior art.

The slight alteration which may be found, especially in the size, of plaintiff's device as compared with the prior art does not involve ingenuity of invention and is not sufficient under the statute to sustain a patent. What the patentee did was to apply a well-known contrivance, different in size, to the same or to an analogous purpose without invention. Why should then, at this stage of the art, the public be deprived of, by monopoly founded on unmeritorious ground, of a device or contrivance well-known in the prior art? The device does not possess any element of invention. It does not involve, in any sense, a creative work of inventive faculty, which the patent laws are intended to encourage and reward. The plaintiff came late in this narrow field of golf tees; he came when common knowledge of the art was extensively spread and well known.

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The application of a well-known

contrivance to an analogous purpose, without novelty in the mode of application, is not invention and is not good ground for a patent.

Northern Shirt Company v. Clark (1).

The facts before the court show that while the patentee has produced a device of somewhat different size, but with features perfectly familiar to the prior art, without giving it any new function and without accompanying it with new result, bring the patent within the principle so often stated that:

The mere carrying forward of the original thought, a change only in form, proportions or degree, doing the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent.

The Railroad Supply Co. v. The Elyria Iron and Steel Co. (2).

A patent for the mere new use of a known contrivance, without any additional ingenuity in overcoming fresh difficulties is bad and cannot be supported. If the new use involves no ingenuity, but is in manner and purposes analogous to the old use, although not quite the same there is no invention.

Gadd and Mason v. The Mayor, etc., of Manchester (3).
See also Frost on Patent, 4th ed., vol. 1, p. 86.

In view of the state of the prior art and for the reasons above set forth I have come to the conclusion that the plaintiff's patent has been anticipated in the prior art and that it is further null and void for want of the primary test of ingenuity of invention.

Were the patent valid I would have certainly found infringement; but I have come to the conclusion, looking to the prior art and to the subject-matter, that the plaintiff's patent does not possess any element of invention and I can in no sense find in it any element of an inventive quality which the patent laws are intended to encourage and reward by restraint upon commercial freedom. *Treo Company Inc. v. Dominion Corset Co.* (4); *Ball v. Crompton Corset Co.* (5).

The action is dismissed with costs.

(1) (1917) 17 Ex. C.R. 273; 57 S.C.R. 607.

(2) (1917) Patents Office Gaz. (U.S.) Vol. 239, page 656.

(3) (1892) 9 R.P.C. 516 at 524.

(4) (1918) 18 Ex. C.R. 127.

(5) (1886) 13 S.C.R. 469, at p. 475.

GORGICA GUETTLER ET AL. PLAINTIFFS;

1927

AND

June 23.
Sept. 6.

CANADIAN INTERNATIONAL PAPER }
CO. ET AL. } DEFENDANTS.

Patents—Novelty—Invention—Improvement

The patent in suit relates to a barking drum used in the making of pulp, and for improvements thereto. The drum is a rotatable, cylindrical drum, the interior wall of which is formed by bars extending longitudinally, the central portion of such bar being rounded or made substantially into a U-shape, projecting inwardly, the marginal edges of the bars on either side constituting a base or flange through which the bars are fastened to the hoops around the exterior of the drum. Between the bars are spaces through which the bark falls. The general construction of the barking drums known to the prior art was of the same general character as that of the plaintiffs. Plaintiffs claimed that their improvements consisted in rounding the angle bars into U-shape, forming pockets between them, which improved and assisted in the tumbling of the wood in the drum and was more expeditious in action. The only difference between the prior art and the patent consisted in this U-shaped alleged improvement, the drums previous to the plaintiffs having a flat smooth surfaced bar.

Held, that to produce a rounded surface on the bars forming the interior walls of the drum did not denote invention; that such an alleged improvement is a matter for a mechanic or engineer to work out, and did not require inventive genius.

2. That merely to carry forward an idea disclosed in the prior art, by making a change in form, but doing the same thing in the same way, by substantially the same means, even if with better results, does not constitute invention. [*Railroad Supply Company v. The Elyria Iron and Steel Company*, (1917) Patent Off. Gaz. (U.S.) vol. 239, p. 656, referred to and followed.]

ACTION by plaintiffs for an injunction against the defendants preventing them from infringing the patent in question.

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

George F. Henderson, K.C., for plaintiffs.

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

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (6th September, 1927), delivered judgment.

This is an action for infringement of Canadian Patent No. 194245, granted to Herbert Guettler for a new and

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useful improvement in Barking Drums. The validity of the patent is challenged. If the patent is valid there can be no question but it has been infringed by the defendants, and I need say nothing further upon the question of infringement.

The inventor in his specifications describes in part his invention as follows:—

The present invention relates to bark removing machines of the type wherein the blocks of wood, from which the bark is to be removed, are tumbled in a rotating drum. The improvements comprising the invention reside in the provision, within the drum, of devices for effecting the required tumbling action constructed in such a way as to completely avoid brooming or splintering of the ends of the logs, which is liable to occur when tumbling devices of the usual character are employed.

According to the invention, as carried into practice, the drum is made up of longitudinal bars which preferably extend from end to end thereof and are provided with continuous longitudinal projecting portions of substantially U-section. These projections, which may be, and in the preferred form of the invention are in the nature of corrugations, occupy the central portions only of the bars, and project inwardly toward the axis of the drum; and they are disposed sufficiently far from one another, due to their formation as just described, to provide an interrupted or pocketed interior surface within the drum, instead of a practically smooth surface. Consequently when the drum is in motion and the tumbling of the wood takes place, no injury to the wood will be occasioned, because of the fact that the ends of the blocks will strike against the rounded projections instead of against the sharp edges of the ordinary tumbling devices. The pieces of bark detached in this way from the blocks are discharged from the interior of the drum through longitudinal slots, which are produced by spacing apart the edges of the adjacent bars.

It will be seen from the specifications that the barking drum in question is a rigid, rotatable, cylindrical drum, in practice about ten feet in diameter and thirty feet in length, and of steel construction. The interior wall of the drum is formed by bars extending longitudinally throughout the drum, the central portion of the bar throughout being rounded or made substantially into a U-shape, or corrugation, projecting inwardly towards the axis of the drum, the marginal edges of the bars on either side of the U formation constituting a base, or flange as it is usually called, through which the bars are fastened to what are practically hoops surrounding the exterior of the drum, the bars being spaced one and a half to two inches apart, just sufficient to allow the bark to fall through the drum. The flanges or sides of any two adjoining bars constitute a pocket of about ten inches in width, sufficiently wide

and deep to catch the end of a log. The space through which the bark falls separates the sides or flanges of any two bars.

The patent in suit is claimed to have been anticipated by several prior patents. In the first place I might mention Paulson, United States patent, dated August 15th, 1916. The only distinction between Guettler and Paulson, is that the bars extending the length of the drum in the latter are flat and smooth upon the surface, there being no pocket space between them that might catch the end of a log, as in Guettler. There is a small space separating the bars through which the bark may pass, and it is claimed that this space is the equivalent of the Guettler pocket, but this contention does not I think call for serious consideration. In Paulson it is by the tumbling of the logs in a promiscuous fashion and the resulting attrition, that the logs are barked. Hussey, United States patent, August 12th, 1919, is of a similar construction except that plain angle bars, substantially spaced, constitute the interior walls of the drum. Guettler acquired this patent and modified the construction somewhat by placing the angle bars back to back. Later still, Guettler, in construction, covered the space between the angle bars with a cap or bent plate, and this cap or plate also covered the corners of the angle bars. This was the forerunner of the patent in suit. Then there is cited, Alfsen, Canadian Patent, Feb. 9th, 1915, the interior of which is constructed of angle bars, its general construction otherwise being the same as those already mentioned. Ross, United States patent, May 29th, 1917, is generally of the same construction, but with flat bars spaced to allow bark to pass through, and having bulb angles or bark knockers secured to the interior surface by rivets, and distanced apart circumferentially. I do not think it is necessary to refer to any other of the cited prior art.

It will be seen therefore that in the prior art which I have mentioned, the general construction of barking drums was of the same general character as Guettler. In the earlier of the prior art, angle bars or something of that nature, were used to assist in knocking off the bark, or to assist in the tumbling of the logs. The only difference between Guettler and Paulson is, that the former has the

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central portion of what was a flat bar, made into a U-shaped bar whereas Paulson has a flat, smooth surfaced bar. The U-shaped bar it is claimed, prevents brooming of the wood. I do not think there can be any merit to a claim of this kind, in any event. The ordinary angle bar construction would necessarily injure the wood, being sharp, but I cannot think that to produce a rounded projecting surface of any kind on the bars forming the interior walls of the drum, instead of the plain angle bars, would require invention. The desirability of rounded projecting means on the surface of the bars, if desired at all, instead of sharp edged bars would no doubt occur to any one observing a barking drum in operation, and it would be a matter for a mechanic or engineer to work out some form of construction of this nature. Paulson has a flat bar interior, and should therefore not injure the wood more, or as much even, as the U-shaped bar, but as a matter of fact, wood that is barked in Paulson, is broomed to some extent. By agreement of counsel, I was permitted to see a Paulson drum in operation, and I observed that the ends of some of the wood were broomed, although to a very small extent, but this was not necessarily due to the drum itself. I also observed that the drum carried the load of wood high up on its side and that the tumbling was pronounced and promiscuous, the logs being in all possible positions. I could not see that anything could possibly add to the tumbling of the logs in the drum. Nor can I see how wood put through a Guettler drum could escape being broomed also, in some degree. I do not think the U-shaped bar in Guettler is of any advantage whatever over Paulson, in so far as the brooming of the wood is concerned.

Then the sole question, as it seems to me, is whether the pocket spaces in Guettler constitute an improvement that is patentable. It has not been established satisfactorily to me that the pocket facilitates tumbling, or at least in such measure as to substantially differ it from much of the prior art. When the head of a log enters a pocket it is said it remains there, and while the drum rotates other logs pile on top of it and behind it, all being carried higher in the drum than it otherwise would, thus it is said causing greater tumbling of the wood, and hence ensuring a more rapid and efficient barking. The pocket may pos-

sibly cause this in a very small degree, but in any event the logs would be tumbling about promiscuously, and I doubt very much if the pocket promotes either tumbling or barking. At least it is not correct to say that the pocket effects the tumbling of the logs as suggested in the Guettler specifications; that is effected by the rotation of the drum itself. It is almost entirely the friction between the tumbling logs that removes the bark, in both Paulson and Guettler. Evidence of a practical test made between Paulson and Guettler in barking wood at a mill of Price Bros. in Quebec, indicated a greater capacity for barking in the former. That test would seem to indicate that the barking of Paulson was more rapid than its rival. Guettler himself in his evidence did not seem clear or emphatic concerning the efficiency or capacity of his patent over Paulson, in this respect. He merely said you could not determine the capacity of a barking drum in a single test. He said you would have to watch the operation for a long period, and at several mills, and then take the average results. This is hardly understandable where there is claimed an improvement so substantial as to represent invention. Mr. MacRae, the plaintiff's expert witness, would only say that he observed in a Guettler in operation that the ends of quite a number of logs entered the pocket. It may be quite true that the pockets of Guettler would fortuitously engage the ends of wood and perhaps promote tumbling, but this would represent but a negligible proportion of the total number of logs in a drum, and it does not at all establish the utility in tumbling or barking attributed to Guettler. Even if better results are obtainable by Guettler, that of itself is not sufficient grounds to sustain a patent. It appears to me that the claim concerning the tumbling qualities secured by the pocket is at the most a mere incident of a particular construction, primarily designed it is alleged to avoid brooming of the logs, but otherwise producing no constant, new, or substantial results.

While Mr. Henderson, particularly in his closing argument, made the most possible out of the case, and impressed me very considerably at the time upon the utility of the pockets of Guettler in tumbling the wood, still I cannot reach the conclusion that this utility has been established, or that Guettler is such an improvement over the prior art

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as to merit the grant of a patent. Guettler has been favourably received by the purchasing public, and it has gone into substantial use, but it has not been established that this was due to a cheaper construction, or to better results over say Paulson, nor has it been shown to produce new results.

In the case of *The Railroad Supply Company v. The Elyria Iron and Steel Co.* (1), the Supreme Court of the United States, in discussing the patent there in suit, refer to a principle by that Court said to have been frequently laid down, and which I think is very applicable to the case before me. That principle is:—

The mere carrying forward of the original thought, a change only in form, proportions or degree, doing the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent.

I am therefore of the opinion that Guettler is not such an invention as will sustain a patent, and for this reason the plaintiffs' action fails. The defendants will have their costs of action.

Judgment accordingly.



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June 15.
Sept. 6.

MARY THOMASSUPPLIANT;
AND
HIS MAJESTY THE KING.....RESPONDENT.

Crown—Pensions—Contract—Grace and bounty of the Crown

Held, that no contractual relations resulted from the various sections of the Pensions Act (9-10 Geo. V, c. 43) and amendments thereto, between the Crown or the Pensions Board and the soldier or his dependents, upon which an action to recover might be based.

That the words "shall be entitled" in section 34 of the said Act were intended merely to authorize the Pensions Board to make the payment, but were in no way imperative upon them.

That pensions are an act of grace and bounty of the Crown which must be left to the discretion of the Government; and there can be no review of the discretions of the Pensions Board by this Court.

PETITION OF RIGHT by suppliant to recover certain amount as pension for the death of her son.

(1) (1917) Pat. Office Gaz. (U.S.) Vol. 239, p. 656.

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

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

Edward Miall for respondent.

The facts are stated in the reasons for judgment.

THE PRESIDENT, this 6th September, 1927, delivered judgment.

In this case the suppliant claims to be entitled under the Pensions Act, to receive a pension at the rate of \$60 per month, from the date of the death of her son, Benjamin Thomas, namely, the 29th day of June, 1922, down to the 1st day of December, 1925. The suppliant alleges in her petition that after May, 1915, her said son was up to the time of his death her sole support. Further, that on the 17th day of May, 1916, he enlisted for service in the Great War, and served overseas until his discharge from the Forces, on the 8th day of June, 1919. That while serving overseas he was gassed, and after his return to Canada was sick and ailing, although able to work at times, and that during such periods as he was able to work, he supported the suppliant. Subsequent to the death of her son the suppliant applied to the Board of Pension Commissioners for a pension as being a dependent mother, but the Board refused to grant such application upon the ground that the condition resulting in her son's death was not attributable to military service. The suppliant thereupon appealed from the said decision to the Federal Appeal Board, which on October 26, 1925, determined that the death of her son was attributable to his military service. On December 28, 1925, the Board of Pension Commissioners ruled that a pension would be paid to the suppliant at the rate of \$60 per month from the 1st day of December, 1925. The suppliant further alleges that at various times since the said pension was awarded her she applied to the Board of Pension Commissioners for retroactive pension from the date of her son's death up to the date of the Federal Appeal Board's decision amounting to \$2,440; but that the said Board had refused to pay the same "in view of the contributions made by the Canadian Patriotic Fund,

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and contributions from other persons interested in your suppliant's welfare, as well as income from other sources."

The Crown by its Statement in Defence denies the right of the suppliant to recover the amount claimed in the Petition of Right on the ground, *inter alia*, that the amount payable to the suppliant in the way of a pension was subject to the discretion of the Board of Pension Commissioners, and that their decision in the matter cannot be reviewed by this court upon a Petition of Right.

The suppliant's right to recover the amount claimed may be said to depend wholly upon a relation of contract subsisting between her and the Crown, as represented by the Board of Pension Commissioners. The principle generally recognized by the courts in England, the decisions of which have been followed in Canada, is that any claim to a pension is not a claim arising out of contract between those in the military service, and the Crown. I would refer to *Mitchell v. The Queen* (1); *Leaman v. The King* (2); *Dunn v. The Queen* (3); *Cooper v. The Queen* (4); *Yorke v. The King* (5).

The Exchequer Court has had occasion to consider the contract relationship existing between both civil servants and military officers and the Crown. In the case of *Balderson v. The Queen* (6) it was held that:

Where under the provisions of the Civil Service Superannuation Act (R.S.C., c. 18) the Governor in Council exercises the discretion or authority conferred upon him by such an Act to determine the allowance to be paid to a retired civil servant, his decision as to the amount of such allowance is final, and the Exchequer Court has no jurisdiction to review the same.

The English cases decided prior to that case were relied on by Mr. Justice Burbidge. His judgment was affirmed by the Supreme Court of Canada (7). In the case of *Bacon v. The King* (8), Audette J. decided that a gratuity to a military officer is in its very nature a matter depending entirely upon the grace and bounty of the Crown, and that no action will lie against the Crown to recover the same. The authorities are well reviewed in this case.

(1) (1896) 1 Q.B.D. 121; *Note*.

(2) (1920) 3 K.B. 663.

(3) (1896) 1 Q.B.D. 116.

(4) (1880) L.R. 14 Ch. D. 311.

(5) (1915) 31 T.L.R. 220.

(6) (1897) 6 Ex. C.R. 8.

(7) (1898) 28 S.C.R. 261.

(8) (1921) 21 Ex. C.R. 25.

The various sections of the Pensions Act, being chapter 43 of the Statutes of Canada, 1919, and the amendments thereto, do not it seems to me set up any contract between the Crown or the Pensions Board, and the soldier or his dependents. I cannot see in any section of the entire Act any specific contractual relations, established between the soldier and his dependents, and the Crown or the Board. The provisions of section 34 of the Pensions Act are relied upon by the suppliant, and while that section enacts that a parent "shall be entitled" that expression does not carry the case any further than the Statutes and Royal Warrants upon which the English cases have been decided. The whole case has to be looked at as involving an act of bounty by the Crown, and the administration of such act of bounty is left in the discretion of an arm of Government, known as the Pensions Board. So far as the court is concerned no review can be made of the decisions of the Pensions Board, even if the Board goes wrong, and I think it is quite clear that such was the intention of the statutes. The only appeal in, or review of, such matters from the Pensions Board is to the Federal Appeal Board, as provided for by chap. 62, sec. 11 of the Statutes of Canada, 1923.

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For the reasons given I am of the opinion that the suppliant is not entitled to the relief claimed. There will be no order as to costs.

Judgment accordingly.

DETROIT RUBBER PRODUCTS, INC. PLAINTIFF;
 AND
 REPUBLIC RUBBER COMPANY DEFENDANT.

1927
 Sept. 20-22.
 Oct. 22.

Patents—Invention—Prior Art

The patent in suit was for a channel rubber runway for slidable windows in automobiles. In respect to sliding windows, the channel, either of metal or rubber, with a fabric lining the groove and upper edges, which contact with the glass was known in the prior art. The "only idea claimed (as invention) was the extension of the fabric down the sides" to the bottom. A patent had previously been granted to one Matthews, for a channel, in which the fabric was carried completely around, but which was intended to be used for stationary windows.

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Held, that the idea of extending the fabric around the channel, was one which might well have occurred to an ordinary intelligent person, or any person skilled in the art, without any exercise of that inventive faculty which was essential to a valid patent, and that the present patent did not denote invention.

ACTION to have Canadian patent no. 243916 declared valid and infringed by the defendant.

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

George F. Henderson, K.C., for plaintiff.

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

The facts are stated in the reasons for judgment.

AUDETTE J., now (October 22nd, 1927), delivered judgment.

This is an action brought for an alleged infringement of the Canadian Patent No. 243,916, bearing date the 21st October, 1924, granted to Walter W. Metzger and subsequently assigned, namely, on the 9th September, 1926, to the plaintiff herein.

The controversy, in the present case, is between the plaintiff and the defendant Republic Rubber Company only, the action having been, by leave, discontinued with costs, at the opening of the trial as against the other defendants.

The Republic Rubber Company—which will hereafter be called the defendant—by its statement in defence, avers, among other things, that if the Patent No. 243,916 is valid, which the defendant does not admit but denies, then the defendant has manufactured in the United States and sold in Canada to the other defendants herein, a channel rubber runway for slidable windows which would infringe the Letters Patent.

The issues are therefore narrowed down to the only question as to whether the plaintiff's patent is valid or invalid.

The grant contained in the patent is for a certain new and useful improvement in

Channel Rubber Runways for Slidable Windows.

The claims read as follows, viz:—

What I claim is:—

1. In combination, a window frame member, a slidable glass window pane, a runway for such pane carried by said frame member comprising

a self-supporting rubber channel substantially rectangular in cross section having a friction-reducing fabric material covering its glass engaging surfaces and extending outwardly over the lips of the runway and then backwardly down the outer sides of the runway to a point where the edges of the material are concealed between the runway and the frame member.

2. In combination, a window frame member, a slidable glass window pane, a runway for such pane carried by said frame member comprising a self-supporting rubber channel substantially rectangular in cross section having a friction-reducing fabric material covering its glass-engaging surfaces and extending outwardly over the lips of the runway and then backwardly down the outer sides of the runway and onto the back of the runway so that the edges of the material are concealed and the runway is protected.

3. In combination, a channelled window frame member, a slidable glass pane, a runway for such pane mounted within the channel of said frame member and comprising a self-supporting rubber channel substantially rectangular in cross-section provided with a friction-reducing fabric material covering its glass-engaging surfaces and extending outwardly over the lips of the runway and then backwardly down the outer sides of the runway and on to the back of the runway so that the edges of such material are concealed and the runway is protected, said runway being movable laterally within the channel of the frame member to permit the glass pane to be shifted laterally relative to said frame member.

Having perused these claims and looked at exhibit No. 3, it is well to bear in mind that what is claimed as new and patentable is the fact of having a channel rubber runway lined with fabric on five faces: i.e., the bottom, two inside sides and two upper outer edges or faces—and to have added thereto the fabric lining to 2 or 3 other faces, namely: to the two outside faces and bottom.

The whole is succinctly stated by witness Fauver, the president of the plaintiff company, who says that the only idea claimed is the extension of the fabric down to the sides, so that it would cover seven faces instead of five—

That is, carrying the fabric down the outer sides to the back. The patent is not for the channel or way, but for the outer lining.

Proceeding then to the consideration of the merits of the case as submitted, the outstanding question which presents itself for determination is as to whether or not the device in question, exhibit No. 3, covered by the patent, is *per se* subject-matter as involving any ingenuity of invention and further as to whether or not it has been anticipated in the prior art.

The patent is in itself very narrow and calls therefore for a narrow construction.

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This device or structure is really one of great simplicity involving devices and structures well defined in the prior art. And in the consideration of such matters is it not always necessary to consider the rights of the general public, as well as the prior art, to avoid monopolies on such simple devices as would occur to any one? Indeed is not the present idea of extending the fabric around, so to speak, one which might well have occurred to an ordinary intelligent person, or a person skilled in the art, without any exercise of that inventive faculty which is necessary as the ground for a patent. *Bonnard v. The London General Omnibus Co.* (1); *Haskell Golf Ball Co. Ltd. v. Hutchison* (2).

On the question of prior publication, as part of the prior art, the defendant sets up the plea arising out of sec. 7 of the Patent Act. Upon that question it will be sufficient to say that such plea must be established by clear and predominating evidence and not from conjecture. The evidence adduced upon that point is too faint to establish any substantial ground to build upon.

The history of the prior art shows first, as testified to by witness Brown, heard on behalf of the defence, the Hoof runway filed as exhibit "A" and described in the Hoof catalogue of 1918 at p. 6, which is a rubber runway or channel lined with fabric on five faces only. It is the same kind of runway as in the plaintiff's patent, excepting that the fabric is only on five faces. And the purpose of the fabric, in the inside of the channel, is to let the sashless glass slide readily up and down in such channel.

Then at p. 7 of exhibit A it is also disclosed that the runway No. 270 is a device

forming a sash for a window which can be used in a variety of ways in connection with sashless windows, as runways

. . . . Adding

If covered *inside and out* it makes a most desirable item in protecting glass against breakage.

At p. 8 of the same catalogue, No. 1150, we also find a steel channel all covered with felt.

These Hoof devices are not protected by a patent; but these structures—Nos. 270 and 1150—it would seem, dis-

(1) (1919) 36 R.P.C. 279; 38 (2) (1908) 25 R.P.C. 194, at p. R.P.C. 1. 204.



close clearly the idea of covering the channel entirely with felt. It is true the channel is steel and not rubber, but this substitution of material is well settled by the case of *Ball v. The Crompton Corset Company* (1). The improvement of the patent in suit is claimed to be that the fabric extends either at the sides or at the sides and back. There is no evidence that Hoof's device was not a success, but as he was selling his device at 45 cents a foot as against 3 cents by the plaintiff, it is no wonder that Hoof's sale fell out when the plaintiff's device was placed on the market. That the plaintiff achieved a commercial success is not sufficient to justify the issue of a patent. See the authorities upon that point gathered and reviewed in re *Durable Electric Appliances v. Renfrew Electric Products Ltd.* (2).

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Then comes the Fischer patent, exhibit G which at one time was declared in conflict with an application by the plaintiff. However, suffice it to say in that respect that Fischer is the Hoof device which was earlier than Fischer, except that in the latter the fabric is embedded in the walls of the groove or rubber.

The Matthews patent, exhibit D1 (1910) disclosed a channel rubber runway *lined with fabric all around* as shewn by the sample filed as exhibit D11. It is claimed to be used in a window sash and in this case the glass does not slide direct within the runway. It is a window sash intended for a railway, and this device is used in the sash to receive the glass instead of putty. However, this patent discloses a channel rubber runway, or a window pane seat, used in a sash, but there is nothing to prevent it being used with a sashless window in the manner provided by the plaintiff's patent, and it discloses a rubber runway all covered with fabric. It also has a groove at the back which would be only the more solid in the sash of the door.

It is used for a similar and analogous purpose—to avoid the rattling of a window. There would be no difficulty in using the Matthews device in place of the Metzger (p. 110).

The application of a well-known contrivance to an analogous purpose, without novelty in the mode of appli-

(1) (1886) 13 S.C.R. 469.

(2) (1926) 4 D.L.R. 1004 at 1037.

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cation, is not invention and is not a good ground for a patent. See *Northern Shirt Co. v. Clark* (1) and cases therein mentioned.

The adaptation of an old contrivance to a new purpose is not invention and there is no subject-matter when no ingenuity of invention has been exercised. Terrell, p. 38.

It may be well to add here what was said by the plaintiff's expert, witness MacRae, when questioned with respect to D1, and D11, viz:

Q. Then I am putting it to you that if the form of rubber covered U-shape, or channel member, call it what you will, shown in Matthews were used in any of the well known windows having sliding panes, so that the channel engaged the said pane, then you would have the plaintiff's structure?—A. Yes.

Q. I am only trying to clear the ground by seeing what the difference is, and I put it to you that if the form of fabric covered channel shown in Matthews were used in the known type of automobile window with the sliding pane instead of the fixed pane shown in Matthews, we would then have the same structure as shewn in exhibit No. 1, do you agree?—A. Yes.

Passing now to the O'Brien patent, Exhibit D2, of 1915, we find that it discloses a window pane which slides up and down in a runway used with window construction adapted particularly for use on motor vehicles. The side members of the frame are provided with grooves within which are flexible guides covered with plush. The runway is entirely covered with fabric or plush on its eight faces. There is nothing in the specification referring to metal channel, so that a rubber channel would be within the terms "flexible guides." Upon this point, witness MacRae heard on behalf of the plaintiff, testified as follows:

Q. And if in O'Brien I had a rubber channel, instead of what you claim metal, I would then, to all intents and purposes, have the plaintiff's structures as shewn in exhibit no. 1?—A. Yes.

Even if the plaintiff's claim were based upon the substitution of material, rubber for metal, this substitution could in no sense be taken as creative work of an inventive faculty as held in *Ball v. Crompton Corset Co., ubi supra*. No invention on O'Brien in the plaintiff's devices.

The Douglas patent, exhibit D3, relating to convertible automobile body shows a metal channel covered

(1) (1917) 17 Ex. C.R. 273, confirmed on appeal to the Supreme Court of Canada.

with fabric extending over the edges and down the sides, the lining covering extending to the back as well as the sides. (MacRae, evidence, p. 193.)

The Cheston English Patent exhibit D5 relates to window guides or metal channels for frameless sliding windows for automobiles, having for object the elimination of rattling, where the rubber or the like strip is covered with velvet or other suitable fabric. The metal channel is adapted to be enclosed or partly surrounded by "a flat strip of rubber and that rubber is covered with velvet." The metal channel has apertures in it and rubber corresponding projections. It is around the rubber that the fabric is placed. It is somewhat different from Metzger but for analogous purposes using almost analogous means.

The plaintiff's patent relies on functions performed by well-known devices abundantly disclosed in the prior art. The invention claimed here is part of and incorporated in patents of the prior art. Sustaining the plaintiff's device as invention would possibly affect the rights of Matthews and O'Brien, the patentees above mentioned, in that the plaintiff takes part of their disclosures. Moreover, the fact of only extending the fabric down over the sides—or at the back, upon which rests the very idea of the patent, cannot, even outside of the consideration of the prior art, be considered invention as it does not show or involve "any creative work of an inventive faculty."

The plaintiff's patent is made up of a group of well-known old devices and contrivances, and has been anticipated by similar and analogous structures. Its invalidity has therefore been established beyond all question; and that is the finding of the court in the case now before it. The action is dismissed with costs.

*Judgment accordingly.*

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 June 6.  
 Aug. 2.

THOMAS Y. PARKER.....CLAIMANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Revenue—Customs Act, sec. 96 (1)—False answers to questions—Seizure—  
 Interpretation*

Section 246 of the Customs Act provides *inter alia* that where any vessel departs from any port or place in Canada without a clearance, . . . or the Master thereof “does not truly answer the questions demanded of him” said Master shall incur a penalty of \$400 and the vessel shall be detained until said penalty is paid. The only report made was that required of the Master under section 96 (1) of the Customs Act.

*Held*, that the delivery of the report required by section 96 (1) to the Customs officer by the Master was not the “answer of questions demanded of him” referred to in section 246 of the Customs Act.

2. That in the interpretation of any enactment which entails penal consequences, the Court should not do violence to the language in order to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it by express language.

Reference by the Crown under section 177 of the Customs Act.

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

*A. W. M. Jones, K.C.*, for claimant.

*Jas. A. Knight, K.C.*, for respondent.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (2nd August, 1927), delivered judgment.

This is a reference under sec. 177 of the Customs Act. The proceedings concern the ship *Marion Phyllis* and her cargo, one of liquor, seized by the Customs authorities for alleged violation of the Customs Act. It is charged that the master of the ship obtained four clearances from East Jeddore, N.S., for St. Pierre, Miquelon, on specific dates in June and July, 1926, without the intention it is claimed of proceeding to St. Pierre, and on obtaining such clearances, did not truly answer the questions demanded of him, and obtained such clearances on false representations as to the intended voyages and it is also charged that on August 9, 1926, in reporting inwards at Halifax, N.S., the

master represented the content of his cargo as 140 kegs of liquor, whereas in fact the same consisted of 177 kegs. These several charges it is said constitute contraventions of sec. 246 of the Customs Act, for which, penalties were exacted against the master in the total sum of \$2,000, and for the non-payment of which the ship, and her cargo, was detained and seized. The ship and cargo were subsequently released upon a deposit of \$2,000 being made with the Customs, pending the decision of the Department of Customs.

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Section 96 of the Customs Act is as follows:—

96. (1) The master of every vessel bound outwards from any port in Canada to any port or place out of Canada, or on any voyage to any place within or without the limits of Canada coastwise, or by inland navigation, shall deliver to the collector or other proper officer a report outwards under his hand of the destination of such vessel stating her name, country and tonnage the port of registry, the name of the master, the country of the owners and the number of the crew.

(2) The master shall also, before the vessel departs bring and deliver to the collector or other proper officer, a content in writing under his hand, of the goods laden, and the names of the respective shippers and consignees of the goods with the marks and numbers of the packages or parcels of the same, and shall make and subscribe a declaration to the truth of such content as far as any of such particulars can be known to him.

Section 98 (1) is as follows:—

The master of every vessel whether in ballast, or laden shall, before departure, come before the collector, or other proper officer, and answer all such questions concerning the vessel, and the cargo, if any, and the crew and the voyage, as are demanded of him by such officer, and if required, shall make his answers or any of them part of the declaration made under his hand.

The penalty clause relied upon by the defendant is sec. 246 of the Act, which is as follows:—

(1) If any vessel departs from any port or place in Canada without a clearance, or if the master delivers a false content, or does not truly answer the questions demanded of him, or if having received a clearance, such vessel adds to her cargo, or takes another vessel in tow, or performs any work without having mentioned in the report outwards the intention so to do, the master shall incur a penalty of four hundred dollars, and the vessel shall be detained in any port in Canada until the said penalty is paid.

(2) Unless payment is made within thirty days, such vessel may, after the expiration of such delay, be sold to pay such penalty and expenses incurred in detaining, keeping and selling such vessel.

The grounds upon which the plaintiff claims a refund of the deposit are: that the statute provides non-penalty

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for stating in the form of outward reports, a destination not reached or in fact not intended; that the master of the ship was not requested and did not refuse to give any answers to questions as contemplated by sec. 98 (1); and that he did not falsely misrepresent the contents of his cargo as alleged.

The contention of the plaintiff that sec. 246 does not provide a penalty for stating in the report outwards required by sec. 96 (1), a port of destination, without the intention of proceeding to such port, or, in fact having not done so, I think must prevail. I have given a very careful consideration to the provisions of the Customs Act upon this point and to the grounds urged by the defendant's counsel in support of the contrary view, but I am unable to discover anything in the Act, or in the views, addressed to me by defendant's counsel which would in my opinion warrant any other conclusion. It is not suggested in this connection that any section of the Act other than 246 creates a punishable offence, if that in fact does. The offence alleged is, that in obtaining the outward clearances in question, the master did not "truly answer the questions demanded of him." It is beyond controversy I think, that this offence is not to be found in sec. 96 (1) where the master is required to state, inter alia, his port of designation when bound outwards, under his hand. A printed form is provided for this purpose, and this form was used in the several outward reports, here in issue. The statute does not require a declaration as to the truth of this report, and the form used by the Customs does not provide for it. The report outwards so far as destination is concerned, was not evidently considered of the same importance, as the requirement of sec. 96 (2) as to the content of the cargo, which must be accompanied by a declaration as to its truth. It cannot I think be contended that the delivery of the report required by sec. 96 (1) to the Customs officer by the master, is the "answer to questions demanded of him" referred to in sec. 246. It is sec. 98 (1) that says that the master must answer all questions demanded of him by the officer, and that those are oral questions to be put to the master by the officer, is made certain and clear by the fact, that this section states, that the master if required shall make his answers or any of

them part of the declaration under his hand. The declaration here referred to, it is also quite clear, is the one required by section 96 (2), as to content. There is in my opinion, nothing whatever to support the contention, that the statement or report required by section 96 (1) relates to the offence of not truly answering questions demanded of the master, as prescribed by sec. 246. If the officer availed himself of sec. 98 (1) and required answers to questions regarding the destination of an outward clearing ship, an offence under sec. 246, might be made possible. In this case no questions were put to the master, by the Customs officer on clearing outwards, in respect of his proposed destination.

There are several sections of the Act requiring true answers to questions put by Customs officers to the master of a ship, and sec. 255 which is very general in its terms, might be referred to. The necessity for such a provision in the enforcement of the Customs laws is quite obvious, but I think it is quite likely that it was not regarded as of practical importance or utility in the protection of the revenue to make a violation of sec. 96 (1) a punishable offence. It would be intolerable in many instances to make it an offence, because in fact we know that frequently in modern days the intended voyage of a ship is changed by direction of its managing owners after departure from port. It is also quite probable that parliament had not in contemplation the existence of the particular trade which occasions these proceedings, and accordingly did not attempt to anticipate the new situations which such trade has developed. Section 128 of the Customs Consolidated Act, of England, which seems to correspond in part with sections 96 and 98 of the Canadian Customs Act, requires the answering of any questions put to the master concerning the ship, the cargo, and the voyage, and requires a declaration as to the content of the ship. This section, however, enables the Commissioners of Customs to dispense even with the declaration as to content. In case of ships clearing from the port of London, the requirement of the delivery of the content has been dispensed with since May, 1872. Highmore Customs Laws, page 174. I only refer to this provision of the English Customs Act, because it would seem to affirm what I have already observed con-

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cerning the somewhat similar sections of our own Act, that is, that parliament at the time of their enactment did not deem it desirable to make it a punishable offence for a ship to state in its outwards report a port of destination without the intention of proceeding there, or for failure to do so, unless questions relating thereto were put to the master and untruly answered.

Where there is an enactment which may entail penal consequences, one ought not to do violence to the language in order to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it by express language. *Rumball v. Schmidt* (1). An American text book, *Law of the Customs*, by Elmes, well states this point:

Penalties must be specially imposed by statute, or they cannot be enforced; and there is no principle that can justify the extension of a statute so imposing them beyond its plain and unmistakable meaning and intention. The courts will look to the express language employed therein for the designation of the offence and the infliction of the punishment. No artificial or forced construction is to be adopted. They will not give an equitable construction to a penal law, even for the purpose of embracing cases clearly coming within the mischief intended to be remedied. The sense is not to be extended so as to bring things into the statute by construction which do not clearly come within the words. The law does not allow constructive offences or arbitrary punishments. No man incurs a penalty, unless the act which subjects him to it is clearly within both the spirit and the letter of the statute imposing such penalty.

Altogether, I entertain no doubt whatever that the charges against the master which I am presently considering, do not constitute the offence of not truly answering questions demanded of the master, as contemplated by sec. 246. I therefore hold that the master is not liable for the penalties imposed upon him in respect of these particular charges.

Now in respect of the charge of delivering a false content of cargo, it is not in question that the *Marion Phyllis* did make four separate custom entries outwards from a Nova Scotia port, for St. Pierre as alleged. The answer made to the charge in question is, that the master reported the content that the supercargo gave to him on the occasion of the entry inwards on August 9, 1926, and the supercargo states that he unintentionally erred in giving the content



to the master. The master and supercargo made declarations to this effect in writing, and they are to be found on the departmental file, but neither appeared before me to give oral evidence upon the point. The suggestion of the defendant is, that the deficiency in the reported content was knowingly false, and had the ship again departed without the disclosure of this disparity between the reported and the actual content, the difference might have been easily disposed of unlawfully within Canadian waters and landed in Canada, without much hope of successfully establishing the offence against the master or the ship, had she been at once detained for such an offence, by reason of the apparent agreement between her last inward and outward report concerning her content. Neither the master or the supercargo have given any explanation of the shortage of 37 kegs of liquor as reported on August 9, 1926, other than to say, it was unintentional and made in error. I am not disposed to accept their mere declaration to this effect. I have read the answers of the crew given to Mr. Young, Assistant Inspector of Customs for Nova Scotia, on August 16, 1926, the questions and answers having been demanded in writing, and signed by each party, and from that reading of such answers and questions, I am not encouraged in accepting the explanation of the ship's short entry in question. It is difficult to accept as true many of the statements of the master and the supercargo given before Mr. Young, and I cannot accept their statements as to the ship's entry in question. I think the burden is upon them to make some attempt to explain just how the short entry occurred. According to the departmental file before me, the report outwards made last before the entry in question, gave the content as 278 kegs of rum, whereas in the report inwards in question the content is given as 140 packages notwithstanding the fact that the master swears therein, that since his last clearance 20 packages only of rum had been removed from the *Marion Phyllis*, to an unnamed ship nine miles off the Nova Scotia coast. This would appear to make the discrepancy in content greater than that charged, unless I have entirely overlooked something. If there was a bona fide error as to the content, this was susceptible of some more convincing explanation than that given, and I do not think I should now permit the master

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to amend his report under the provisions of sec. 190, or disturb the action taken by the Customs authorities in imposing a penalty of \$400 for this offence.

I am therefore of the opinion that \$1,600 of the total deposit made with the defendant and in connection with the alleged offences first disposed of by me, should be refunded to the plaintiff and the balance declared forfeited. There was, I certify, probable cause for the detention and seizure of the ship and cargo in the first instance. For the reason that neither side is wholly successful, there shall be no order as to costs.

*Judgment accordingly.*

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TORONTO ADMIRALTY DISTRICT

1927  
 Jan. 24, 25.  
 Feb. 7.

BETWEEN:—

OWNERS OF SS. *MANLEY*.....PLAINTIFFS;

AND

OWNERS OF SS. *HECTOR* AND THE }  
 NORTHERN CONSTRUCTION CO..... } DEFENDANTS.

*Shipping—Collision—Signals—Rules—Negligence*

*Held*, that where vessels are meeting in narrow channels or areas and improper signals by whistle are exchanged, Rules 22 and 23 being violated by both vessels, liability for negligence which causes a collision must be determined by the weight of evidence after consideration of the action of each vessel, having regard to Rule 37.

This was an action for damages arising out of a collision which took place on the 8th day of August, 1925, between a scow in tow of the tug *Hector* and the tug *Manley*, in a part of Port Colborne Harbour.

The action was tried on January 24 and 25, 1927, before the Honourable Mr. Justice Hodgins, at Toronto.

*R. I. Towers, K.C.*, for plaintiffs.

*R. S. Robertson, K.C.*, for defendant company.

The facts are set out in the reasons for judgment.

HODGINS, L.J.A., now (February 7th, 1927) delivered judgment.

Action for damages due to a collision on 8th August, 1925, between a scow in tow of the tug *Hector* and the tug *Manley* in that part of Port Colborne Harbour through which a deeper channel for the New Welland Canal was being dredged and drilled.

At the opening of the case the claim against the owners of the *Hector* was abandoned, as that tug and her scow were at the time of the collision being operated by the defendant company under charter.

The tug *Hector* was coming down the navigable channel leading from the last lock of the Welland Canal with a scow behind loaded with some 750 tons of clay and fastened by two towing lines to the tug. The distance of the scow behind was some 66 feet. The tug *Manley* was coming in from Lake Erie with a light scow lashed to her starboard side. Before the collision the *Hector* had met and passed SS. *Griffen* in the navigable channel. The dimensions of the vessels named are as follows:—

*Manley*, 92 feet long, 18 ft. 4 in. beam, draught 10 ft.

*Hector*, 67 feet 5 in. long, 16 ft. 6 in. beam, draught 9 ft.

*Griffen*, 266 feet long, 38 feet beam, draught 15 feet.

*Manley's* scow (Approx.) 130 feet long, 40 ft. beam, draught line 4 ft.

*Hector's* scow, 350 tons weight, 40 ft. beam, draught loaded 8/9 feet.

Owing to the operations connected with the new Welland Canal, the channel through the harbour to the canal had been divided in 1924 into a navigable channel 200 feet in width and a construction area lying alongside to the east, divided from the navigable channel by a line, over 2,000 feet in length from north to south, of spar buoys or stakes 600 feet apart, with two gas buoys marking the north and south ends. These gas buoys are shown on Exhibit 1, the position of that at the south end being marked "A." To the west of the navigable channel the harbour spread out with plenty of water some 22 feet in depth. In the construction area there was a drill boat anchored which, on the morning of the collision was at work some 140 feet east of the line of buoys and stakes as shown on Ex. 1.

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[The learned trial judge here discussed the preliminary acts and the evidence given by each side. After pointing out the contradictions and discrepancies in the testimony, he found the facts largely as given by the Master and crew of the SS. *Griffen*, a vessel proceeding inward ahead of the SS. *Manley*. He then proceeds.]

The only difficulty presented is in connection with the signals. The *Manley* says that when the *Hector* first blew 2 blasts he answered with an alarm and 1 blast, the *Hector* responding with an alarm and two blasts. The *Manley* then again repeated her alarm and one blast, and the *Hector* replied with one blast. Both thus violated Rules 22 and 23 which require slowing down and stopping if necessary. I will deal with this branch of the case later.

. . . . . In view of the short distance traversed by the *Hector*, 100 feet, while she was giving her two signals of two blasts and an alarm with them, and considering that the *Manley*, encumbered by a scow lashed to her, was coming in with the current, and liable to drift crosswise and into the *Hector's* course if stopped, I think the course of the *Manley*, though technically a breach of rules 22 and 23, was justified by Rule 37. I doubt if Rule 30 is applicable. If it is, then the *Hector* was bound to go to starboard and she finally accepted the one blast signal of the *Manley*. I consider that the position was made critical by the position and signals of the *Hector*, and should be governed rather by Rule 37 than by Rule 30.

I find that the *Hector* was to blame for keeping too long on the course she chose in order to clear the *Griffen* and thus crossing into the construction area where she admits she should not have gone, by her confusing signals, in not going to starboard earlier, and in stopping when she had got so close to the *Manley's* course as to thereby endanger the *Manley* and permit her heavy scow to swing, causing the collision which happened.

There will be judgment for the plaintiff company against the defendant company, and a reference to the Registrar at Toronto to ascertain the damages. The defendant company must pay the costs of the action and reference.

*Judgment accordingly.*

SINCENNES McNAUGHTON LINE, LTD., PLAINTIFF;

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Nov. 17.

VS.

THE STEAMSHIP *BRULIN*, DEFENDANT.

*Shipping—Collision—Rule 25—Contributory negligence—Passing signal—  
Breach of Rules—River navigation*

On June 15, 1926, at 11.30 p.m., the weather being fine and clear, with little or no wind, the tug *E. L.* was proceeding down the St. Lawrence River channel, on Lake St. Louis, and the *B.*, a steel vessel of the lake type, was going up. When the ships were about 2½ miles apart, *B.*'s pilot observed a white light ahead, which he took to be that of a yacht coming down on the north side of the channel. The channel at this point is between 2,000 and 4,000 feet wide and bounded by shoals. The *E. L.* was on the north side of the channel and the *B.* was at all material times on the north of midchannel, which was her proper side. The only lights seen by the *B.*, on the *E. L.* were then the two white lights which were broadening on the starboard bow of the *B.* indicating she was passing clear, starboard to starboard. When 70 feet away the *E. L.* suddenly changed her course, to cross the *B.*'s bows, when her red light was disclosed. The *E. L.* failed to give any signal to indicate which side she elected to take (Rule 25) nor did the *B.* give any signal. When the *E. L.* changed her course the *B.* put her helm hard astarboard, and her engines full speed astern, and collision occurred, the stem of the *B.* colliding with the port side of the *E. L.*, near the pilot house.

*Held:* On the facts, that the *E. L.* was solely to blame for the collision.

2. That the fact of the *E. L.* attempting to cross the bow of the *B.* was the direct and immediate cause of the accident, and that the fact of the *B.* earlier transgressing one or more of the Rules of the Great Lakes, or the rules of good seamanship did not contribute to the accident, and did not constitute contributory negligence. [*Anglo-Newfoundland Development Co. v. Pacific Steam Navigation Co.* (1924) A.C. 403, followed.]

ACTION by the plaintiffs to recover for the loss of their tug *Emma L.* by reason of collision with the defendant.

The action was tried before the Honourable Mr. Justice Archer at Montreal, assisted by Captains J. Mackintosh and J. O. Grey as Nautical Assessors.

*A. R. Holden, K.C.*, for plaintiffs.

*Francis King, K.C.*, for defendant.

The facts are stated in the reasons for judgment.

ARCHER L.J.A. now (November 17, 1927), delivered judgment.

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L.J.A.

The plaintiff is the owner of the tug *Emma L.*, a steam tug of 56 tons gross, 35 tons net, 68 feet 4 inches long, and 14 feet 8 inches wide, drawing 7 feet 8 inches, and carrying a crew of seven; her speed being from 8 to 9 miles per hour.

The steamship *Brulin*, under the command of Captain G. A. Felker, is a steel lake type vessel of 2,241 tons gross, 1,576 tons net, speed  $9\frac{1}{4}$  knots an hour, carrying a crew of nineteen. At the time of the collision she was drawing 13 feet aft, and 4 feet forward. Her length is 247 feet and her beam 43 feet.

On the evening of June 15, 1926, the weather being fine and clear with little or no wind, the tug *Emma L.* was proceeding down the channel of the River St. Lawrence in Lake St. Louis, with the current. The *Brulin* was en route for Port Colborne, proceeding up Lake St. Louis. Shortly after leaving Lachine the Master of the *Brulin* had retired, leaving command of the vessel to Captain J. Clark, who was engaged as a pilot. When nearing buoy 868 Captain Clark, the pilot of the *Brulin*, observed a white light ahead of buoy 988, and thought it was a yacht coming down the river on the north side of the channel. It should be noted that the distance between buoy 868 and buoy 988 is approximately two and one-half to two and three-quarters miles. The buoys are all placed on the north side of the channel.

After passing buoy 848 the channel is bounded north and south by shoals, the width varying approximately from 2,000 to 4,000 feet.

The evidence clearly establishes that the tug *Emma L.* was on the north side of the channel. The *Brulin* was always northward of the midchannel line, and, therefore, on her right side of the channel. As both ships were approaching, the only lights seen on the *Emma L.* were the two white lights which were broadening on the starboard bow of the *Brulin*, indicating that she was a ship passing clear, starboard to starboard. The crew of the *Brulin* claim they did not see the green light of the *Emma L.*

The evidence shows clearly that had the *Emma L.* followed this course she would have passed clear of the *Brulin* on the starboard side of that vessel, close to the line of buoys on the north side of the channel, but when at about

70 feet distance the *Emma L.* suddenly changed her course to cross the *Brulin's* bow, and at the same time disclosed her red light. The *Brulin's* helm was put hard astarboard, and her engines were put full speed astern. I am instructed by my assessors, and I am of opinion, that when one considers the speed of the *Brulin* and the short distance between the ships the above manoeuvre did not make any appreciable change in her direction or speed. The *Emma L.* continued across the *Brulin's* course, and a collision followed, the stem of the *Brulin* and the port side of the *Emma L.* in the vicinity of her pilothouse coming together.

As a result of the collision the tug *Emma L.* sank immediately, and became a total loss; and all her crew, with the exception of one fireman who was sitting on deck, were drowned. The *Brulin* was not damaged.

The collision occurred at 11.30 p.m., a short distance below buoy 92, at one of the widest parts of the channel, and at about 800 feet south of the buoy line.

In this case I have not had the advantage of seeing and hearing the witnesses, the parties having by consent submitted the case on the evidence taken before the Wreck Commissioner. Some of the evidence is not very satisfactory, but I cannot impute perjury. I have to accept the evidence given by the crew of the *Brulin*, and, accepting this evidence, which I have analyzed with great care, it is clear that the only and determining cause of the collision is to be found in the fact that the *Emma L.*, for reasons unknown and unexplained, suddenly changed her course to starboard from a position and direction in which she would have passed the *Brulin* in perfect safety starboard to starboard, and crossed the bow of the *Brulin*.

The only survivor of the *Emma L.*, fireman Sylvio Mongeon, corroborates to a certain extent the evidence given by the crew of the *Brulin*. He admits that shortly before the collision the *Emma L.* suddenly changed her direction to the right,—that is to the starboard. (Pages 5, 6, 7 and 8).

There is no doubt that the *Emma L.* proceeding down the channel with the current had the right of way under section 25 of the Rules of the Road for the Great Lakes. This section reads:

[The learned trial judge here cites Rule 25.]

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The *Emma L.* did not give any signal to indicate which side she elected to take, neither did the *Brulin* give any signal.

Captain Clark who was acting as pilot, and the second mate who was with him in the pilothouse, do not seem to have watched with care the movements of what they supposed to be a yacht. This lack of care and attention did not contribute to the collision, which was brought about by the sudden change of course of the *Emma L.*

I am of opinion, and I am also advised by my assessors, that although the initiative lay with the *Emma L.*, if she neglected to give a signal, the pilot of the *Brulin* would have shown good seamanship by indicating his intention by blowing a passing signal.

When the red light of the *Emma L.* appeared, as she started to cross the bow of the *Brulin*, the latter instead of putting her helm hard astarboard should have ported her helm and gone full speed astern. But, as I said before, this manoeuvre was *in extremis* and even if the proper manoeuvre had been adopted it would not have had any effect.

Having reached the conclusion that the direct and immediate cause of the collision is proven to be due to the fault of the *Emma L.*, even if I assume the *Brulin* transgressed one or more of the Rules of the Great Lakes, or the rules of good navigation, I must say that the transgression of such rules did not in any way contribute to the accident. This question has been fully discussed in many cases but I think the leading case is *Anglo-Newfoundland Development Company v. Pacific Steam Navigation Company* (1). See also remarks of Lord Selbourne in *Spaight v. Tedcastle* (2).

I am, therefore, of opinion the *Emma L.* is alone to blame for the collision, and plaintiff's action is dismissed with costs.

*Judgment accordingly.*

Solicitors for plaintiff: *Meredith, Holden, Heward & Holden.*

Solicitors for defendant: *King & Smythe.*

(1) (1924) A.C. 406, at p. 421.

(2) (1880-81) 6 A.C. 217, at p. 219.



WHITFIELD COOK .....CLAIMANT;

1927

AND

Sept. 28.  
Dec. 31.

HIS MAJESTY THE KING.....RESPONDENT.

*Revenue—Customs Act—Forfeiture—Sections 101, 237, 238, 186 and 196 of Customs Act.*

*Held*, that the purpose of sections 101, 237 and 238 of the Customs Act, is to prevent fraudulent export entries from customs warehouses, and to ensure the performance of the obligation to export the goods to another country. That the forfeiture penalties attached only when there had been actual and fraudulent relanding of the goods into Canada, in violation of the Customs Law.

2. That where goods are transferred within the territorial Waters of Canada, without the intention of fraudulently re-landing or bringing the same back into Canada, no offence is committed under the Act.
3. That if Parliament intended to make such an act an offence, then it is not sufficiently or clearly stated to warrant the imposition of the penalty of forfeiture.
4. That sections 186 and 196 deal with two entirely different offences, and cannot be read together so as to make a ship liable to forfeiture, for entering any place in Canada other than a port of entry.

Reference by the Minister of Customs and Excise under Section 179 of the Customs Act.

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

*G. L. Fraser* and *W. C. Ross* for Claimant.

*H. A. McLean, K.C.*, for Respondent.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (December 31, 1927), delivered judgment.

This is a reference made by the Minister of Customs and Excise under sec. 179 of the Customs Act. The claimant contends that the motor vessel *Ououkinish* which he owned, was improperly seized by the Customs authorities, and that the decision of the Minister, that the ship be and remain forfeited should be set aside.

Briefly stated the facts are as follows: The ship *Ououkinish* cleared from Vancouver on January 21, 1925, for Banks Island, B.C., with 100 barrels of beer and 95 cases of liquor, which was excise and duty paid, and on the 16th of April following, reported inward at Vancouver from

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Banks Island, without any cargo. The vessel in fact did not proceed to Banks Island, but proceeded to sea where she came into communication with the Nicaraguan schooner *Lirio de Agua*, on January 26, this schooner being laden with liquor received from a sufferance warehouse at Victoria, B.C. It was the intention there to transfer the cargo from the Nicaraguan schooner to the claimant's vessel, but it is alleged, that owing to weather conditions and other causes it was found impossible to effect the transfer, and so both vessels proceeded to Neuchatlitz Inlet in Canadian waters, not being a port of entry, where the cargo consisting of 1,005 cases of liquor, was transferred to the claimant's vessel. The claimant alleges that his vessel's cargo was disposed of, off the American coast, and it is not contended that the same was landed in Canada.

The claimant's ship was seized upon her return to Vancouver, charged by the seizing customs officer with having been made use of in the unshipping and removal of goods liable to forfeiture,

under sections 196 and 222 of the Customs Act. In the report of the Commissioner of Customs and Excise, the seized vessel was charged with the commission of the following offences: making a false report outwards, from Vancouver; making a false report inward at Vancouver; entering a place in Canada other than a port of entry; adding to cargo after receiving a clearance; for all of which offences it was alleged she was liable to penalties aggregating \$2,000. It was also claimed that the vessel was liable to forfeiture under sections 101 and 238 of the Customs Act for having brought back into Canada goods exported from a Customs warehouse, and also liable to forfeiture under sec. 196 of the Customs Act for having been made use of in the importation or unshipping or landing of goods liable to forfeiture. The Commissioner of Customs and Excise recommended that the vessel be and remain forfeited, and the decision of the Minister of Customs and Excise affirmed the recommendation of the Commissioner.

The case is somewhat complicated by the following facts. The seizing officer detained the vessel for violation of sections 196 and 222 of the Customs Act. The Commissioner of Customs and Excise in his report, states that

the vessel had committed the four offences which I have just above stated, and was liable to the penalties there also mentioned. The Commissioner also reported that the vessel was subject to forfeiture for violation of sections 101 and 238, and also sec. 196 of the Customs Act, the violation of sections 101 and 238 not having been mentioned by the seizing officer. It was the recommendation of the Commissioner that the vessel be forfeited, that the Minister concurred in. It was apparently the major offences and penalties that the Commissioner and Minister acted upon, but it does not follow I assume, that the minor offences were to be considered as abandoned. Then the owner and master of the vessel were officially notified, according to the papers before me, that the offence committed was violation of sec. 196, and for which forfeiture was decreed. This notification, which was in writing, was dated June 2, 1925, and was the notification required by sec. 175, which requires the Commissioner of Customs to notify the owner or his agent of the thing seized, of the reasons for the seizure, detention, penalty or forfeiture. At the hearing of the reference, counsel for the Crown pressed only the offences for which forfeiture was the penalty. Under the provisions of the statute I am empowered to consider the subject matter of the reference, upon the papers and evidence referred, and upon any other evidence produced, and decide according to "the right of the matter." I think I am justified therefore in considering all the offences charged or mentioned in the report of the Commissioner of Customs, or any offence disclosed in the proceedings upon the reference, whether prior or subsequent to the Minister's decision, and thus decide according to "the right of the matter." If I should find the vessel was not liable to forfeiture, it yet may well be that the vessel is, and should be liable to other penalties for such or other offences, if committed. It would seem strange if that were not possible, particularly in cases of this kind. Pleadings were filed in these proceedings, and the statement of defence is sufficiently wide to cover all the offences mentioned in the Commissioner's Report and alleged to have been committed. The Minister's decision affirming the recommendations of the Commissioner only means

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that forfeiture was the proper penalty for some of the offences alleged to have been committed, but if such penalty of forfeiture in such case is not maintainable, it does not I think follow that penalties may not be imposed for other offences alleged or disclosed, and which in fact have been committed. I shall therefore proceed to consider the several offences alleged to have been committed by the vessel in question.

In respect of the charge that the master of the claimant's vessel, contrary to the provisions of sec. 96 (1) made a false report outwards, that is to say gave a false destination in his entry outwards, I need say little. There is no doubt but that the master stated a false destination in his entry outwards. In the case of *Parker v. The King* (1), I held that the Customs Act provided no penalty for such an offence, and I see no reason for varying the opinion delivered in that case.

Now in regard to the charge that the vessel added to her cargo in Canadian waters after clearance without having mentioned the intention to do so in her reports outwards, it is to be observed that the penalty (sec. 246) is against the master, and the vessel may be detained until the penalty is paid, and unless payment is made within thirty days, the vessel may be sold to pay such penalty. I think the master became liable to the penalty as he cleared with the intention to add to his cargo, without having mentioned it in his report outwards. However, that is not a ground for forfeiture of the vessel. The vessel is still in the possession of the Crown in the form of a deposit, pending a final decision of all the issues in dispute, and the question as to whether or not a penalty may yet be exacted for the offence stated, still remains open for adjudication. I am of the opinion that the master of the *Ououkinish* was guilty of this charge, and it is one of the offences set forth in the report of the Commissioner of Customs and Excise. I am of the opinion therefore that the vessel is liable for the payment of the penalty prescribed for this offence, viz., \$400, if the same is not paid by the master within thirty days from the date of the rendering of this judgment.

In respect of the charge of making a false report inward, which charge I take to mean that the vessel reported she was from Banks Island whereas this was untrue, there is no doubt as to the commission of the offence and that the report inwards in this respect was deliberately false. I cannot, however, find anywhere in the Customs Act any penalty provided for such an offence, and my attention has not been directed to any such provision. This charge against the vessel cannot therefore be sustained.

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Another charge is that the claimant's vessel is liable to forfeiture for having brought goods back into Canada, which had been entered outwards from a Customs warehouse for export, and sections 101, 237 and 238 of the Customs Act are relied upon by the Crown. The real question for determination then is, did the claimant's vessel re-land or bring into Canada the cargo transferred from the Nicaraguan vessel within Canadian waters in the circumstances already stated, and within the meaning of sec. 238. I am unable to reach the conclusion that sec. 238 was intended to cover the facts of the particular charge I am now dealing with. The purpose of the three mentioned sections of the Act is to prevent fraudulent export entries from customs warehouses, and to ensure performance of the obligation to export goods to another country. If there has been a non-performance of this obligation the person entering the same for exportation shall be liable to a penalty of double the duties of importation on such goods. Also, if such goods are re-landed or brought into Canada in violation of the Customs law or regulations, they are liable to seizure together with any vessel from or on which they have been so landed. I think this section was intended to mean that the forfeiture penalties attached only when there had been an actual and fraudulent re-landing of the goods into Canada from whence they were exported, in violation of the Customs Law, that is without payment of duty, or without proper entry, or something of that nature. I do not think this section was intended to cover the case where a transfer was made within the territorial waters of Canada as was done in this case, without the intention to fraudulently re-land or bring the goods back into Canada. There is no evidence that the goods were fraudulently

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Maclea J.

re-landed in Canada and I am not asked to find that they were so landed. If this section of the Customs Act was intended to make the act complained of here an offence, which I very much doubt, then it is not sufficiently or clearly stated to warrant the imposition of the penalty of forfeiture. An offence may have been committed, but not I think the one contemplated by sec. 238. That section was intended to state as an offence, and to provide a penalty, the fraudulently landing back into Canada of goods taken out of Canada for export, without complying with the Customs law or regulations. I am not of the opinion that the goods in question were fraudulently landed or brought back into Canada in the sense contemplated by sec. 238. I am therefore of the opinion that the claimant's vessel is not subject to forfeiture upon this charge.

Then it is charged that the ship is liable to a penalty for entering a place in Canada, other than a port of entry, in contravention of sec. 186. There can be no doubt I think but that the claimant's vessel violated this section. She entered a place in Canada other than a port of entry, first with the goods she had on board when she cleared from Vancouver, and which was supplemented by cargo transferred from the *Lirio de Agua*. In doing so the claimant's vessel became liable of seizure, the goods to seizure and forfeiture, and the master liable to a penalty of \$800. The vessel was liable to detention only if the penalty against the master was not paid within thirty days. After that period of time the vessel might be sold to pay such penalty. The vessel's value is now in the hands of the court, and the only question for decision is whether the master is liable to a penalty upon this charge, and I think he is, and in the sum of \$800. There is no evidence that any penalty was imposed upon the master in this connection, or that he was notified of the imposition of such penalty. Accordingly I find that the master is liable to the penalty of \$800 and if the same is not paid within thirty days of the date of the rendering of the present judgment, the same shall be paid from the money value of the ship now in the hands of the Crown.

There remains for consideration the question as to whether the claimant's vessel is liable to forfeiture under

sec. 196. I think this section relates to the case where a vessel is made use of in unlawfully importing, unshipping or landing in Canada, goods liable to forfeiture under the Act. It is not claimed that the claimant's vessel landed any of her original or later acquired cargo in Canada, or imported the same into Canada. What she did was to receive a part of her cargo within Canadian territorial waters and at a place other than a port of entry. I do not think that was the offence contemplated by sec. 196. It is the actual importation, unshipping or landing into Canada, of goods in violation of the Customs Act that constitutes the offence for which this section provides the penalty of forfeiture. There is no warrant I think for reading more into the section than this. If there is no offence created by statute covering what was done by the two vessels concerned in the transfer of cargo as here related, other than that I have already dealt with, there possibly should be, but the failure clearly constitutes such additional offence and to provide the appropriate penalty, does not I think justify any attempt to read into section 196 something that is not clearly there. I cannot reach the conclusion that there was any importation, unshipping or landing as contemplated by sec. 196. The fact that sec. 238 seems to deal specifically with the facts of this charge, would indicate that sec. 196 was not intended also to meet the case. It would I think be a forced construction of sec. 196 to say that the *Ououkinish* was engaged in the importation or unshipping or landing or removal of goods liable to forfeiture. To so hold would appear like applying the provisions of this section to offences which I think was never contemplated. It is always difficult to interpret with confidence this provision of the Act, but in this case that provision does not in spirit appear to have been enacted to meet the offence presently under discussion, and I doubt very much if it was ever so intended. It is to be hoped that amending legislation is imminent to remove such doubts regarding this section of the Act, as well as many others.

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Mr. McLean on behalf of the Crown urged upon me strongly that sec. 186 and sec. 196 should be read together, and that for the offence of entering a place in Canada other than a port of entry, the vessel was liable to forfeiture

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under sec. 196. I think there is no substance in this argument. These two sections deal with entirely two different offences, and to attempt to read them together would I think be unwarranted and obviously beyond the intention of the enactments themselves. This is made clear I think by the fact that under sec. 186 the vessel is liable to seizure, but the seizure does not make the vessel liable to forfeiture, except for non-payment of the penalty imposed against the master, whereas under sec. 196 the vessel is liable to seizure and forfeiture, for the offence therein mentioned. There is no principle justifying the extension of a statute imposing penalties, beyond its plain and unmistakable meaning and intention, and the courts must look only to the express language employed therein for the designation of the offence and the penalty.

In the result I find that the *Ououkinish* is liable to the penalties already stated and amounting to \$1,200; that this sum be declared forfeited and be deducted from the total deposit made with the respondent by the claimant, if not paid by the master of this vessel within the period already mentioned, and that the balance or the whole of the deposit be refunded to the claimant as the case may be. There was I certify probable cause for the detention and seizure of the vessel. In all the circumstances I think each party should bear its own costs, particularly as no demand was made by the claimant, or the master of the *Ououkinish*, in respect of the penalties which I have found to be payable.

*Judgment accordingly.*

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 Jan. 12.  
 Jan. 28.

ON APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT

BETWEEN:—

THE TUG *SPRAY* (DEFENDANT)..... APPELLANT;

AND

HERMAN ST. CLAIR (PLAINTIFF)..... RESPONDENT.

*Shipping and seaman—Prescription—Action in rem—Maritime Conventions Act, 1914—Interpretation.*

The present action is one *in rem* against the tug *S.* for damages to plaintiff's canal boat, when in tow of the *S.*, as a result of a collision between the said canal boat, a dumb tow, and the wall of the inner basin



of the Harbour of Quebec; which collision was alleged to be due to the negligent navigating of the *S.* The action was commenced more than two years after the date when the damage or loss or injury complained of was caused, and the defence claimed that the action was barred under sec. 9 of the Maritime Conventions Act, 1914. In the trial court defendant's contention was dismissed on the ground that "from the wording of Section 9 and from the object of the Act as read in the preamble and in Section 2, Section 9 only applied to "collision between vessels."

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*Held:* (Reversing the judgment appealed from) That Section 9 of the Maritime Conventions Act, 1914, was not limited in its application solely to actions for damages due to collision between vessels, and that the present action not having been commenced within two years from the date when the damages or loss or injury was caused cannot be maintained by the Court and should be dismissed (*The Cairnbahn* (1914) P. 25 followed).

2. That where the text of an enactment of a Statute is clear and unambiguous, no reference to the preamble of the Act is necessary to a proper interpretation of such enactment.

APPEAL from the judgment of the Local Judge in Admiralty, Quebec Admiralty District, rendered herein on the 1st of June, 1927.

The Appeal was heard before the Honourable Mr. Justice Audette at Quebec.

*A. C. M. Thomson* for the appellant.

*Alfred C. Dobell, K.C.*, for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now (January 28, 1928), delivered judgment.

This is an appeal from the judgment of the Local Judge in Admiralty holding, upon the grounds set forth in his reasons for judgment, that sec. 9 of The Maritime Conventions Act, 1914, (4-5 Geo. V, ch. 13), applies only to "collisions between vessels" and that, therefore, the limitation within which actions are to be commenced within two years from the date when the damage or loss or injury was caused, as fixed by that section, does not apply to the present case as the collision herein was "between a canal boat, a dumb tow, and the port wall of the Inner Basin of the Harbour of Quebec."

With this view, with the greatest deference, I am unable to agree.

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The judgment appealed from rests its interpretation of sec. 9 of The Maritime Conventions Act (Can. 4-5 Geo. V, ch. 13) upon "the object of this Act as read in the preamble and in section 2."

The text of the enactments of The Imperial Maritime Conventions Act 1911 (1 and 2 Geo. V, ch. 57) is the same as the Canadian Maritime Conventions Act, 1914, (4-5 Geo. V, ch. 13).

The facts of the case are fully set out in the judgment *quo* and it is unnecessary to repeat them here, suffice it to say that the damages claimed would be the result of a collision "between a canal boat, a dumb tow, and the port wall of the Inner Basin of the Harbour of Quebec," and not between two vessels.

The same questions raised in this case as to the interpretation of the Act came up for decision in England in the cases of *The Cairnbahn* (1), and *The Batavier III* (2).

Sir Samuel Evans, at p. 28 *et seq* of *The Cairnbahn* case, says, *inter alia*:

It is necessary for the decision of the case to determine the construction to be placed upon sec. 1 of the Act of 1911 (which corresponds to sec. 2 of the Canadian Act). The Act was passed to amend the law in relation to merchant shipping, to enable effect to be given to certain international conventions, which are referred to in the preamble . . . . What is the proper construction of the section? Its language appears to me to be quite plain . . . . There is nothing in the section about the two vessels in fault *being themselves* in collision with each other.

The learned President reviews some other points of law raised in that case and then proceeds:

*If the words in the section which I have to construe were ambiguous, I think I should be entitled to look at the conventions referred to in the preamble, in order to see whether a reasonable construction could be given to the section which would carry out what was agreed by the high contracting parties to the conventions. It is not necessary to do this, because the words appear to be unambiguous and clear; but it is satisfactory to find on reference to the terms of the conventions that the section in its plain meaning does carry out what was agreed.*

This decision of so eminent a jurist as Sir Samuel Evans, confirmed by the Court of Appeal and followed by Mr. Justice Hill in *The Batavier III*, has clarified these questions and settled them beyond doubt. *Stare decisis*.

The question of recovery of damages in Admiralty arising out of the collision by something not a ship, etc., had long been settled before the passing of the Act of 1911.

(1) (1914) P. 25.

(2) (1925-6) 42 T.L.R. 8.

*The Mersey Docks and Harbour Board v. Turner; (The Zeta)* (1) and the cases cited in Mayer's Admiralty Law and Practice, pp. 110 and 111; Roscoe Admiralty Practice, 4th ed., 80.

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I find in the present case that the language of the enactment of section 2 is quite clear and that in a case of that kind the preamble must be discarded to find the meaning of the section. As said on appeal by Lord Parker of Waddington in the *Cairnbahn* case (*ubi supra*), p. 30:

I do not think that such preamble or title can, according to any sound canon of construction, be called in aid to control the meaning of words in themselves clear and unambiguous.

Besides apportioning the damages, the Act, instead of being limiting in scope, has enlarged the scope of the liability to contribute, not merely dealing with the proportion of contribution; but extending to cases where more than two vessels are involved, the Judicature Act being confined to cases in which two colliding vessels only are in fault. *The Cairnbahn*, p. 38 (*ubi supra*); Craies, On Statute Law, 3rd ed., 181; *The Umona* (2).

And as further said by Warrington J., in the Court of Appeals, at page 38, *The Cairnbahn* case

. . . . According to the true construction of the Act, all damage or loss to one or more of the vessels in fault is to be apportioned between these vessels, *whether it arises from collision between them or not*. The enacting words seem to me free from ambiguity, and it would, in my opinion, be improper to seek to control them by reference to the preamble or the headings of the divisions of the Act.

For the considerations to which I have just adverted and for the reasons fully given in the cases above cited, I have come to the conclusion that as the text of the enactment of the statute is clear and unambiguous, no reference to the preamble is necessary to a proper decision of the questions in controversy here. Furthermore it should not be overlooked that all damage or loss to one or more of the vessels in fault is to be apportioned between these vessels whether it arises from collision between them or not.

The appeal is allowed; the action is dismissed as being barred, under sec. 9 of the Act, having not been brought or commenced within two years from the date when the damage or injury was caused. The whole with costs below and on appeal in favour of the defendant appellant.

*Judgment accordingly.*

(1) (1893) A.C. 468.

(2) (1914) P. 141.

## TORONTO ADMIRALTY DISTRICT

1928

Jan. 20.

BETWEEN:—

CANADA ATLANTIC TRANSIT CO..... PLAINTIFFS;

AND

EASTERN STEAMSHIP CO., LTD..... DEFENDANT.

*Shipping—Practice—Admiralty—Appeals—Collision—Both vessels to blame—Separate appeal by both—Rules 164, 168 and 169—Directions as to evidence at trial.*

*Held*, that where a judgment holds both vessels to blame for a collision and where each party is actively claiming against the other for damages, it is open to each to appeal from such judgment by a separate and distinct appeal. In such a case each must serve notice of appeal and give security to the other for costs of his appeal.

2. That rule 164 should be confined to cases where the respondent desires some modification in or enlargement of the judgment against the appellant or some relief against him but is not himself or his ship held to be liable in damages to the appellant.
3. When both claims have been tried together directions as to the evidence taken at trial and as to the costs of typewriting or printing it for the appeal, should be obtained under rules 168 and 169.

Application of plaintiff for permission to bring a separate appeal.

On the 10th day of January, 1928, the Honourable Mr. Justice Hodgins rendered judgment herein, finding the ships of both plaintiff and defendant to blame for a collision which had taken place.

On January 11, 1928, the defendant served a notice of appeal from the said judgment, and on the 18th of January, the plaintiff also served notice of appeal. On the 20th, the defendant moved to have the security furnished by it on appeal approved, when counsel for plaintiff stated that he proposed also to move for a similar order in reference to the appeal taken by the plaintiff. Thereupon the question of the right to separate appeal, and the effect of rule 164 was argued, the defendant contending that under this rule the respondent in an appeal was limited to serving the notice mentioned in said rule. The plaintiff contending that as by the judgment, both were found to blame and liable for part of damages, he should have a separate appeal, as the mere notice under rule 164 might leave him

without remedy, if, after the delay for appealing had lapsed, the defendant-appellant should abandon its appeal.

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CANADA  
ATLANTIC  
TRANSIT Co.  
v.  
EASTERN  
STEAMSHIP  
Co., LTD.

The two motions were heard before the Honourable Mr. Justice Hodgins, at Toronto.

*J. P. Pratt* for plaintiff.

*G. S. Jarvis* for defendant.

The facts are stated above and in the head-note.

HODGINS L.J.A., now (20th January, 1928) delivered judgment (in Chambers).

(The memorandum handed down by the learned judge was very concise and short and is practically given verbatim in the head-note and is therefore not repeated here.)

Between:—

O'REILLY & BELANGER, LIMITED . . . . . APPELLANT;

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Nov. 4.  
Dec. 28.

AND

MINISTER OF NATIONAL REVENUE. . RESPONDENT.

*Revenue—Donations—Income—Deductions—Sec. 3, subsection 8 of  
Income War Tax Act, 1917*

*Held*, that donations made to public, social, charitable and ecclesiastical institutions, at the request of the friends of such institutions as well as amounts paid in the office to casual visitors for tickets to performances, lotteries, etc., under an alleged commercial practice, with the object of benefiting appellant's business, and not for charitable purposes, are not disbursements or expenses "wholly, exclusively and necessarily laid out or expended for the purposes of earning the income," and cannot be deducted from the profits and gains of the company in arriving at its taxable income, under the provisions of subsection 8, section 3 of The Income War Tax Act, 1917, and amendments.

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 Audette, at Ottawa.

*N. A. Belcourt K.C.* for appellant.

*C. F. Elliott* for respondent.

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&  
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LTD.  
v.  
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OF  
NATIONAL  
REVENUE.

The facts are stated in the reasons for judgment.

*Audette J.* now this (28th December, 1927) delivered judgment.

This is an appeal, under the provisions of secs. 15 et seq. of The Income War Tax Act, 1917, as more specially amended by sec. 7 of 13-14 Geo. V, ch. 52, from the assessment during the year 1925, of the appellant company's income for its fiscal period ending 31st March, 1925.

Counsel on behalf of the Crown undertook at trial to make the finding in the present case applicable to the years of taxation previous to the year in question herein, in respect to the appellant's income taxes.

The appellant contends that a deduction should be made from the profits or gain realized during that year of the sum of \$829.17, for donations made to the persons or parties mentioned in exhibit No. 5.

This deduction is claimed under the provisions of subsec. 8 of sec. 3 of the Act which reads as follows:

(8) In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of:—

(a) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income.

These provisions of the statute, like those of the English Act, do not affirmatively state what disbursements and expenses may be deducted and there is in words no deductions allowed at all unless indirectly. They merely furnish negative information, that is, they direct that after having ascertained the amount of the profits or gain there may be deducted therefrom only such disbursements or expenses as were *wholly, exclusively, and necessarily* laid out or expended for the purpose of earning the income.

The taxation is the rule and the exemption is a case of exception which must be strictly construed. *Wylie v. Montreal* (1); Endlich, Interpretation of Statutes, No. 356; Cooley on Taxation, 146; *Ville de Montréal-Nord v. Commission Métropolitaine de Montréal* (2).

Now the deductions claimed are set out in exhibit No. 5, and range from payments of \$100 down to the paltry sum of 25 cents, and were made under an alleged commercial practice with the object of benefiting the appellant's

(1) (1885) 12 S.C.R. 384, at 386.      (2) (1927) Q.R. 43 K.B. 453.

business. With respect to the larger amounts paid to public, social, charitable and ecclesiastical institutions, the appellant testified they were paid at the request of friends of such institutions. Some of the small amounts were paid in the office, to a casual visitor, child or grown up person, for tickets of all kinds and descriptions, for some performance, lottery, etc. Some such payments were even made to non-residents of Ottawa. The appellant further testified these payments were not made for charitable purposes.

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All of these donations were paid at the discretion, at the will and at the choice of the taxpayer; the expenditure was not in any manner compulsory and was not in the nature of a commercial expenditure or loss. Konstan, 3rd ed. 148. Are they not to be entirely measured by the degree of generosity of each payer or taxpayer? Are they not freely and voluntarily incurred? And if so how can they be classified as *necessarily* expended to earn the income?

The question or policy of making these donations is of a discretionary character and is in no way affected by any legal obligation. The payment is not made *ex debito justitiae*. And in the result, if it were recognized as contended; there would be discrimination in favour of the recipients of these donations in that they would have bought the coal so much cheaper than it was sold to others.

The Canadian Act, it will be noticed, uses the words "wholly, exclusively and necessarily." The English Act uses only the words "wholly and exclusively." Sanders, in his work on Income Tax in England, commenting upon these words (p. 85) says that the constitution of a deductible allowance is left to the operation of the words "wholly and exclusively" laid out or so expended for the purpose of such trade, therefore the issue in practically all questions of deductible expenses is influenced solely by these words. The Crown has advocated a strained interpretation of these words, contending, in effect, that only expenses without which the business could not be carried on are admissible, etc. This argument, he says, would require the words "wholly and exclusively" to read "wholly, exclusively and necessarily": that is the very wording of the Canadian Statute.

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—

Therefore the Canadian Statute having the word *necessarily*, the narrow interpretation above mentioned would obtain and the expenses deductible would be only such without which the business could not be carried on, and this would deny the present appellant's contention.

The evidence discloses that it was a business practice to make such donations, the extent and volume of which was not however defined and cannot be defined. Is it to be fixed by the merchant himself? He would then become the judge in his own case. Nothing indeed prevents a merchant from following this practice if he sees fit, he can do so *ad libitum*. It is quite voluntary for him to do so or not, but it is not necessary. Are we to approach this question with all the great niceties it would involve and say that a man under a given state of facts should pay so much and another so much. Without a statutory enactment how could a rule be found to be applicable to all cases?

If such donations were to be recognized as a legal practice under the statute to operate as deduction, then it might happen that we would have one person bribing and another receiving a bribe to induce the purchase of goods from some particular merchant. Right thinking men would on no account lend themselves to such a practice and take such moneys to induce them to deal with one merchant in preference to another. It makes for impropriety and is against high business ethics.

With regard to the smaller donations and, among them, referring particularly to the annual payments made to a coloured man from Whitney who had no occasion to buy coal in Ottawa, and the purchase of tickets, etc., they are on a parity with the King Xerxes's order to whip the sea to abate the storm, and are all equally unnecessary and ineffective in the result.

The rule of law upon the construction of all statutes is to construe them according to the plain, literal and grammatical meaning of the words used. Craies, On Statutes, 3rd ed. p. 80. These donations were absolutely voluntary, made at the choice and volition of the appellant, and if they are so voluntarily made, then they cannot be regarded as necessary. In face of so formal a statutory enactment, it is impossible for a court to offer its aid in relieving the



appellant against this express provision. Acts of Parliament are omnipotent and are not to be got rid of by declarations of courts. If we depart from the plain and obvious meaning of the words of the Act, we do not then construe the Act but we alter it. If the words are precise, no more is necessary than to accept these words in their ordinary and natural meaning.

If this taxing Act is to be construed in a manner that will best ensure the attainment of its object, according to its true intent, meaning and spirit (sec. 15 Interpretation Act) it will obviously appear that to make such deductions would wholly nullify the intention of the enactment. Only deductions made on business principles can be recognized under the Statute.

Moreover, the contention that these donations may be of particular service to, and benefit the appellant, is purely conjectural, and unascertainable. Moreover, these donations have been paid out of ascertained profits and not for the purpose of earning the profits.

The appeal is dismissed with costs.

*Judgment accordingly.*

GOLD MEDAL FURNITURE MANU- }  
 FACTURING CO., LTD..... } PETITIONER;

AND

GOLD MEDAL CAMP FURNITURE }  
 MANUFACTURING CO. .... } RESPONDENT.

*Trade-marks—Registration—User in Canada*

*Held*, that the applicant for the registration of a trade-mark in Canada must be the first user of the same in Canada. (*Impez Electrical Ltd. v. Weinbaum* (1927) 44 R.P.C. 410, referred to.)

PETITION to have the trade-mark of the respondent herein expunged.

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

*R. S. Smart, K.C.*, and *R. R. McMurtry* for petitioner.

*A. W. Langmuir* and *Wm. Mockridge* for respondent.

The facts are stated in the reasons for judgment.

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MFG. Co.,  
LTD.  
v.  
GOLD MEDAL  
CAMP  
FURNITURE  
MFG. Co.

AUDETTE J., now (November 29, 1927), delivered judgment (1).

This is an action whereby the petitioner seeks to expunge from the Canadian Register of Trade-Marks the objecting party's

specific trade-mark to be applied to the sale of beds, chairs, cots, litters, stands, stools, tables, folding bath tubs and folding houses, and which consists of the arbitrary name GOLD MEDAL.

This trade-mark was registered in Canada on the 14th August, 1919, upon the usual declaration, as required by sec. 13 of the Trade-Mark and Design Act,

that the said specific trade-mark was not in use to his knowledge by any other person, firm or corporation than the said Gold Medal Camp Furniture Manufacturing Company at the time of its adoption thereof.

Both parties carry on business in a class of merchandise of this particular description; the petitioner in Canada, and the objecting party at Racine, in the state of Wisconsin, U.S.

At the time the objecting party subscribed to the above mentioned declaration it was wrong, as is now established by conclusive evidence, in stating that it was the first to make use of this trade-mark. To maintain the purity of the Register it is evident that this statement should not remain unchallenged.

Moreover, it is well to mention as significant, although not as a matter determining the question at bar, that prior to the objecting party registering their Gold Medal trade-mark in 1919, the petitioner in 1907 had already registered as their specific trade-mark the words "Gold Medal" as applying to the sale of mattresses.

The question as to whether or not a trade-mark consisting of the words "Gold Medal" is good or bad in view of its suggestive character, is one I need not decide as it has not been raised by either party.

Now it is the use of a trade-mark, not its invention, that creates a right to it.

The test in all cases of conflict as to priority of adoption is, which claimant was first to so use the marks as to fix on the market a conviction that the goods so marked had their origin with him.

(1) An appeal has been taken to the Supreme Court of Canada.

Paul on Trade-Marks, 148, and 153, sec. 92. See also *Candee, Swan and Co. v. Deere and Co.* (1).

The applicant for the registration of a trade-mark in Canada must be the first user of the same in Canada. *Vess Jones v. Horton* (2). The law upon this question is well settled.

The recent observation of Tomlin J. upon this subject in *re Impex Electrical Ltd. v. Weinbaum* (3) is quite apposite and reads as follows:

. . . foreign markets are wholly irrelevant, unless it be shown by evidence that in fact goods have been sold in this country with a foreign mark on them, and that the mark so used has thereby become identified with the manufacturers of the goods. If a manufacturer having a mark abroad has made goods and imported them into this country with the foreign mark on them, the foreign mark may acquire in this country this characteristic, that it is distinctive of the goods of the manufacturer abroad. If that be shown, it is not afterwards open to somebody else to register in this country that mark, either as an importer of the goods of the manufacturer or for any other purpose. The reason of that is not that the mark is a foreign mark registered in a foreign country, but that it is something which has been used in the market of this country in such a way as to be identified with a manufacturer who manufactures in a foreign country. That, I venture to think, is the basis of the decision in the *Apolinaris* case. It seems to me to be the basis of the decision in the case before Mr. Justice Clauson of *Lacteosote Limited v. Alberman*, and it seems to me to be consonant with good sense.

It has been abundantly established by conclusive evidence that the petitioner, as far back as 1890 and 1891 under the circumstances disclosed at trial, were first to use in Canada, and have continuously ever since so used, the words "Gold Medal" upon their goods and articles of merchandise, that is upon goods and merchandise of the same class and description as those for which registration was granted to the objecting party, and I am, therefore forced to the conclusion that they are thereby entitled to the mark as against all others in this country.

Having so found, it becomes unnecessary to say any more or to pass upon secondary questions raised at trial.

Therefore there will be judgment ordering the expunging from the entry in the Canadian Trade-Mark Register of the Specific Trade-Mark "Gold Medal," under No. 128, Folio 29460, in accordance with the Trade-Mark and Design Act. The whole with costs against the objecting party.

*Judgment accordingly.*

(1) (1870) 54 Ill. Rep. 439.

(2) (1922) 21 Ex. C.R. 330.

(3) (1927) 44 R.P.C. 405, at p. 410.

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 Dec. 1 & 2.  
 Dec. 28.

THE NORTH PACIFIC LUMBER CO., }  
 LIMITED ..... } APPELLANT;

AND

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

*Revenue—Company in liquidation—Interest on deferred payments—  
 Income—Liquidator—Winding-Up Act*

The appellant is a company which was carrying on large lumbering operations and the manufacturing of lumber. In 1914, business being bad owing to the war, the company ceased operating, closed down a large mill, and in 1916 resolved to wind up the company. They sold a number of their assets, partly for cash and partly under deferred payments extending up to 1931. Upon the interest on such deferred payments the appellant paid income tax until 1926 when it was authorized, under the Winding-up Act, to be wound up, and a liquidator was appointed thereunder. The company then refused to pay any further tax on said interest, contending that upon the winding-up taking place under the Winding-up Act, there was a notional change in the character of the company, whereby the distinction formerly existing between capital, profits and interest was lost as to which was left, and all became merely assets.

*Held*, that the Crown is not bound by a statute unless therein mentioned, and not being mentioned in the Winding-up Act, that Act did not bind it. (*The Queen v. Nova Scotia Bank*, 11 S.C.R. 1 followed.)

2. That a liquidator under the Winding-up Act is the agent of the company, and that it is the company which is taxed and not the liquidator; that interest on deferred payments of capital is income, subject to taxation.
3. That the nature and character of the debt did not change by the fact that the affairs of the company had passed under the control and custody of a liquidator.
4. That a company, though not actively engaged in the business mentioned in its charter, is not by reason of that fact necessarily exempt from taxation, and, if it has income, such income is liable to taxation.

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 Audette at Ottawa.

*C. M. O'Brian* for the appellant.

*C. F. Elliott* for the Minister of National Revenue.

The facts are stated in the reasons for judgment.

AUDETTE J., now (this 28th December, 1927), delivered judgment.

This is an appeal,—under the provisions of sec. 15 *et seq.* of The Income War Tax Act, 1917, and amendments thereto—from the assessment of the appellant company in the sum of \$8,371.14 in respect of alleged income received by it from the date of liquidation, namely, the 29th July, 1926, to 30th November, 1927. This income consists of the sum of \$136,563.84 received by the liquidator as interest during the period in question on account of deferred instalment of purchase money from sale of capital assets, after the respondent had credited the sum of \$31,216.60 in respect of certain expenses, disbursements, and carrying charges.

The appellant is a duly incorporated company, under a Dominion charter, bearing date the 17th June, 1889, with a fully paid-up capital of \$750,000 at the present time, for the purpose of carrying on the business of manufacturing lumber, etc., the whole as more fully set out in the charter, and is and was the owner, for the purpose of its business, of large and valuable timber limits in British Columbia. In 1914 business being bad, the company ceased operations and closed down a mill which it had erected at an approximate cost of \$1,000,000. In 1916 it passed a resolution

to turn into cash as quickly as possible the liquid assets of the company and to apply the same in reduction of the indebtedness, and to bend every energy towards a satisfactory sale of the business, in whole or in part.

Since the year 1920, as set out in par. 6 of the statement of claim,

all the property and assets of the appellant company have been disposed of, with the exception of one timber lease, namely, Lease 46, Sayward District, Vancouver Island, and some foreshore property situate in and at Burrard Inlet, B.C. The fixed capital assets so disposed of consisted of a sale of provincial lease 50, Vancouver Island, sold on May 1, 1920, for \$550,000, on deferred purchase terms, which agreement has been fully performed and completed by the purchaser; a further sale of timber berth and provincial timber lease 439, embracing timber situate near Chilliwack, B.C., sold for \$600,000, on deferred purchase terms, which said agreement of purchase has been fully performed and completed by the purchaser; the sale of the company's sawmill, site and plant situate at Barnet, Burrard Inlet, British Columbia, sold on 13th March, 1924, to the Barnet Lumber Company, Limited, for \$750,000, of which \$250,000 was paid in cash and the balance of \$500,000 secured by a purchase money mortgage, instalments of principal to be paid at the rate of \$10,000 monthly, the said

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mortgage bearing interest at the rate of six per cent. There remains due on this mortgage the sum of \$125,000; and lastly, a sale on 28th January, 1925, to Bloedel, Stewart and Welch Corporation, Limited, of provincial timber leases 47, 48 and 51 for \$2,850,000, payable as to \$500,000 in cash and the balance \$175,000 on 28th January and July, 1927, \$200,000 on 28th days of January and July in the years 1928, 1929, 1930, 1931 and 1932, with interest on the unpaid balance at six per cent, payable half yearly on which said agreement there is approximately \$1,750,000 accruing due and unpaid.

On the 29th July, 1926, the company was authorized to be wound up and on the 10th September, 1926, Robert Maclaren Kenney was appointed permanent liquidator of the company.

From 1914 to 1926—the year of the liquidation—the company had ceased operating and was only engaged in the business or occupation of disposing of its assets and paying its debts.

The debts of the company—with the exception of the claim for income tax herein—have all been paid and satisfied, and it stands to make large profits and surplus out of the sale of its assets.

While the company was not operating since 1914 to the date of the appointment of a liquidator, it was yet paying income tax to the crown upon the interest earned by the deferred payments of the capital; but it now refuses to do so, since the appointment of the liquidator.

We have had in this case, on behalf of the appellant, every argument that could conceivably have been urged with great ingenuity, and, among others, it was contended that when a winding-up takes place under the Winding-Up Act, that there is a notional change in the character of the company, so that the distinction between what was formally capital, profits, interest, is lost with regard to what is left and it becomes only assets, and that accordingly a company in liquidation is not, under the term of The Income Tax Act, that which connotes to be a person carrying on business or a person under the Act.

This contention would seem to postulate some undisclosed text of law.

The claim of the Crown rests upon the Taxing Act and it is for interest earned on deferred payment for the sale of capital assets under contract passed before the liquidation.

Assuming that under the Winding-Up Act equality of the rule of distribution had been established (a questionable matter since that Act deals with secured and preferred claims) the Crown is not bound thereby.

The general rule of construction of statutes—as held by the Supreme Court of Canada in the case of *The Queen v. Nova Scotia Bank* (1) is that the Crown is not bound by a statute unless therein mentioned, citing in support Maxwell on Statutes (2nd ed. 161 *et seq.*):

When a statute is general and thereby any prerogative, right, title or interest, is diverted or taken away from its King, in such case the King shall not be bound, unless the statute is made by express words to him . . . And the Court in that case expressly decided that the Crown was not bound by the Winding-Up Act.

Section 16 of the Canadian Interpretation Act (ch. 1, R.S.C., 1906) is also to the same effect as the finding in the *Nova Scotia* case (*ubi supra*).

Nowhere in the Winding-Up Act is the Crown named and accordingly there is no pretence for saying that the Crown should be bound thereby; therefore the respondent's rights are free from any restraint that might be invoked under the provisions of the Winding-Up Act and in respect of the liquidator appointed thereunder.

The rights of the Crown cannot be altered to its prejudice by mere implication. However, in the present case, the Crown rests upon the Taxing Act which superabundantly justifies the present claim.

Even if the Winding-Up Act applied to the Crown it would seem that the appellant could not succeed in its contention. Indeed, the Winding-Up Act was primarily instituted to protect the creditors and a just and legal claim cannot be defeated thereby under a mere notional or imaginary conception. The denial of the Crown's claim is repugnant to the very character of the Winding-Up Act. To deny the claim because the company appears to have passed into the hands of a liquidator, would moreover amount to reading the taxing act against its very intent, meaning and spirit. (Sec. 15, Interpretation Act.)

Under sec. 33 of the Winding-Up Act the liquidator, upon his appointment, receives, takes under his custody

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and controls all the property, effects and choses in action of the company.

What is a chose in action, if not a right to receive or recover a debt or money, which can be enforced by action. The interest due on the deferred purchase price and earned by that capital is a revenue of the company subject to the income tax, and which becomes a debt due to the Crown, for which the company is liable. It is not sought here to collect the same from the liquidator personally, but as the agent of the company, as the person who administers the company, receiving and paying moneys.

The effect of the Winding-Up Order is explained by sec. 20 of the Act. The company from the date of the winding-up has continued, through the liquidator, to do what it was doing from 1914 to 1926, that is, not carrying on the business mentioned in its charter, but the business of adjusting and winding up the business of the company. A company which is not actively engaged in business is not by reason of that fact necessarily exempt from taxation. If it has income, it becomes liable to taxation. *Plaxton and Varcoe*, Dominion Income Tax Law and cases therein cited.

The company, under the provisions of sec. 20, retains its corporate state until its affairs are wound up, and under sec. 69 all claims against the company, present or future, must be considered. The liquidator must maintain an impartial hand between all persons interested and has no right to deny a creditor his just claim without justification. The nature and character of a debt does not change from the fact that the affairs of the company have passed under the control and custody of the liquidator. The main function of a liquidator is to collect and realize all the assets of the company to be applied in discharge of its liabilities. 5 Hals. 445.

Some stress was laid at trial upon the state of the law in England of a liquidator under similar circumstances and cases cited; but all of this must be cast aside. There is no analogy whatsoever between the English and the Canadian law with respect to income tax under similar circumstances. In fact, a case like the present could not arise in England for the obvious reason that the tax is payable at



the source. In other words when the interest on the deferred payments would come into the hands and control of the liquidator, the tax would have already been paid. The party who paid such interest would have been obliged to deduct therefrom the income tax and pay it to the Government. The party paying the interest must remit the tax.

The obligation to pay interest—which is income under the Taxing Act—*Hudson's Bay Company v. Thew* (1)—was duly discharged before the liquidator was appointed, and that obligation has passed into the hands of the liquidator. The tax is the debt of the company and the liquidator is the agent of the company clothed with the obligation to discharge it; the company and not the liquidator is responsible for the debt. They are two distinct entities. One is the principal, the other is the agent. *Knowles v. Scott* (2); *In re Anglo-Moravian, etc., Ry Co.* (3); *Pulford v. Devenish* (4); *John Hood & Co., Ltd. v. W. E. Magee* (5).

Under the Canadian Taxing Act it must be found that the liquidator is truly an individual and a person who represents a corporate body, also a person under the Act, residing in Canada. The word corporate body in the interpretation of the word "person" covers a company. Yet it is contended that as the name of "liquidator" is not mentioned in the interpretation clause of the Act defining the word "person,"—that both the liquidator and the company escape taxation. But it must first be clearly borne in mind that it is the company which is sought to be taxed in this case and not the liquidator and the company clearly comes within the definition of "persons." That is quite sufficient for the purposes of this case. The company is only approached through the liquidator because he happens to be the agent who administers the company and in whose hands the assets, the annual profits and gains of the company are, under a special Act, administered by him.

It cannot be contended that because the interpretation clause defining the word "person" does not mention the word "liquidator" that he must escape. Does it mean

(1) (1919) 7 R.T.C. 206.

(3) (1875) 1 Ch. D. 130 at 133.

(2) (1891) 1 Ch. D. 717 at 723.

(4) (1903) 2 Ch. D. 625 at 636.

(5) (1918) 7 R.T.C. 327, at p. 350.

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that the clause must cover all classes of persons to bring them under the Act and that because the words "lawyer," "notary," etc., are not in that clause that they become free from taxation? Yet the liquidator must be a person just as much as a lawyer or a notary.

Moreover, an interpretation clause in an Act of Parliament which extends the meaning of a word does not by any means take away its ordinary meaning.

As I had occasion to say in a recent judgment, in the interpretation of statutes it is the duty of the court to ascertain the real intention of the legislature by carefully regarding the whole scope of the statute to be construed. And in each case the court must look at the subject-matter, consider the importance of the provisions and the relation of that provision to the general object intended to be secured by the Act. *Liverpool Borough Bank v. Turner* (1).

Light on the true meaning of the words used in the statute has to be sought from the context and the scheme of taxation with reference to which they are used.

There is no occasion, by specious argument, to endeavour beclouding the question at issue by endeavouring to exempt the appellant company from paying its just and lawful taxes, because the word "liquidator" is not in the interpretation clause. The liquidator is only there to settle the business of the company and to carry on the winding-up of its affairs and the company is the one which has been found liable to pay and not the liquidator; but the liquidator is there to pay the debts of the company out of the company's assets. The liquidator is however mentioned in some clauses in the act, establishing by necessary implication that he is considered as a person accessible to the arm of the law under the act. See sec. 9 and also sec. 8, subsec. c. And the word "winding-up" is also to be found in sec. 3, subsec. 9.

The true test of the controversy is solved from the very facts that the appellant, the party lawfully taxed, is a company; that its capital assets have earned annual profits or

(1) (1861) 30 L.J. Ch. 379-380.

revenues in the nature of interest on deferred payment of capital and that such profits are taxable under the Taxing Act.

The appeal is dismissed with costs.

*Judgment accordingly.*

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AND

THE MINISTER OF NATIONAL REV- }  
ENUE ..... } RESPONDENT.

1927  
Nov. 21-22.  
Dec. 28.

*Revenue—Income—Trade or Business—Irregularities in Department—  
“Annual”—Section 3 of Income War Tax Act, 1917—ejusdem  
generis*

M. was carrying on the business of grain commission merchant in partnership with one K., and his assessment as such is not in question here. He was also personally buying and selling grain through his firm and paying it the necessary margins and commissions. He was assessed for the net profit from these transactions, but refused to pay, contending that this was not carrying on a trade or business. Hence the appeal. During the period of taxation in question M. had had 260 such transactions. It was also contended that the assessment was illegal, as the commissioner who made the assessment in the first place was also the judge on appeal from his own pronouncement.

*Held,* That in the present Act there is the imperative enactment to tax, being the main purpose of the Act, and there is the directory enactment, providing the machinery to do so, and whilst the former must be fulfilled absolutely, it is sufficient if the latter is substantially fulfilled. That assuming the act of the commissioner to be irregular, as no one was thereby prejudiced, his ruling should not be invalidated.

2. That the personal transactions of M. amounted to the carrying on of a trade or business, and that the net profit of such trading was liable to taxation under the Income War Tax, 1917.
3. That when an interpretation clause in any Act, extends the meaning of a word it does not take away its ordinary meaning.
4. That the word “annual” in sec. 3 of the Act is used to mean all profits during the year.
5. That the seven different classes of subjects mentioned in sec. 3 of the Act, following the definition of income, as “the annual net profit or gain or gratuity,” are not exhaustive, but are only there by way of illustration and not as limiting the foregoing language of the Act, as these provisions are further supplemented by the words “and also the annual profit or gain from any other sources.”
6. That the words “and also” and “other sources” in the Act make the said illustration absolutely inconsistent with the application of the doctrine of *ejusdem generis*.

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 AND EXCISE.

APPEAL under the provisions of the Income War Tax Act, 1917, from the decision of the Minister.

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

*H. Phillips K.C.* and *A. E. Hoskin K.C.* for appellant.

*C. Fraser Elliott* for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J. now (December 28, 1927) delivered judgment.

This is an appeal, under the provisions of sec. 15 et seq. of the Income War Tax Act, 1917, and the amendments thereto—from the assessment of the appellant's income for the year 1922.

No oral evidence was offered, either by appellant or the respondent, on the hearing of this appeal, which was submitted altogether upon documentary evidence, the pleadings, and more especially, the admissions, the latter reading as follows:—

[The learned judge here gives the written admissions of facts of the case, filed.—He then proceeds.]

The appellant, during the period of taxation in question, was carrying on, in partnership with one Ewart Kelly, a business of grain commission merchants, and his assessment as such is not in question in this case. However, at the same time he was so carrying on such business in partnership he was also personally buying and selling grain, through his own firm, sometimes at a loss and sometimes at a profit, and paying to his firm the necessary margins and commission. For the gains and profits made in these grain transactions on margins, after deducting losses, the appellant was duly taxed, but he refuses to pay. Hence the present controversy.

The appellant, *in limine*, attacked the departmental proceedings, laying great stress on the irregularity of the same in that the Commissioner, who primarily pronounced upon the assessment, is also made the judge on appeal from that pronouncement—his own decision—under an alleged delegation of power from the Minister to him which could not, under the Statute, be so plenary as to cover this jurisdiction, and that the finding is illegal and

not justified by the Statute. The whole contention presenting on the one hand an illegal finding under the statute, and on the other hand an officer placed in the "grotesque" position of a person sitting on appeal from his own finding or decision.

While I am disposed to agree with the appellant's counsel, in recognizing the impropriety of placing an officer in what he called such a "grotesque" and objectional position, which (besides making of it a parody of administration of justice) is subversive of judicial tradition,—on purely legal grounds I am not prepared to accept his view with respect to the decisions on appeal in the present case. I would, however, in the interests of public policy, earnestly recommend an amendment of the statute to cure the impropriety without delay.

Coming to the consideration of the legal effect of the finding or appeal of this departmental officer, it must be pointed out that the appellant proceeded with his appeal before the Commissioner without taking any objection to his jurisdiction or authority to hear the same. Is he not now thereby estopped from raising that question on appeal before this Court? Has he not by his attitude before the Commissioner sitting on appeal acquiesced in and attorned to his jurisdiction?

In the interpretation of statutes, it is the duty of the Court to ascertain the real intention of the legislature by carefully regarding the whole scope of the statute to be construed. *Liverpool Borough Bank v. Turner* (1). And in each case the Court must look at the subject-matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act. Light on the true meaning of the words used in the statute has to be sought from the context and the scheme of taxation with reference to which they are used.

In construing this taxing act, in expounding its enactments, it must be borne in mind that it is passed for the purpose of taxing incomes and that it also prescribes the procedure or manner in which such taxation is to be accomplished. Here there is to be found an absolute or impera-

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(1) (1861) 30 L.J. Ch. 379-380.

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 —

tive enactment to tax and also a directory enactment providing for the machinery in doing so. So far as the statute is an imperative enactment it must be fulfilled absolutely, while it is sufficient if the directory enactment is substantially fulfilled.

In considering the validity of these departmental appeals it would seem proper that if some formalities have not been strictly followed, and some technical objections are made thereto, and it appears that the person complaining has not been in any way prejudiced, nor any third party affected thereby, as in the present case, to hold the departmental decisions good and valid. The objections need not be discussed at length here. Whether or not there is any formal irregularity in the appeal before the Commissioner, does not affect the final pronouncement upon the case. Whether or not the matter comes before this Court, after the first or second decision of the Commissioner upon the same matter, does not defeat or affect the rights of the subject on the merits. It is a matter for Parliament, if it sees fit, to make the necessary amendments to the Act and remedy the anomaly.

And as was said by the Judicial Committee of the Privy Council, in the *Montreal Street Ry. v. Normandin* (1), when the provisions of a statute relate to the performance of a public duty, and the case is such that to hold null and void acts done in neglect of this duty would work serious inconvenience or would cause injustice to persons having no control over those entrusted with the duty, and at the same time would not promote the main object of the legislature, such provisions are directory only, and the neglect of them does not affect the validity of the acts done. See also *Re Gold Medal Mfg. Co. Ltd.* (2); *Rex v. Cantin* (3); *Rex v. Breen* (4); *Rex v. Boak* (5) Chitty, Practice of the Law, vol. 3, pp. 76-77. *The National Provident Inst. v. Brown* (6).

Coming now to the substantial question as to whether or not the fact of the appellant personally buying and selling grain, on his own private account, distinct from the

(1) (1916-17) 33 T.L.R. 174.

(2) (1927) 8 Can. Ban'cy. R. 39.

(3) (1917) 39 Ont. L.R. 20.

(4) (1917-18) 13 Ont. W.N. 100.

(5) (1925) 3 D.L.R. 887.

(6) (1919) 8 R.T. Cas. 65, at p.

business of his firm, would amount to carrying on a trade and business on his own behalf and would thereby become liable to taxation upon the net profit or gain he realized thereby, it must be at first stated that each case rests on its own merit, different facts will call for different decisions. A person may carry on several distinct commercial operations—distinct businesses or trades—each forming “a scheme of profit making.” An individual in his personal exertions may also carry on two or more isolated such transactions on the exchange; but when it comes to a person, like in the present case, using his skill and knowledge in his trade acquired through experiences in trading in the same commodity in partnership, and who in this one year, as appears by exhibit No. 6, has gone into 260 such separate transactions or ventures, the necessary conclusion is that he makes a particular business or trade of it with the object of making profits, and he thereby becomes a dealer in stocks, a trader who carries on business in such commodity. *Smith v. Anderson* (1). And the gain or profit he makes thereby, which must have accrued with fair regularity in the course of such business during the year, is the result of such trade or business. A substantial profit was made by the appellant through those transactions, and his firm, treating him as a client, also made substantial profits thereby.

Similar questions have come up in England, and under their Act the Courts, in several cases, found the subject liable. These cases were much discussed at the hearing.

In *Cooper v. Stubbs* (2) the dealings in cotton “futures” were private speculations of a person in which his firm of cotton brokers and cotton merchants had no interest, and were held transactions constituting a trade and the profits realized were declared annual profits and gains chargeable with the tax.

The following year the case of *Martin v. Lowry* (3) came up for consideration. The head note reads as follows:—

The appellant, who was an agricultural machinery merchant bought a gigantic consignment of linen and set to work to make people buy it, and he succeeded in selling it within a year by organizing a vast activity

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(1) (1880) L.R. 15 Ch. D. 247, at p. 260.

(2) (1925) 2 K.B. 753.

(3) (1926) 43 T.L.R. 116.

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for that purpose. He was assessed to income-tax under Schedule D on his profits on the sale of the linen, and on appeal to the Special Commissioners he contended that he did not carry on any trade in connexion with linen, that the transaction was an isolated one, and that the profit was not an annual profit chargeable to income-tax. The Special Commissioners held that in exercising these activities the appellant was for the time being carrying on a trade the profits of which were chargeable to income-tax.

*Held*, that there was evidence on which the Special Commissioners could find the transaction to be in the nature of a trade, and that the fact of the profits being the income of a trade and belonging to the year of assessment was enough to make the profits "annual" within Case VI of Schedule D, and the decision of the Special Commissioners must be affirmed.

Then in 1927 the same view was taken in the case of *Pickford v. Quirke* (1). The head note reads as follows:—

During the "boom" in the Lancashire cotton trade in 1919, the appellant, in company with other persons, engaged in the operation known locally as "turning over" a cotton mill, i.e., acquiring a controlling interest in the mill, organizing its administration and finances, and reselling it to a new company. The operation was successful and the appellant was asked to join and did join other syndicates, composed partly but not entirely, of the same persons engaged in "turning over" three other mills. In each case a profit resulted to the appellant. On March 24, 1923, the Additional Commissioners for the Division in which the appellant resided signed the book containing an estimated assessment upon the appellant to income-tax under Schedule D for the year 1919-20. The book was not delivered to the General Commissioners until April 18, 1923; notice was given to the appellant on May 5, 1923, and the assessment was signed by the General Commissioners on September 5, 1923.

*Held*, that though each adventure of "turning over" a mill, taken singly, was not a trade, but a capital transaction, yet the succession of such adventures, in each of which the appellant took part, might constitute the carrying on of a trade, and the Special Commissioners on an appeal against the assessment were not estopped by their previous decisions from reconsidering the whole of the facts and finding that the appellant in so doing was carrying on a trade on the profits of which he was liable to income-tax and excess profits duty on the profits.

*Held* also, that the assessment was made in time, having been made when it was signed by the Additional Commissioners within the three years allowed by s. 125 (2) of the Income Tax Act, 1918. The subsequent steps need not be within that time.

Now it was contended by the appellant that *Cooper and Stubb* (ubi supra) was decided under the English Taxing Act which is different from the Canadian. This is quite true, but both acts may, by different process, lead necessarily to the same conclusion.

The word "trade" is defined by sec. 237 in the English Act and in lieu of the Canadian sec. 3 defining the word

(1) (1927) 44 T.L.R. 15.



income, the English act has schedules dealing with different classes of matter and in the same will be found also what is called "the sweeping clause" which are both to be found at pp. 457 and 458 of Dowell's Income Tax Laws, 9th ed. This "sweeping clause" corresponds to the Canadian clause which was called the "Omnibus clause."

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In this *Cooper v. Stubb case* (ubi supra) the judge of first instance and two of the appellate judges found it was a trade and one judge disposed of the case under the "sweeping clause."

Much stress was laid by appellant upon the fact that the word trade is especially defined in the English Act, and that had much to do in arriving at these results in England. Yet it is well to state here in that respect that an interpretation clause in any Act, which extends the meaning of a word, does not take away its ordinary meaning. It is used as a mere glossery for the purpose of that Act.

Be all this as it may, this case will be considered and decided upon the Canadian statute.

By section 3 of our Act, the word "income" is defined and means the *annual* net profit or gain or gratuity of a person; the word annual is used to mean all profits during the year and to be consistent with sec. 4 which says that the income is to be assessed and levied upon the income of the preceding year.

Now the controlling and paramount enactment of sec. 3 defining the income is "the annual net profit or gain or gratuity." Having said so much the statute proceeding by way of illustration, but not by way of limiting the foregoing words, mentions seven different classes of subjects which cannot be taken as exhaustive since it provides, by what has been called the omnibus clause, a very material addition reading "and also the annual profit or gain from any other sources." The words "and also" and "other sources" make the above illustration absolutely refractory to any possibility of applying the doctrine of *ejusdem generis* set up at the hearing. The balance of the paragraph is added only *ex majors cautelâ*. Then follows the enumeration of the exceptions, which do not cover the present case. No help can the appellant find there.

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 MORRISON *Expressio unius, exclusio alterius. Burntisland Shipbuilding Co. v. Weldhen* (1).

v.  
 MINISTER OF CUSTOMS AND EXCISE. The net is thrown with all conceivable wideness to include all *bona fide* profits or gain made by the subject.

Audette J. Untrammelled by the English Act and the definition of the word "trade" therein, a word which retains its ordinary meaning, I find that the appellant became liable to taxation upon his profits and gains realized in this particular and continuous course of business or pursuit, as a standing commercial practice, in buying, and selling this commodity for profit.

Moreover, the words "trade and business" mentioned in sec. 3 must comprehend every species of continuous course of business in dealings for profits and for a livelihood. See Oxford Dictionary, vo. Trade.

Exhibit No. 6 discloses that he was engaged in two hundred and sixty such transactions during the taxation period; these numerous and continuous activities amount to and constitute the carrying on of a trade and business.

The statute by which the tax is imposed plainly includes this subject, which cannot, by any means, be construed as a casual receipt of profits. In re *Griffin* (2).

These profits are the fruits derived from his monies employed and risked. The *Liverpool and London and Globe Ins. Co., etc. v. Bennett* (3). They are the profits derived from a business or trade carried on habitually and systematically during the taxation period. *Grainger & Son v. Gough* (4).

The appellant has been assessed and taxed under the provisions of sub-sec. 3 (a) of sec. 4 upon his share in the income of the partnership; but the section further provides that he shall be taxed in addition thereto upon "all other income" and this has been done by the present assessment appealed from. *Tenant v. Smith* (5).

*Appeal dismissed with costs.*

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| (1) (1922) 8 R.T.C. 409, at p. 418.     | (3) (1913) 6 R.T. Cases 327, at p. 378. |
| (2) (1890) 60 L.J., Q.B.D. 235, at 237. | (4) (1896) 3 R.T. Cases 462, at p. 472. |
| (5) (1892) A.C. 150 at p. 155.          |                                         |

ON APPEAL FROM THE BRITISH COLUMBIA ADMIRALTY  
DISTRICT

1927  
Sept. 27.

THE SHIP *CATALA* (DEFENDANT) . . . . . APPELLANT;

1928  
Jan. 23.

AND

MARTHA DAGSLAND (PLAINTIFF) . . . . . RESPONDENT.

*Shipping and seamen—Exchequer Court—Jurisdiction—Workmen’s Compensation Act, B.C.—Maritime Conventions Act, 1914—Right of Action—Election of tribunal.*

Plaintiff’s husband was killed in a collision between the *C.* and a boat in which he, with another man, was engaged in fishing. Following his death plaintiff applied to the Board, under the Workmen’s Compensation Act (B.C.) for compensation under the Act. Payments were made to her, from the date of her husband’s death until about the time of the trial of this action, which she accepted. After judgment the Board ceased making payments pending the final result of this action.

Upon application of the owners of the *C.* under sec. 12 (3), the Board “adjudicated and determined” that the owners were employers within the scope of part 1 of the Act; that the deceased was a workman in an industry covered by and within the scope thereof; that the accident arose out of and in the course of the employment; that plaintiff was one entitled to compensation under the Act, and that the action was one concerning which the right to bring was taken away by part 1 of the Act. After the application aforesaid, plaintiff took action *in rem* in the Exchequer Court in Admiralty to recover damages arising out of the death of her husband as above mentioned.

Held (reversing the judgment appealed from) that the Exchequer Court had no jurisdiction to hear and determine the present action.

(*The Camosun*, (1909) A.C. 598 and *The Vera Cruz* (1884-5) A.C. 59 referred to.)

2. That the Maritime Conventions Act, 1914, did not so enlarge the jurisdiction of the Exchequer Court in Admiralty, as existing under the Admiralty Court Act, 1861, as to give jurisdiction in actions like the present.
3. That even if this court had jurisdiction, the plaintiff, having elected to claim compensation under the Workmen’s Compensation Act (B.C.), and having accepted it, could not thereafter renounce it and resort to an alternative remedy once open to her.

APPEAL from the decision of the Honourable Mr. Justice Martin, L.J.A.<sup>1</sup>

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

*E. P. Davis, K.C., J. K. Macrae* for appellant.

*W. E. Shannon* for respondent.

(1) For text of the judgment of Martin L.J.A. see at end of this report.

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 THE SHIP  
*Catala*  
 v.  
 DAGSLAND.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (December 23, 1928) delivered judgment:—

This is an appeal from a decision of Honourable Mr. Justice Martin, Local Judge in Admiralty for British Columbia, in an action for damages against the ship *Catala* of the Port of Vancouver, brought by Martha Dagsland on behalf of herself and two infant children, the widow and children respectively of Erik Dagsland, who lost his life in a collision between the *Catala* and a boat in which the deceased with another were engaged in fishing operations, at the mouth of the Skeena River, B.C., and within the territorial waters of Canada. The learned trial Judge found that the death of Dagsland was due to the negligence of the ship *Catala*, and he awarded damages against that ship in the sum of \$20,000. As was said by Mr. Mayers of counsel for the Respondent, upon the trial, the case is one of importance and not free from difficulties.

The respondent issued a writ addressed to the owners and parties interested in the ship *Catala*, and endorsed as follows:—

The plaintiff as the widow of Erik Dagsland deceased, brings this action on behalf of herself and the children of the said Erik Dagsland deceased, to recover damages sustained by reason of the negligent navigation of the ship *Catala*, by the defendants or their servants, in or about the month of July, 1925, whereby the said ship came into collision with a fishing boat off the mouth of the Skeena river, and in consequence thereof the said Erik Dagsland lost his life, and for costs.

The *Catala* was arrested but was subsequently released on a sufficient bail bond being given.

Preliminary acts were filed on behalf of the respondent and the *Catala*, but no other pleadings were delivered or filed. From the endorsement to be found in the writ, it might appear as if the action was originally intended to be brought under the Families' Compensation Act 1911, R.S.B.C., cap. 85, which I might say is textually the same as the English statute known as Lord Campbell's Act, but apparently any contemplated action based upon the Families Compensation Act was abandoned, and the cause was professedly tried and disposed of by the learned trial judge as an action for damages *in rem* against the defendant

ship, under the provisions of the Admiralty Court Act 1861, and the Maritime Conventions Act, 1914 (4-5 Geo. V, c. 13).

Two important defences in law were raised upon the trial and on this appeal. One was, that there was no jurisdiction in the Exchequer Court of Canada, on its Admiralty side, to entertain an action for damages for loss of life; and that any right of action for damages in the circumstances obtaining here could only be maintained by virtue of the Families' Compensation Act, 1914, which action this Court was without jurisdiction to entertain.

The second point I shall refer to later. The learned trial judge was of the opinion, that the Admiralty Court Act, 1861, which by s. 7 gives a Court of Admiralty jurisdiction over "any claim for damages done by any ship," and s. 6 of the Maritime Conventions Act, 1914, gave jurisdiction to this Court, and also a cause of action in respect of damages for loss of life or personal injury. Sec. 6 of the Maritime Conventions Act is as follows:—

Any enactment which confers on any Court of Admiralty jurisdiction in respect of damages shall have effect as though reference to such damages included references to damage for loss of life or personal injury, and accordingly proceedings in respect of such damages may be brought *in rem* or *in persona*.

The learned trial judge, reading together s. 7 of the Admiralty Court Act 1861, and s. 6 of the Maritime Conventions Act, 1914, held that those enactments gave jurisdiction to this Court to entertain an action *in rem* for damages for loss of life, and also constituted a new cause of action, and such jurisdiction and cause of action being created by Imperial and Federal statutes, the same could not be disturbed by any provincial law, such as the Workmen's Compensation Act.

A brief reference to the jurisdiction of the Exchequer Court of Canada, on the Admiralty side is perhaps appropriate. It is certainly not greater than the Admiralty jurisdiction of the High Court in England. It has no general common law jurisdiction, apart from its Admiralty jurisdiction. See *Bow, McLachlan & Co. v. The Camosun* (1). The Admiralty side of the High Court in England, is presided over by a Judge of the High Court, who exer-

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(1) (1909) A.C. 597, at p. 608.

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cises by virtue of the Judicature Acts of 1873, and 1875, what is frequently referred to as a double jurisdiction, in consequence of which litigants may invoke their common law remedies, in the Court of Admiralty. The Judicature Act 1873 amalgamated the English Courts, and transferred to the High Court all the jurisdiction which had been previously exercised by the different courts, but these changes conferred no new Admiralty Jurisdiction upon the High Court, and the expression "Admiralty Jurisdiction of the High Court" does not include any jurisdiction which could not have been exercised by the Admiralty Court, before its incorporation into the High Court, or which might be conferred by statute giving new Admiralty jurisdiction. A judge of the High Court sitting on the Admiralty Division thereof may, as a judge of the High Court, exercise any jurisdiction which is possessed by a judge thereof, but he does so by virtue of the general jurisdiction conferred upon him, and not by virtue of any alteration in his Admiralty jurisdiction, *The Camosun (supra)*. The jurisdiction of the Exchequer Court of Canada, on the Admiralty side, with certain limitations, is the same as the Admiralty jurisdiction of the High Court in England, but it is limited to that; it however cannot entertain common law actions in the exercise of its Admiralty jurisdiction. I refer to this solely because it affords an explanation of the reason why certain actions are sometimes entertained by judges in the Admiralty Division of the High Court, in England.

Dealing now with the legal defence mentioned, I have reached the conclusion that I am bound by the authorities, to hold that this contention of the appellant is correct, and that this Court is without jurisdiction in an action of this kind. There are many decisions upon the point, but perhaps the most important one is that of *The Vera Cruz* (1), in which the House of Lords held, affirming the decision of the Court of Appeal, that the Admiralty Court Act 1861, which by s. 7 gave the Court of Admiralty jurisdiction over "any claim for damage done by any ship," did not give jurisdiction in claims for damages for loss of life under Lord Campbell's Act, and that the Admiralty

(1) (1884-5) 10 A.C. 59; 9 P. 88.

Court as such, could not entertain an action *in rem* for damages for loss of life under Lord Campbell's Act. If therefore the cause now under consideration, had been taken under the Families' Compensation Act, then it is already established I think, that this Court could not entertain an action *in rem* for damages for loss of life. It will of course remain to be considered whether the Maritime Conventions Act 1914, so extends the jurisdiction granted by the Admiralty Court Act 1861, as to give jurisdiction or a new right of action, in the facts of this case. In the case of *The Vera Cruz (ubi supra)* the action was against its owner and *in rem*, claiming damages for loss of life resulting from a collision between two ships. The judgment of the House of Lords was delivered by Lord Selborne L.C., and Blackburn and Watson L.J.J., and I might usefully quote from the opinions of their Lordships. The Lord Chancellor in his speech said:—

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\* \* \* Inasmuch as there can be no right of action whatever unless it comes within the terms of Lord Campbell's Act, let us see whether those are terms which can be brought reasonably and naturally and consistently within the interpretation sought to be imposed on the 7th section of the Act of 1861, which statute turns the action into an action *in rem* at the option of the plaintiff. Now what are the words? "Whosoever the death of a person shall be caused by wrongful act, neglect, or default"—all words plainly applicable only to a person doing an act or guilty of a neglect or default, and not to an inanimate instrument or thing like a ship—"and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof." "To maintain an action and recover damages" plainly points to a common law action—"then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured." Well it is to my mind, as plainly as possible, a personal action given for personal injury inflicted by a person who would have been liable to an action for damages, manifestly in the common law courts, if the death had not ensued. Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim, *actio personalis moritur cum persona*, because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor. And not only so, but the action is not an action which he could have brought if he had survived the accident, for that would have been an action for such injury as he had sustained during his lifetime, but death is essentially the cause of the action, an action which he never could have brought under the circumstances which if he had been living would have given him for any injury short of death which he might have sustained, a right of action, which might have been barred either by contributory negligence, or by his own fault, or by his own release, or in

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various other ways. Every word of that legislation being as it appears to me legislation for the general case and not for particular injury by ships, points to a common law action, points to a personal liability and a personal right to recover, and is absolutely at variance with the notion of a proceeding *in rem*.

Blackburn L.J., said:—

But the question raised here being exclusively whether the liability of a ship owner as a person, under Lord Campbell's Act, to make good damages for negligence of his servants, who happens to be the master of the ship, comes within the words "damage done by any ship." I decidedly say that I do not think it does. The legislature in using such general words as those cannot have had in contemplation all the numerous and important subjects which, had they been considering Lord Campbell's Act, they would have had.

Bowen L.J. in the Court of Appeal (1), in the same case said:—

I am confident that there is no right of action under Lord Campbell's Act in the Admiralty Division, and I agree with the judgments of Lord Bramwell and the Master of the Rolls delivered in the *Franconia*. Shortly the question is whether this is a claim for damages done by a ship and I think that the history of the law on this point proves that it is not.

The reasoning supporting the conclusions reached in *The Vera Cruz* case by both the Court of Appeal and the House of Lords, is that in the case of loss of life, any right of action dies with the deceased, and no cause of action in consequence of the loss of life exists except under Lord Campbell's Act, and that any right of action which existed under that Act was not a claim "for damage done by any ship," but was an entirely new and different cause of action. As was stated in *The Vera Cruz* case by Blackburn L.J.:—

Before Lord Campbell's Act, where a person had been injured from any of the causes mentioned in the first section of that Act and had died, the maxim *actio personalis moritur cum persona* applied, he could not sue for he was dead, and it did not survive to anybody whomsoever to sue for the damages occasioned by the accident which had caused injury to him, resulting in death. That Lord Campbell, or rather the legislature at the instance of Lord Campbell, thought fit to alter; and I think that when that Act is looked at, it is plain enough that if a person dies under the circumstances mentioned, when he might have maintained an action if it had been for an injury to himself which he had survived, a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived; an action which, as is pointed out in *Pym v. Great Northern Railway Co.* is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent, or child, who under such circumstances suffers pecuniary loss by the death.



The same point was considered in 1916, in the case of *The Amerika*,<sup>1</sup> by the House of Lords. It is not necessary to state the facts in this case, but their Lordships upheld the principle long ago established by the rule expressed by Lord Ellenborough in *Baker vs. Bolton*,<sup>2</sup> that in a civil court the death of a human being cannot be complained of as an injury, and that the only modification of that common law principle was brought about by Lord Campbell Act, which first introduced into the law of England a remedy in case of injury attended with loss of life, the law up to the time of the passing of that Act being, that in case of death resulting from injury the remedy for the injury died with the person, and that Act provided a new cause of action and did not merely regulate or enlarge an old one. Therefore one may safely conclude that under the Admiralty Court Act, 1861, a Court of Admiralty, did not possess jurisdiction to entertain a claim for damage for loss of life under Lord Campbell's Act because that was not a claim, "for damage done by any ship."

Turning now to an inquiry whether s. 6 of the Maritime Conventions Act enlarges the jurisdiction of the Admiralty Court, or by itself gives a new right of action, in such a case as the one under consideration, I might observe that s. 6 of the Maritime Conventions Act (Canada) is an exact reproduction of s. 5 of the Maritime Conventions Act enacted in England. The language of s. 6 of the Canadian Act gives rise to some doubt, and it is difficult to understand exactly what was in the mind of the legislature when enacting this provision. It is not clear in what manner it has changed the case law on the subject. If the words "damage done by any ship," in the Act of 1861, did not give jurisdiction in an action under Lord Campbell's Act, it is a little difficult to perceive how s. 6 of the Canadian Act of 1914 does, because the words, "damage done by any ship" still remain as they were. The act of 1861 s. 7 relates expressly to damage done by ships; or as was said by Lord Selborne in *The Vera Cruz* case, maritime damage by ships is the subject of that legislation. The Maritime Conventions Act, s. 6 in providing

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(1) (1917) A.C. 38.

(2) (1808) 1 Campbell's R. 493.

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that any enactment conferring on the Admiralty Court any jurisdiction in respect of damages, shall have effect as though references to such damages included references to damages for loss of life or personal injuries, does not qualify in any way the active instrument of damage "any ship." That is to say, that even if it more specifically enlarges the scope of damages recoverable so as to include damages for loss of life or personal injury, still under any construction it seems to me, the right of action still relates to "damage done by any ship," and by binding authority it has been held, that this does not give a right of action for damages for loss of life against a ship, in a Court of Admiralty. There is not I understand any other enactment except s. 7 of the Act of 1861, to which s. 6 of the Act of 1914 can relate, when it refers to "any enactment" which confers on any Court of Admiralty jurisdiction in respect of damages.

This enactment has been judicially considered. In the case of *The Moliere* (1), Roche J. held that no change was made by the statute of 1911, that is the Maritime Conventions Act of England, and he reached the conclusion that the law remained as it was before the Maritime Conventions Act. It may be true that the exact point for determination in this case is distinguishable from the facts of the case under consideration, but nevertheless Roche J. expressed the view I have just stated, and I think he could not well avoid expressing an opinion one way or the other upon that particular point, because it was urged upon him by counsel, that the Maritime Conventions Act (England) and the prevalence of Workmen's Compensation Acts, or its equivalent, in most countries of the world, had changed the law, and that any sum paid to dependents as a consequence of loss of life following a collision between two ships, under a Swedish statute in that case, was as much an item of damage as the amount of the injury to the ship, and was damages within the meaning of the Maritime Conventions Act. Then there is the case of *The Kwasind*<sup>2</sup>. This was an action *in rem* for damages brought by the dependents of a deceased person against the ship *Kwasind*. The defendant's solicitors having ac-

(1) (1925) P. 27.

(2) (1915) 84 L.J. Adm. 102.

cepted the service of the writ and undertaken to put in bail, subsequently filed an admission of liability. The plaintiffs thereupon asked for leave to enter up interlocutory judgment, for damages to be assessed. The President of the court in the end directed that the action should be tried by the judge, assisted by a common jury in the Admiralty division of the High Court of Justice, from which an appeal was taken, Counsel for the appellants contended that the damages should be assessed by the Registrar of the Admiralty Division rather than by a jury, and that an action *in rem* to recover damages in respect of loss of life caused by collision could now be brought in the Admiralty Division by virtue of s. 5 of the Maritime Conventions Act 1911, and s. 7 of the Admiralty Act of 1861, but the Court of Appeal was of a different opinion. This was an instance I think where a judge presiding in the Admiralty Division of the High Court was exercising his common law jurisdiction. Buckley L.J. delivering the judgment of the Appeal Court said:

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This is an action for damages brought by the dependents of a deceased person. It is brought *in rem* against the ship. The President has directed that the action be tried by "The Judge assisted by a common jury in this" (that is to say, the Admiralty) "Division of the High Court of Justice." Counsel for the defendants has addressed an argument to us for the purpose of shewing that this is not an action under Lord Campbell's Act. He suggests that section 7 of the Admiralty Court Act, 1861, and section 5 of the Maritime Conventions Act, 1911, have created a liability for damages for loss of life, and that an action can now be brought to recover such damages, not under Lord Campbell's Act, but under the provisions of these other Acts. It appears to us that that is not so. Lord Campbell's Act is the only Act which creates this sort of liability for the death of persons to their widows or dependents, a limited class. No liability was created under the Admiralty Court Act, 1861, or the Maritime Conventions Act, 1911. This, then, is an action under Lord Campbell's Act. Now, in the Court of Admiralty, it is said, and said with truth, where the only question is the assessment of damages, it is usual to refer that to the Registrar and Merchants. What has happened in this case is that the ship has delivered an admission of liability, so that there is nothing to try except damages, and it is contended that according to the practice, not only is it usual for that to go to the Registrar and Merchants, but it must,—or perhaps it is not put quite so high as that—but it ought to go to the Registrar and Merchants. To my mind, the question is one of discretion for the judge. That he can sit with a jury is beyond dispute, and he has directed that the assessment should be made not by the ordinary subordinate officer, but by himself sitting with a jury. I think that is an order within his discretion, one which it was competent for him to make, and one which we ought not to review.

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If it was intended by the Canadian Maritime Conventions Act, 1914, to give to the Admiralty Court, jurisdiction in the case of damages for loss of life, under such provincial enactments as the British Columbia Families' Compensation Act, or by virtue of it or in addition to it, it is unfortunate that this was not made clear. If such an important departure from the law as existing and known in this country prior to 1914 were in contemplation, one would think it would have been dealt with by the legislature in very exact terms, and express or specific words indicating such a change is certainly not to be found in the legislation. In the *Vera Cruz* case, Lord Selborne said it was impossible not to see, and the proposition was too clear to admit of dispute, that if the 7th section of the Act of 1861 had the effect of transferring that action to the Court of Admiralty to be brought under the Admiralty rules and system, to be tried without a jury, to be enforced *in rem* and not *in personam*, without making any person individually a defendant on the record, and so on, the Act of 1861 had materially varied the effect of Lord Campbell's Act, which gave the right of action. He further said that if anything were certain it was this, that where there are general words in a later Act capable of reasonable and simple application without extending them to subjects specifically dealt with by earlier legislation, you are not to hold that earlier and specific legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so. See also *McCull v. Canadian Pacific Railway Co.*<sup>1</sup>

The second point relied upon by the appellant is, that if there was jurisdiction in this court to hear this action, it could be maintained only by virtue of the Families' Compensation Act, and in that case the appellant's submission is, that the right of action has been taken away by the operation of the Workmen's Compensation Act of British Columbia. This Act applies to certain enumerated industries such as the fisheries, shipping, transportation, etc. The Act makes provision for a fund maintained by contributions, from which compensation is to be paid to work-

(1) (1923) A.C. 126, at p. 128.

men injured by accident, arising out of and in the course of their employment, and to their dependents where such injury results in death; and it creates a Board, known as the Workmen's Compensation Board, for its administration. By s. 11 (1) it is enacted that when an accident happens to a workman in the course of his employment in such circumstances as entitles him or his dependents to an action against some person, other than the employer, the workmen or his dependents are entitled to compensation under Part 1 of the Act. That is to say they "may claim such compensation or may bring such action." An important qualification of s. 11 (1) is introduced by s. 11 (4). it is as follows:—

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S. 11 (4) In any case within the provisions of subsection (1) neither the workmen nor his dependents nor the employer of such workmen shall have any right of action in respect of such accident against an employer in any industry within the scope of this Part; and in any such case where it appears to the satisfaction of the Board that a workman of an employer in any class is injured owing to the negligence of an employer or of the workman of an employer in another class within the scope of this Part, the Board may direct that the compensation awarded in such case shall be charged against the last mentioned class.

S. 11 (3) provides that if the workman or dependent makes an application to the Board claiming compensation under Part 1 of the Act, the Board shall be subrogated to the rights of the workmen or dependent, etc.

By s. 12 (3) it is provided:—

Where an action in respect of an injury is brought against an employer by a workman of a dependent, the Board shall have jurisdiction upon the application of any party to the action to adjudicate and determine whether the action is one the right to bring which is taken away by this Part, and such adjudication and determination shall be final and conclusive; and if the Board determines that the action is one the right to bring which is taken away by this Part the action shall be forever stayed.

The Board is given exclusive jurisdiction by s. 74 to inquire into, hear and determine all matters of fact and law arising under Part 1 of the Act, and provides that the decision of the Board shall be final and not open to review. The section adds:—

And without restricting the generality of the foregoing the Board shall have exclusive jurisdiction to inquire into, hear, and determine:— among other questions:—

(1) Whether or not any workman in any industry within the scope of this Part is within the scope of this Part and entitled to compensation thereunder;

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(j) Whether or not any person, firm or body corporate is an employer within the scope of this Part.

In due course the respondent applied to the Board for compensation, and payments were made from the date of the death of her husband, until about the time of the trial of this action, or for substantially a year. It appears that the Board ceased making payments after judgment by the learned trial judge, and pending the final result of these proceedings. The Board, on November 22, 1926, upon the application of the owners of the *Catala* under the provisions of s. 12 (3); "adjudicated and determined" that the said owners were employers in an industry within the scope of Part 1 of the Act; that the deceased was a workman in an industry covered by or within the scope of the Act, and that the accident arose out of and in the course of his employment; that the death of the deceased was one in respect of which the respondent, on behalf of herself and the infant children of the deceased, had a right of compensation under the Act; and that the action was one which the right to bring was taken away by Part 1 of the Workmen's Compensation Act.

The learned trial judge in his reasons for judgment said it must be conceded that if the Board had the power to make the adjudication mentioned, this Court could not exercise any further consideration in the action because, it is not only "forever stayed" but the "right to bring" the action itself is taken away by the Workmen's Compensation Act. Even if it could be said that the Maritime Conventions Act, and the Admiralty Court Act, 1861, together give jurisdiction to entertain an action, under the provisions of the Families' Compensation Act, then in that view, I think the issue is concluded by *Peter v. Yorkshire Estate Co., Ltd.* (1), and the right of action if existent at all, is taken away. In that case the Judicial Committee of the Privy Council held that the decision of the Workmen's Compensation Board, that an employee who had brought an action was a workman to whom the British Columbia Workmen's Compensation Act applied, and that the defendant was an employer within the scope of the Act so as to fall within the provisions of s. 12 (3), which

(1) (1926) 2 W.W. Rep. 545.

took away the right of action, was final and not open to review. In the judgment of their Lordships delivered by the Lord Chancellor, the matter of the construction of the Workmen's Compensation Act (British Columbia) s. 12 (3) is discussed as follows:—

There remains the third question, as to the construction of sec. 12, subsec. (3). It is argued on behalf of the appellant that the words "an employer" contained in that subsection refer only to the employer of the workman there mentioned and not to a third person, that is to say, to another employer, although that other employer falls within the definition of an "employer" within the meaning of the Act. It might have been an answer to that contention that the Board have jurisdiction to decide questions of law as well as questions of fact; but it appeared to their Lordships more satisfactory to come to a conclusion themselves upon the point of law, and they are of opinion that the contention cannot prevail. Throughout secs. 11 and 12 of the Act a distinction is drawn between "the employer" of a workman, who is from time to time referred to, and "an employer" within the meaning of the Act. It has been pointed out that in three expressions contained in the two sections "the employer" of the workman is clearly pointed to, and that in three other instances the word "employer" is used with reference to any employer under the Act. The seventh instance which occurs in the Act is the one in sec. 12, subsec. (3), which has to be dealt with. Upon the whole their Lordships are of opinion that the words "an employer" there occurring include any employer who falls within the purview of the Act. That view is supported by the circumstances that the Board is by the same subsection authorized to determine whether an action is one the right to bring which is taken away "by this part," that is to say, by any section of this Part of the Act, including sec. 11, subsec. (4). That is the view which was taken by the Court of Appeal of British Columbia, and their Lordships do not see their way to differ from the conclusion of the Court. It follows that this appeal must be dismissed with costs, and their Lordships will humbly advise His Majesty to that effect.

Upon the hypothesis that this court has jurisdiction to entertain this action under the Families' Compensation Act, then I think it is reasonably clear that such right of action has been taken away by the adjudication of the Board under the Workmen's Compensation Act.

While it is not necessary to the decision of this appeal, the point has been raised and it is therefore proper for me to say, that under the provisions of the Workmen's Compensation Act of British Columbia, and the principles of common law, it would appear that the respondent is bound by her election to claim compensation under that Act. The Act itself is remedial legislation and as such must receive such a beneficent interpretation by the courts as will enable the intention of the legislation to be effectively attained, and I do not think it was the intention of

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the legislature that a dependent could elect to apply for and receive compensation under the Act, and at the same time pursue a common law remedy. The remedies are alternative and not cumulative. The dependent I think is burdened with a duty of making an election, between the remedy provided in the Workmen's Compensation Act, and his or her common law remedy, and the respondent in this case having elected to claim compensation under that Act and accepted it, cannot now renounce it and resort to an alternative remedy, which once was open to her. There is the consideration inhering in the common law rule "*Interest rei publicae ut sit finis litium*," i.e., it is the interest of the State that there should be an end of litigation. In the early history of the Common Law it will be found that the minds of judges and lawyers were impressed with the desirability of adhering to the rule that a man should not be vexed twice for the same cause of action. This is the doctrine of the maxim, *nemo debet bis vexari si constat curiae quod sit pro una et eadem causa*, and in *Sparry's case* (1), it is regarded as a fundamental principle of the common law. This doctrine may be paraphrased as follows: If there has been a final decision of a competent court there should be no further proceedings allowed in another court, between the same parties for the same cause of action. See Broom's *Legal Maxims* 9th ed., p. 228; Elliott on *Workmen's Compensation Act* (9th ed.), p. 400-413; *Black Lake Asbestos and Chrome Co. v. Marquis* (2); *Bonham v. The Sarnor* (3).

Resting my views on that point on what has been said above, I may say here that it is conceivable that a distinction might be drawn between a statute which imposes upon a litigant the obligation of making a choice—an election or option as the books say—between two remedies, and a statute which ousts the jurisdiction formerly vested in one tribunal, by providing a new and exclusive jurisdiction in another. In other words, to prevent a litigant who undertakes to pursue his remedy in one tribunal from seeking relief in another for the same cause, does not necessarily disturb the jurisdiction of one or the other of the two

(1) (1826) 3 Coke's Rep. 123.

(2) (1922) Q.O.R. 33, K.B. 390.

(3) (1922) 21 Ex. C.R. 183.



tribunals. It is perhaps a matter affecting the litigant personally, and not the tribunals. However, as I have already mentioned, it is not necessary for me to make this point, a ground of my decision to allow this appeal.

With great respect, therefore, I am of the opinion for reasons given that the appeal must be allowed with costs.

*Judgment accordingly.*

Judgment of Martin L.J.A. delivered May 27, 1927.

This is an action for damages against the SS. *Catala* by the widow and two infant children of Erik Dagsland, whose death was brought about by a collision between that vessel and a fishing boat in which were the deceased working as a boat puller and one Albert Carlson (the licensee and person in authority thereof) on the 31st July, 1925, in Middle Passage near the mouth of the Skeena river in the territorial waters of Canada on the Pacific Ocean.

With respect to the cause of the death of Dagsland I find that it was due to the negligence of the ship and I award damages against her to the amount of twenty thousand dollars, bearing in mind the increased cost of living and consequent reduction in the pre-war value of money as pointed out in *Wand v. Mainland Transfer Co.* (1).

Apart from the questions of fact the following objections in law were taken to the jurisdiction of this Court, and otherwise, viz.,

First: It was submitted that the pending proceedings in this action could not be further entertained because of an "adjudication and determination" made after their inception by the Workmen's Compensation Board on the 22nd of November last in the exercise of

its supposed powers under sec. 12 (3) of the Workmen's Compensation Act of this province, being cap. 278, R.S.B.C., said section being: (See text in foregoing judgment, p. 93.)

The said adjudication was made upon the application of the Union Steamships Limited purporting to be the owners of the defendant ship herein, and after reciting the proceedings the adjudication thus concludes:

"And this Board does further find and declare that the said action is one the right to bring which is taken away by Part 1 of the said Workmen's Compensation Act."

It must be conceded that if the Board had the power to make that adjudication this Court cannot exercise any further jurisdiction in this action because it is not only "for ever stayed" but the "right to bring" the action itself is "taken away" by the Provincial Act. I am, however, of opinion that the submission of the plaintiff that the Provincial Board has no jurisdiction over rights of action or proceedings in this Court is correct, and therefore the adjudication is, speaking with all respect, wholly null and void with the principles and authorities cited in *The Leonor* (2).

(1) (1919) 27 B.C. 340 and 345.

(2) (1916) 3 Brit. and Col. Prize Cases, 91; (Grant.); (1917) 3 W.W.R. 861.

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There was much learned and instructive argument upon this interesting and important question but I may summarize my conclusion thereupon by saying that as the jurisdiction exercised and remedies afforded by this Court (through the Vice-Admiralty Court the lineal descendant of the Court of the Lord High Admiral and of the High Court of Admiralty) (1), pursuant to Imperial and Federal legislation, are in no way based upon common law rights but exist "to deal with matters arising at sea outside the purview of other Courts" (Anson on the Constitution, 3rd ed. 283), the invocation of principles founded upon the common law does not advance this matter, and just as it is impossible for this Court to expand its jurisdiction by provincial laws so it is impossible for such laws to curtail its jurisdiction in any degree, any more than they could that of another tribunal established by Federal legislation, i.e., the Supreme Court of Canada. *Crown Grain Co. Ltd. v. Day* (2), wherein the Privy Council said (there being an attempt by the Province of Manitoba to deprive the Supreme Court of Canada of jurisdiction), p. 507:

"But further, let it be assumed that the subject-matter is open to both legislative bodies; if the powers thus overlap, the enactment of the Dominion Parliament must prevail."

By sec. 6 of the Maritime Conventions Act, cap. 13, Stat. Can. 1914, it is enacted:

"Any enactment which confers on any court Admiralty jurisdiction in respect of damages shall have effect as though references to such damages included references to damages for loss of life or personal injury, and accordingly proceedings in respect of such damages may be brought in rem or personam."

The new Federal right thus conferred would, in my opinion, continue to exist throughout Canada (save as excepted by sec. 10) if the Provincial Families' Compensation Act, cap. 85, R.S.B.C., conferring certain causes of action for death occasioned by tortious acts, or similar acts in other provinces were repealed, and the only limitation upon it is that the action must be commenced within two years unless the time is extended by the court having jurisdiction—sec. 9. In coming to this conclusion I have not overlooked the decision of the English Courts in *The Kwasind* (3) and *The Molere* (4), which are based upon very different circumstances in the constitution of the Admiralty Court as a division of the High Court of Justice which exercises all ordinary civil jurisdictions, and on the existence of one British Legislature only with undivided and complete jurisdiction over all subject-matters. Furthermore, I do not, with respect follow the grounds or the object of the reasoning of Buckley L.J., in the former case respecting Lord Campbell's Act, because the decision really turned

(1) Note.—"The jurisdiction of the Lord Admirall is verie antient and long before the reign of Edward the third, as some have supposed, as may appear by the laws of Oleron (so-called) for that they were made by King Richard the first when he was there) that there had been an admirall time out of minde, and by many other antient records in the reignes of Henrie the third, Edward the first, and Edward the second, is most manifest. No. 2 Co. Litt. 260 b./ A.M.

(2) (1908) A.C. 504.

(3) (1915) 84 L.J. Adm. 102.

(4) (1925) P. 27.

upon the proper exercise of judicial discretion in ordering the assessment of damages by a jury instead of assessors under English High Court Rule 2 of Order XXIV—1, giving the judge power to order the trial of the cause, matter or issue to be had with a jury, or assessors, or referee as therein directed, whereas by our Admiralty Rule 124 the most that the judge can do is to “refer the assessment of damages and the taking of any account to the registrar either alone or assisted by one or more merchants as assessors.” In the note upon the decision in Roscoe’s Admiralty Practice, 4th ed. 1920, p. 356, it is said that the order for a jury thereby authorized was “never acted upon as the case was subsequently settled by agreement.” I can only regard the decision as obiter and inapplicable to the said radically different conditions in Canada both curial and legislative. To place them on a parity as regards the case at bar, there should at least be a general Federal Act in Canada similar to Lord Campbell’s in England and one Court entertaining all actions for damages for personal injuries founded upon the common law or special statute. As to *The Moliere*, the same observations as to different conditions apply, and moreover, it does not touch the exact point raised here. I cannot bring myself to the conclusion, in the absence of express authority upon the point, that said Federal sec. 6 has conferred no additional Federal rights or benefits upon litigants of this class in Canada unless there happens to be a statute of the nature of Lord Campbell’s Act in existence in the province wherein the damage was suffered.

Since this Court had already under sec. 7 of the Imperial Ad-

miralty Act, 1861, cap. 10, “jurisdiction over any claim for damage done by any ship” I regard the effect of said sec. 6 of 1914 as now conferring in a clear, simple and full way one and the same maritime lien and remedy for damage to the person or property “done by any ship” and the two jurisdictional sections should now be read together in their amplitude, speaking and operating as though originally so enacted, and hence it is just as impossible to deprive a litigant in this Court of the later as of the earlier right he has become entitled to: in other words, as applicable to this case, sec. 7 of 1861 is, by sec. 6 of 1914, simply rewritten and re-enacted to include “jurisdiction in respect of damages . . . for loss of life or personal injury”; the decision of the Privy Council in *McCull v. Can. Pac. Ry.* (1), though relied upon by the defendant really supports the plaintiff, and is in accord with *Grain Co. v. Day, supra*.

It follows that the objection to the jurisdiction of this Court is over-ruled.

Then, second, it is submitted that the plaintiff has barred her right of recovery because she has accepted benefits under the said Workmen’s Compensation Act, the result of which is that she has “elected,” under sec. 10 thereof, to resort to that act for relief, and further, that the effect of such acceptance is to deprive her, apart from the act, of a right to recover more than one sort of compensation, and reliance is placed upon the cases of *Scarf v. Jardine* (2); *Wright v. London General Omnibus Co.* (3); and *McClenaghan v. Edmonton* (4); to which I add *Birmingham Corporation v. S. Allsopp & Sons Ltd.* (5), which is an exact application of the principle

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(1) (1923) A.C. 126.

(2) (1882) 7 A.C. 360.

(3) (1876) 2 Q.B.D. 271.

(4) (1926) 1 W.W.R. 449.

(5) (1919) 88 L.J., K.B. 549.

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of the *Wright* case, and the *Mc-Clenaghan* case is likewise based thereupon and on *Scarf v. Jardine* (an action by a creditor of a partnership), the general principle of which is thus laid down by Lord Blackburn, pp. 360-1:

“The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one or two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election.”

If I am right in my view that the Workmen's Compensation Act does not apply to the right the plaintiff is seeking to establish, its provisions do not bar her, and otherwise the evidence does not bring the plaintiff within Lord Blackburn's principle, nor does, I think, the *Wright* case support the defendant. That decision was based upon a statute which provided that where a cab-driver was convicted of “wanton or furious driving,” etc. . . . he should be fined three pounds and, in addition—

“Where any such hurt or damage shall have been caused the justice upon hearing of the complaint, may adjudge as and for compensation to any party aggrieved as

aforesaid a sum not exceeding ten pounds.”

The cab-driver was prosecuted by the police and convicted, and the magistrate awarded the plaintiff, who was a witness at the hearing, the sum of £10 for compensation to his cab which the plaintiff received though stating it was an inadequate sum. The view taken by the Court of the statute and its effect is best stated by Mellor J., p. 275, thus:

“The provision appears to me to be a very advantageous one with regard to the cases it was intended to meet, though in the present case the plaintiff seems to have availed himself of it in ignorance of the legal effect of what he was doing. It is intended to give to the party aggrieved a speedy and convenient mode of recovering in respect of slight injuries by means of the summary jurisdiction of the magistrate, so that when the complaint is brought before the magistrate with regard to the driver's misconduct, the whole matter may be settled, and the party injured may recover his compensation without being sent to the county court or compelled to engage in further litigation. It appears to me that there is no reservation of any further right of compensation, and that if the party aggrieved avails himself of the summary remedy given by the section he cannot afterwards proceed elsewhere. The plaintiff in the present case submitted himself to the magistrate's jurisdiction, in my opinion, by accepting the amount of compensation awarded. The matter thus became *res judicata* and cannot be re-opened.”

I am unable to see how a maritime lien upon, and a right *in rem* against a ship in a Court of Admiralty can be compared to the special statutory circumstances upon which that decision was based.

In the latest edition of MacLachlan on Shipping (1923), pp. 238-9, it is said, after noting the said section of the Maritime Conventions Act, and the leading cases on the point:

“In addition to the jurisdiction *in rem* possessed by the Admiralty Court for damage done or received by a ship, which was correlative with a maritime lien over the vessel which was the instrument of mischief, the Legislature has given certain powers for the detention of vessels in any part of the territorial waters of the United Kingdom. . . . A maritime lien for damage done by a ship attaches that instant upon the vessel doing it, and notwithstanding any change of possession, travels with her into the hands of a *bona fide* purchaser thereof without notice, and being afterwards perfected by proceedings *in rem*, relates back to the moment when it first attached. . . . Before the Maritime Conventions Act, 1911, the lien remained inchoate for an indefinite period, provided proceedings were taken with reasonable diligence and followed up in good faith. The Maritime Conventions Act has altered the law in this respect, in that it has set up a period of limitation within which actions for damage must be brought.”

But fortunately there is a clear authority upon both the principle and the practice of this Court in cases of maritime liens arising out of wages and damage by collision: I refer to the two decisions of Dr. Lushington in *The Bengal* and *The John and Mary* (1), the former being a joint report from which I quote the judgment in the latter case, p. 1086, though both reports should be considered:

“With respect to *The John and Mary*, the only difference between

it and the *Bengal* is, that that is a suit for wages and this is a cause of damage. In this case an action was brought at common law, but the parties could not realize the fruits of their judgment. It quite comes within the decision of the case in Douglas' Reports (*Burnell v. Martin* (1780) 2 Doug. 417).

Where a party suffers damage by collision, he is entitled to recover at common law, or to avail himself of the lien he has, for the loss he has sustained. If there had been a *lis pendens*, it would have been a different thing; for I certainly would not allow, where an action was pending at common law, a suit to be promoted in this court to a precisely similar effect. I would not allow both suits to go on at the same time, because, in the action originally commenced there might be full and complete indemnity for the injuries suffered; but if it so happened that in the court of common law the party could by no means obtain full compensation, I would then allow him to proceed against the ship in this court. I see no substantial difference between this and the case of *The Bengal*; and therefore my judgment must be to allow the parties to proceed in this case as in the other, and I give them their costs.”

The judgment in the former case points out, citing *The Bold Buccleugh* (2), that:

“We have already explained, that in our judgment a proceeding *in rem* differs from one *in personam*; and it follows that, the two suits being in their nature different, the pendency of the one cannot be pleaded in suspension of the other.” In the former case the master had recovered a personal judgment in the Court of Exchequer against the owner for his wages but could not

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(1) (1859) 5 Jur., N.S. 1085; Swabey, 468, 471.

(2) (1851) 7 Moore P.C., 267, 286.

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realize it because of the defendant's bankruptcy though he had filed a proper claim with the assignee against the bankrupt's estate based on his judgment; in the latter the plaintiff had recovered in the same court a personal judgment against the owners of the ship for damages for collision but further proceedings arising therefrom were pending in that Court respecting the ownership of the vessel, and the same question of barring a remedy by "election" was raised by counsel (Swab. p. 472) as is raised here.

It follows from these cases that unless the actions are to a "precisely similar effect" and "full and complete indemnity" can be recovered in the other tribunal this Court will not refuse the appropriate, distinct and complete remedy it can afford. In the case at bar the amount awarded by the Workmen's Compensation Board is in any event so inadequate that it cannot be regarded, in my opinion, as anything approaching that "full compensation" contemplated by the learned Doctor Lushington, but as plaintiff's counsel has very properly offered to accept a reduction of all sums already received by her from the said Board from my said award of \$20,000, judgment will be entered for that reduced amount after ascertainment by the Registrar if not agreed upon.

To the Admiralty decisions already cited I add an instructive later one in the Court of Common Pleas, *Nelson v. Couch* (1), wherein they were unanimously approved and applied in principle by permitting proceedings to be taken at common law for damages for collision after those in Admiralty had proved insufficient to satisfy the injured party—as Willes J., puts it, p. 48, the plaintiff is entitled to recover at law *in personam* "the excess of damage which the ship is insufficient to satisfy"; and he concludes:

"It is clear from the case of *The John and Mary* that a proceeding *in rem* in the Admiralty Court may follow proceedings against the owners in a court of law."  
 And cf. *The Chieftain* (2).

These above reasons being sufficient, in my opinion, to support this action I do not deem it necessary to consider the other answers advanced by the plaintiff to the said objections, but will content myself by citing the decision of the Court of Appeal in *The Burns* (3), on general statutes of limitation of action not barring "actions" in Admiralty *in rem*; and in particular the observations of Lord Collins M.R. on pp. 146-7 which support the submission of plaintiff's counsel on the meaning of "action" in secs. 11 and 12 of said Workmen's Compensation Act.

*Judgment accordingly.*

(1) (1863) 33 L.J. C.P. 46.

(2) (1863) Br. & Lush. 212.

(3) (1907) P. 137.

HIS MAJESTY THE KING.....PLAINTIFF;

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March 2.

v.

THE COSGRAVE EXPORT BREWING }  
CO., LTD. .... } DEFENDANT.

AND

HIS MAJESTY THE KING.....PLAINTIFF;

v.

JOHN LABATT, LIMITED.....DEFENDANT.

*Practice—Crown—Information—Set-off—Fiat—Jurisdiction*

The Crown by its information claimed that the defendants were indebted to it for certain duties and asked for judgment accordingly. By its answer to said information defendant set off a claim to recover certain other duties that had been paid to the Crown, and which were absolutely distinct from what was claimed by the information.

*Held*, that the set-off and counter-claim confer definite and independent remedies upon a defendant against the plaintiff, and are two separate claims or causes of action, and as one cannot sue the Crown without a fiat, such set-off or counter-claim could not be pleaded by way of answer to the information. (*The Queen v. Whitehead* (1884) 1 Ex. C.R. 134 distinguished.)

2. That to allow a counter-claim or set-off the court must as a condition precedent be vested with the jurisdiction of hearing both the action and the counter-claim or set-off, and that this court has no jurisdiction to hear the counter-claim until a fiat has been given to hear the same.

MOTION by the Crown to strike out paragraph 11 from the defence in the first case and paragraph 12 from the defence in the second case.

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

*F. P. Varcoe* for the Crown.

*George Macdonnell* for the defendants.

The facts are stated in the reasons for judgment.

AUDETTE J., now (March 2, 1928), delivered judgment.

The question of set-off and counterclaim against the Crown was settled in this Court in its early days.

Dealing first with the point relied on by Mr. Macdonnell that technical objections to the pleadings after they are

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closed are excluded from consideration, this Court is not much concerned with technical objections. The Court wants to go to the pith and marrow and merits of the case, and endeavours to do justice between the parties. We have a special rule, Number 338, enacting that no proceeding in the Exchequer Court shall be defeated by any mere formal objection. That takes care of Mr. Macdonnell's last argument.

Dealing now with the matter on its merits one must bear in mind that this is a claim for duties that have not been paid but were due. Now, you want me to allow you to set off a claim to recover back some other duties that have been paid and that are absolutely distinct from what is claimed in the present action.

And coming to the case of *The Queen v. Whitehead* (1) cited by Mr. Macdonnell, I may preface my remarks by saying that this is a case of special circumstances which must be distinguished from the present one. Whilst in the present case the amounts of the claim are not mixed or interwoven with the matter set forth in the paragraph of the defence above mentioned, in the *Whitehead* case the items or amounts were inseparable.

Indeed the *Whitehead* case is a case of special circumstances, so to speak. The head-note reads as follows:

Where the dealings of the parties thereunder were so continuous and inseparable—[*Inseparable* does not meet this case, because the taxes to be paid as absolutely distinct to the taxes that have been paid long before.]—that the claims on one side could not properly be investigated apart from those of the other, the rule against pleading a set-off to a declaration for money due to the Crown did not apply, and the demurrer to said plea should be overruled.

Yet the *Whitehead* case recognizes the rule against pleading set-off against the Crown, but decides that when the amounts are so linked and interwoven that you could not deal with one part without dealing with the other you had to let in the set-off.

Under the present system of practice in England I find that set-off and counterclaim must be regarded as conferring definite and independent remedies upon a defendant against the plaintiff. They are two separate claims or causes of action. And until the fences of the prerogatives of the Crown are removed one cannot sue the Crown with-

(1) (1884) 1 Ex. C.R. 134.



out a *fiat*. That comes back to a fundamental principle. No counterclaim can be set off at common law against the Crown. The subject must proceed by petition of right.

There can be no set-off against the Crown in so far as it is a substantive course of action.

The case of *Fortier v. Langelier* (1) which also deals with a matter of this kind, holds: 1st that compensation does not take place between a debt due to the government for a direct personal tax and a debt due by the government to the person owing such tax; and 2nd, no action can be sustained against the government except by petition of right allowed by the express consent or *fiat* of the Lieutenant-Governor, and to permit a plea of compensation to be set up, would be equivalent to permitting a suit to be prosecuted against the government without such consent or *fiat*.

There is a similar decision in the case of *Côté v. Cie du chemin de fer du comté de Drummond* (2).

Juge: 1. On ne peut plaider compensation à une demande de la couronne sans avoir recours à la pétition de droit.

A *substantive cause* of action cannot be pleaded as an incidental demand or counterclaim to an information by the Crown. *Queen v. The Montreal Woollen Mills Co.* (3). The same principle was also recognized in the two cases: *Hogaboom v. The King* (4); and *The King v. British American Bank Note Co.* (5).

To allow a counterclaim or set-off the court must as a condition precedent be vested with the jurisdiction of hearing both the action and the counterclaim or set-off, and that this court has no jurisdiction to hear the counterclaim until a *fiat* has been given to hear the same; it is the *fiat* that gives the court jurisdiction to hear it.

Following the judgment of Lord Gorell, in the case of *Bow McLachlan et al v. Ship Camosun* (6), I have come to the conclusion that the real contest between the parties in the present instance, is with regard to a matter which is not a defence proper, and over which, if put forward as a claim, the Exchequer Court has no jurisdiction until a *fiat*

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(1) (1895) Q.R. 5 K.B. 107.

(2) (1898) Q.R. 15 S.C. 564.

(3) (1895) 4 Ex. C.R. 348.

(4) (1901) 7 Ex. C.R. 292.

(5) (1901) 7 Ex. C.R. 119.

(6) (1909) A.C. 597 at p. 613.

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is obtained to so hear the claim. The contest should be left to be settled by a cross action in a court having jurisdiction.

The motions to strike out are granted and paragraph 11 in the first case of the statement of defence, and paragraph 12 in the second case in the statement of defence, are stricken out and deleted from the plea. The whole with costs of the application in favour of the plaintiff.

*Judgment accordingly.*

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 Jan. 30.  
 Feb. 22.

SAUL WEISS .....CLAIMANT;  
 vs.  
 HIS MAJESTY THE KING.....RESPONDENT.

*Revenue—Smuggled goods—Seizure—Onus of proof—Sec. 264 of Customs Act.*

*Held,* That where goods alleged to have been smuggled, are found and seized in the possession of any person, the *onus*, under the provisions of sec. 264 of the Customs Act, is upon such person to explain how the goods had come into his possession or how they had been imported into Canada, and if so, to prove that the duty upon them was paid.

Reference by the Minister of Customs and Excise under Section 177 of the Customs Act.

The Action was tried before the Honourable Mr. Justice Audette, at Montreal.

*L. Phillips* for claimant.

*A. H. Tanner K.C.* and *J. L. Desaulniers* for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now (February 22, 1928) delivered judgment.

This is a Reference to this Court, by the Minister of Customs and Excise, under the provisions of sec. 177 of The Customs Act, of the claim of Saul Weiss in respect of a seizure made upon him, on the 8th September, 1925, upon the ground of having smuggled into Canada the following goods and articles, viz.: Stick pins, value, \$37; wedding rings, \$24; ring mounts, \$147; diamond rings, \$1,570, in all, \$1,778; watches and watch cases, \$145; total, \$1,923.00.

To this value of \$1,923 as appears from the Customs Seizure report, should be added the Sales Tax and the duties, establishing the "probable value" of the seizure at \$2,718.23, duty paid, for an infraction of the Revenue Laws of Canada.

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The matter of a Reference under sec. 177, is not in the nature of an appeal and the Court has power to hear and consider it upon the evidence before it, whether the same was before the minister or not. *Tyrrell v. The Queen* (1).

It is well to state here that there were no loose diamonds seized as the question of loose diamonds comes up hereafter.

The circumstances which led to the seizure and what took place at that time, are given by the seizing officer, in his report of the 18th September, 1925.

This officer, Willie T. Conway, having been informed that the claimant had, in his jewellery store, a considerable quantity of goods brought into Canada, from foreign countries and upon which duty had not been paid,—accompanied by officer J. D. Labelle, together with John F. Murphy, a jeweller from a jewellery firm in Montreal,—called on Weiss, on the 8th September, 1925, requested him to produce his books showing the amounts of purchases and sales; but Weiss informed the officer that he did not keep any books. Thereupon the officer had the jeweller pick out the American goods, consisting of rings, watches, watch cases, rings set with diamonds and some stick pins. Weiss had no invoices to check these goods, but claimed he could show where he had bought these goods of American manufacture, claiming he had lost the invoices covering most of the goods so picked out, and that he would get duplicates. The customs officer then took the goods under detention and gave Weiss ten days within which to make proof showing where the goods came from and up to the present day he has failed to do so. The seizure was made and perfected on the 18th September, 1925.

On the 9th October, 1925, the affidavits of Weiss and Belhomme were transmitted to the Department of Customs at Ottawa and are to be found on the Departmental file.

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Weiss, in his affidavit, stated, among other things, that the said seizure covered stick pins, wedding rings, ring mounts, and diamond rings and loose diamonds, and I am transmitting to the department an affidavit of Mr. Henry Belhomme, diamond cutter and polisher, from whom I bought all the loose diamonds, twelve rings set with diamonds, and four dinner rings set with diamonds;

3. The stickpins seized were bought by me from one Abraham Simon, a jeweller in Montreal, from whom I bought the place of business where I now operate, at 1039 St. Lawrence Boulevard, on February 29, 1924, I have not at present a detailed list of the articles contained in the store at the time of the purchase by me, but attach hereto a copy of the Bill of Sale made on February 29, 1924;

4. The balance of the merchandise seized, other than the goods purchased from Mr. Belhomme and Mr. Simon, was purchased by me in the ordinary course of business from various parties, among whom were S. H. Miller, whose invoice is attached hereto; Mr. Kushner and Mr. Riback, and invoices from these latter two parties were given to the officials of the department at the time of the seizure;

5. I am also a manufacturing jeweller, and the great majority of the rings seized were manufactured by me.

And Belhomme's affidavit sets forth that

I am a diamond cutter and polisher by trade, and my place of business is in Room 201, Mappin & Webb Building, Montreal.

2. I have from time to time done business with Mr. Sol Weiss, jeweller, of Montreal, said business being done in the regular way, invoices being given for all merchandise bought and sold;

3. I know that the Department of Customs and Excise has seized certain merchandise belonging to Mr. Weiss, and among other items seized are twelve rings, set with diamonds, as well as a number of loose diamonds;

4. At the request of an officer at the Customs Department in Montreal, I went down and examined the diamonds seized, and hereby swear that the greater majority of these stones seized undoubtedly were sold by me to Mr. Weiss, as I recognize the said diamonds, and know that they came from me and were sold to the said Mr. Weiss, in the regular course of business; this applies also to four dinner rings, set with diamonds, which were also seized;

5. This statement would cover not less than 75 per cent of the diamonds seized, and as to the balance, the diamonds are not easy of identification, and it is difficult to state with absolute assurance that the said stones were sold by me to Mr. Weiss, but it is quite possible and highly probable that the said stones formed part of those sold by me from time to time to said Mr. Weiss.

Both Weiss and Belhomme were not present at the trial and were not heard, and these affidavits and the statements made by Weiss have been so much contradicted, that they are left bereft of any truth or reliability.

Officer Conway in his evidence states that Weiss had stated to him, at the time of making the seizure, that the goods seized were goods mostly all of his own manufacture. First conflict. Then he had stated he would produce evi-

dence as to the stick pins and has not done so. With respect to the wedding rings, Weiss stated he had bought them from one Simon who manufactured them. Simon identified the rings seized and denied this, granting a certificate to that effect. Exhibit D. Another false statement.

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With respect to the ring mounts. Weiss stated he manufactured them himself and the jeweller Murphy says they are of American make. Another conflict.

Coming to the diamond rings. Weiss says he manufactured these ring mounts and that he bought all the diamonds from Belhomme. These mounts have been identified as of American manufacture. Belhomme kept no book and when called by officer Conway, in his presence and that of Murphy and Labelle, he claimed he identified 29 of these diamonds which were set on the ring mounts. Yet Belhomme's affidavit states that no less than 75 per cent were sold by him to Weiss. Now, in that respect, jeweller Murphy says it is next to impossible to identify diamonds when set on the ring. Belhomme himself in his affidavit states something to that effect,—that it is not easy of identification. He said:

it is difficult to state with absolute assurance that the said stones were sold by me to Mr. Weiss; but it is quite possible and highly probable that the said stones formed part of those sold by me from time to time to said Mr. Weiss.

A declaration of that nature bears upon its face unreliability and suggests nothing but an effort both of imagination and good will in an endeavour to save Weiss. Conway, in his report of the 5th November, 1925 seems to have found the solution respecting these diamonds when he says there was no evidence to show that any of the diamonds

set in the rings were bought from Mr. Belhomme, and as to the invoices produced (afterwards) by Mr. Weiss from Belhomme they simply read diamonds, and as there were a number of loose diamonds in Mr. Weiss's store at the time of the seizure which were bought from Mr. Belhomme it seemed to me that the invoices only covered the loose diamonds which were not seized.

And in his report of the 18th September, 1925, (p. 2) he further says:

On checking the goods in Mr. Weiss's store I came across a quantity of small diamonds which seemed to be covered by those invoices and I therefore did not touch the same.

With Conway's view and explanation I abundantly concur.

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Coming now to the watches and watch cases. Weiss says two of these watches do not belong to him but to customers. Asked for their names, he could not give them. One of these watches he had on him and he said he was regulating it. With respect to the watch cases, Weiss says they were not his, that he had them for safety deposit in a box in the Bank of Montreal. By reference to exhibit E we find that these two watches, duly identified by the numbers, were smuggled into Canada by one D. Wolofsky and turned over to Weiss. Here again we find Weiss has made another false statement.

With respect to one diamond ring valued at \$100 which was stated as bought from Levine and that Levine had bought it from N. Slover & Co., the latter gave a certificate (Exhibit B) that it was not produced from their factory. This is of the same class of evidence.

Adverting now to ring mounts, Weiss said he bought them from I. Kushner. Now, the latter states that these ring mounts so seized had not been sold by him to Weiss—exhibit C. It is said by witness Conway that he found in Weiss's store an invoice from The Guarantee Finding Co. Inc., which according to his view, covers the mounts seized. Furthermore it is contended by witness Conway that these have been smuggled into Canada, by one Shaffer, mentioned in the Gelfer letter forming part of exhibit C.

It is further established by evidence that the series of invoices from Simon and Oster, in exhibit D do not cover the wedding rings seized.

Coming to the opal and the onyx rings, Weiss contends that those rings were sold to him by S. H. Miller, the pawnbroker. Witness Sagermacker, the manager of S. H. Miller, who was present at the time of the sale of these two rings, testified they were not the same as those under seizure, and he had further established this fact to the same effect by a declaration under the Evidence Act, on the 28th of January, 1928. Here again Weiss comes with a false statement. Those who contradict him are in no wise interested and their evidence is to be accepted in preference to that of the claimant.

Weiss further stated he had bought some of this jewelry from one S. Riback; but the invoice from Riback, filed as exhibit No. 3, does not cover any of the goods

seized, and yet it had been given to Officer Conway by Weiss saying it did. Another false statement.

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None of the persons called could identify the goods under seizure, except Belhomme who claimed he identified 29 of the mounted diamonds without taking them out of their mountings. However I already had occasion to discuss the latter's evidence, and I have shewn how little reliability can be placed upon it in the present circumstances; besides the obvious fact that his affidavit is in direct contradiction to the result of his examination of the rings, in the presence of Conway and others. I am unable to accept this conflicting and dubious evidence. The claimant has failed in that behalf to comply with the requirements of sec. 184 of The Customs Act and the allegations of the Crown's defence are deemed proved and judgment should be given as in a case by default.

The draft of contract found in the departmental file cannot be depended upon as it is neither signed nor certified.

It is unnecessary to pursue any further the review of or comment upon the claimant's unsatisfactory, unreliable, conflicting and false evidence. The goods have been "found" and seized and the onus is upon him, under the provisions of sec. 264 of the Customs Act, to explain how these goods have come into his possession or how they have been imported into Canada, and if so if any duty has been paid upon them, and the claimant has entirely failed to do so.

This section 264 was amended in 1927, by 17 Geo. V, ch. 50, sec. 35, making the matter still more clear by enlarging the scope of the section from what it was before by adding thereto that the onus is upon the person in whose possession the goods were found, although there had been decisions to that effect before. This section 264 is now 262 of the R.S.C., 1927, ch. 42.

The claimant, for reasons best known to himself, has failed to be present at the trial, the date of which had been fixed long in advance. Had he been able to explain his false and conflicting statements, it is not likely he would have neglected an opportunity of doing so.

The claimant has failed to discharge the onus put upon him by sections 184 and 264 of the Customs Act and his

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action must be dismissed. See *Queen v. Six Barrels of Ham* (1); *Regina v. One Box of Jewellery* (2); *Rex v. Leblanc* (3); *Cardinal v. The King* (4); *Crosby v. The King* (5). See also secs. 195 and 202 of the Customs Act.

There will be judgment dismissing the action with costs and maintaining the seizure as good and valid.

*Judgment accordingly.*

Solicitors for claimant: *Jacobs, Phillips & Sperber.*

Solicitors for respondent: *Tanner & Desaulniers.*

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THE ADAMS AND WESTLAKE COM- } PLAINTIFFS;  
PANY ET AL..... }

VS.

E. T. WRIGHT, LIMITED..... DEFENDANT.

*Patents—Invention—Impeachment—Practical and beneficial results.*

The plaintiff's patent was for certain new and useful improvements in trainmen's lanterns, to permit of the use of kerosene oil instead of signal oil. The object of the invention was to provide, under all conditions, an adequate supply of air from the upper part of the lantern, to maintain combustion, when the currents through the body were reversed from their normal upward direction. It consisted broadly in a lantern body having air conductive ports above the upper end of the globe and a perforated shield located within the body and facing such ports. A trainman's lantern in which kerosene could be used, being cheaper and giving a brighter light, had long been desired, but, until the advent of the present lantern, none had been made giving satisfactory results. When the present lantern came on the market it was readily adopted by practically all Canadian railways and by 75 per cent of the railways of the United States, and proved satisfactory. The invention effects a saving of 80 per cent in operating cost.

*Held*, on the facts, that the lantern in question was new and useful, and that the changes made in the ventilation in the lantern to control the quantity and direction of the air currents was not the result of mere mechanical skill, but required thought, study and an inventive mind, and constituted invention.

2. That in order to avoid a patent for illegal importation, the thing imported must be the patented article itself, and not merely consist of material, which, while requiring but a trifling amount of labour or expense to transform them into the patented invention, yet do not in their separate state embody the principle of the invention.

- (1) (1856) 3 Allen N.B.R. 387.
- (2) (1864) 8 L.C.J. 130.
- (3) (1927) 2 D.L.R. 793.
- (4) (1927) S.C.R. 541.
- (5) (1907) 11 Ex. C.R. 74.



Action by plaintiffs to restrain the defendant from infringing their patents.

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

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

*F. B. Fetherstonhaugh, K.C.*, for defendant.

The facts are stated in the reasons for judgment.

AUDETTE J., now (March 27, 1928), delivered judgment.

This is an action for an alleged infringement of the plaintiffs' Canadian Patents No. 213,301, of the 13th September, 1921, filed as exhibit No. 1, and of No. 228,390 of the 30th January, 1923, and filed as exhibit No. 2.

The defendant, by his statement in defence, denies infringement and avers, in substance, among other things, that these two patents are null and void for want of subject matter; that the plaintiffs, contrary to the Act, did not manufacture within the period of two years from the date of Patent Exhibit No. 1; that they imported into Canada the patented article after the expiration of 12 months from the date of the patent; and lastly that "contrary to the condition of the patent, the patented article was manufactured outside of Canada to supply the Canadian market with the invention covered by patent No. 228,390, Exhibit No. 2."

However, counsel for the defendant, at the opening of the trial admitted that, if the patents are good, the defendant has infringed, admitting further that the plaintiffs' and the defendant's lanterns are identical in their construction. Furthermore, the defendant, on his examination taken on discovery admitted having actually copied the plaintiffs' double shield covered by patent exhibit No. 2.

The issues are therefore narrowed down first to the question of the validity of the patents, and second to the further question of manufacture and importation as above set forth.

The grant contained in the patents is for certain new and useful improvements, in lanterns especially adapted for the use of trainmen. The object of the invention, as set forth in exhibit No. 2, is to provide, under all conditions an

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adequate supply of air from the upper part of the lantern body to maintain combustion when the currents through the body are reversed from their normal upward direction; and it consists broadly in a lantern body having air conductive ports above the upper end of the globe and a perforated shield located within the body and facing such ports.

The evidence discloses that in the past the railway lanterns, although expensive and somewhat defective, were burning signal oil. Up to the day of these patents kerosene lamps for railway purposes could not be used as they would go out under the gyrations and the jerky movements necessary in the practice of signalling. The Great War, followed by proclamation by the State for the conservation of fats, induced the inventors to investigate and experiment intensively with kerosene oil. Signal oil is a mixture of one-third lard oil and two-thirds mineral oil and it gives a phlegmatic flame as compared to the bright light yielded by kerosene.

A railway man takes exceptionally good care of his hand lantern, because it is an instrument of vital importance for him in his work. Upon the proper and distinct signals made therewith depend life and death for him, his fellow-employees and the public.

This is a combination patent.

The patentee, having realized the unsuitability of the kerosene hand lantern for railway purposes, although much desired, using his long experience from an analytical standpoint, set to work to discover how the defects could be overcome. He shortened the globe in the dome which was obstructing the air, and he devised and invented a manner of taking care of the foul air rising from the burner up, and allowed better circulation of the air, controlling it to better purpose when it came from the port holes. The vitiated air,—that is the air that has the oxygen removed from it by combustion—has to rise and get out by the top outlet holes. Anything that causes this vitiated air to come back on the flame—either by the air or by being forced back by the circular movement of the lantern—will necessarily cause trouble. It is the ventilation that counts. By changing ring 26 in No. 10 and substituting rings 22 and 24, and spacing them apart, a passageway was made be-

tween these two rings that carried the air quicker to the point of combustion in greater volume. The whole was very clearly explained by witness Hamm.

The patentee on the one hand by his ingenuity realized the difficulty and overcome it scientifically, so to speak, and on the other hand he applied the mechanical devices to work out his invention. The patentee devised and invented—after studying the problems—a means of overcoming the difficulty and for that new and useful invention he is justly entitled to his patents. He has done ever so much more than was contended by defendant, namely exercising mechanical skill. He has solved a problem that was long wanted in the art and met a long felt want.

There is in this case a real invention producing a practical and beneficial result. The patent lies so much out of the track of the former use of lanterns that it required thought, study and an inventive mind to produce it, and under such circumstances no anticipation could be found. What the patentee has done had never been done before, although sought for—one should not be misled by the apparent simplicity of the invention. Experience has indeed shown that not a few inventions, some of which have revolutionized the industry of this country, have been of so simple a character that, when once they were known, it was difficult to understand how the idea had been so long in presenting itself. *Vickers v. Siddell* (1); *Consolidated Car Heating Co. v. Came* (2); *Gross v. Frank* (3); *O'Rourke Engineering Cons'n. Co. v. McMullen et al* (4).

The device made under patent exhibit No. 1 proved generally satisfactory, except that the lantern would blow out when near a locomotive blowing its signal whistle, and it was then that the patentee set again at work to overcome this new trouble. He removed ring 26 in the first patent and replaced it by two rings, Nos. 22 and 24 in the second patent, with other minor improvements, and the lantern became most satisfactory all around, and that is the device that the defendant copied, thus further emphasizing its excellence.

(1) (1890) 7 R.P.C. 292.

(2) (1903) A.C. 509.

(3) (1923) 293 Fed. Rep. 702.

(4) (1908) 160 Fed. Rep. 933 at 939.

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Now upon this question of the lantern Exhibit No. 10, blowing out when placed near a locomotive blowing its whistle, the evidence discloses that fact quite clearly. And in answer to this the defendant adduced evidence that pending the trial they experimented with Exhibit C—without the anti-whistle ring—similar to Exhibit No. 10, the whistle ring having been removed for the purpose of the test and that the lantern did not go out.

Now what was it that was done in the experiment by the defendant? They took a lantern No. 11, with the two rings; removed the top ring assuming thereby they had a similar patent as No. 10. But they were obviously in error because when the inventor told us he replaced ring No. 26 in No. 10 and that he replaced it by rings Nos. 22 and 24 in No. 11, he added that in making that change he cut ring No. 26 in Exhibit No. 10 half of its former height. Therefore the defendant in making his experiment with No. 30 did not have a lantern similar to No. 10 but a mutilated No. 10, with a ring No. 26 half its former height. To make a proper test and experiment it was a necessary condition to have a similar lantern, which they did not. Moreover, witness Hamm testified that such removal of the top ring would make the lamp less likely to be affected by the whistle—as it would have the same effect as opening at the top, for the reasons stated in his testimony.

Be all this as it may, it does not in one way or the other affect the indisputable fact that the plaintiff's device is a most desirable invention in the art and one that has proved most successful. So much so that the defendants declare it to be a very good lantern and they openly and admittedly copied it.

Upon these experiments there is but one conclusion to arrive at. Whether or not the experiment or test made by the defendant was properly made and with an identical lantern, yet without casting any discredit upon any one, I must find the plaintiffs' evidence respecting the blowing out of the lantern, as already referred to, is beyond controversy.

The dominant purpose the patentee had in mind was to produce a dependable lantern to give the appropriate signals when necessary, a consideration that would outweigh all other objects. Safety in operation was the object.

Besides the ingenuity of invention above referred to by, among other things, making the anti-whistle ring with an air space between, so that the air could get over into the globe or flame chamber quicker, it counteracted the suction in the lower part of the lantern, the patentee has also invented a new and useful device.

On this question of novelty the evidence is all one way, establishing overwhelmingly that up to the time of the patents, the railways had been unable, for want of efficiency, to use these kerosene lamps.

The invention is most useful as it saves 80 per cent in the cost of operating and the lamp has been adopted in almost all the Canadian railways and 75 per cent of the American railways. The invention has been a great success and a great boon to railways. As a test of the difference between success and failure, the evidence establishes that an enormous quantity of these lanterns have been sold to railways, and further that all previous attempts to manufacture such a lamp had failed.

There remains the question of importation and manufacture to deal with. On the question of importation it will suffice to say that the delay within which importation was allowed has been extended to the 13th March, 1923, and that there was no importation after that delay of the complete device.

On the question of manufacturing, the evidence discloses that the plaintiffs manufacture in Canada about 25 per cent of the whole device, including the assemblage. They also make the burner, and the globes resisting heat used are not made in Canada. The plaintiffs have in that respect satisfied the requirement of the law. As decided in *The Anderson Tire Co. v. The American Dunlop Tire Co.* (1) and many other cases, in order to avoid a patent for illegal importation, the thing imported must be the patented article itself, and not merely consist of materials which, while requiring but a trifling amount of labour and expense to transform them into the patented invention, yet do not in their separate state embody the principle of the invention. See *Practice Exchequer Court*, pp. 300 to 303.

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(1) (1896) 5 Ex. C.R. 82.

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Correlating all the facts above reviewed to the law applicable to the case, I have reached the conclusion that the plaintiffs must succeed. There will be judgment adjudging and declaring that the two patents in question here are good and valid; that the defendant has infringed the said patents; that there will be the usual injunction restraining the defendant, his servants or agents from so infringing; that all products or articles in possession of the defendant which infringe the said patents be destroyed or delivered up by the defendant—unless otherwise arranged in this respect between the parties. Furthermore there will be a reference to the Registrar of this Court for enquiry and report upon the question of damages or accounts of profits, as the plaintiffs may elect. The whole with costs in favour of the plaintiffs.

*Judgment accordingly.*

Solicitors for plaintiffs: *Ewart, Scott, Kelly & Kelly.*

Solicitors for defendant: *Fetherstonhaugh & Fox.*

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Dec. 1.

ALBERT VALENCOURT .....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Expropriation—Petition of Right—Licensee—Deprivation of use and occupation—Compensation—Elements of compensation*

Where one is in occupation of part of a street under license from the municipality, by the provisions of which license he was obliged to vacate upon notice before a given date, and when by reason of the expropriation of the property he was forced to vacate before such date, he becomes entitled to compensation for his loss of the use and occupation thereof for the period he was deprived of it by such expropriation, as well as for the extra inconvenience and expense occasioned by reason of having to make an immediate move instead of having the whole life of the license to do so, but not to include the cost of moving.

PETITION OF RIGHT to recover from the Crown \$19,463.23 as compensation for the loss of the use and occupation of a street and for his removal as a result of the expropriation of the land.

The action was tried before the Honourable Mr. Justice Audette at Welland.

*W. M. German, K.C.*, for suppliant.

*James E. Day, K.C.*, for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now (December 1, 1927), delivered judgment.

The suppliant, by his Petition of Right, seeks to recover the sum of \$19,463.25 for the deprivation of the use and occupation of a certain part of Aqueduct street, in the city of Welland, and the removal therefrom of his boiler and blacksmith shops, resulting from the temporary expropriation, by the Crown, of that part of said street for the use of the Welland Ship Canal.

The suppliant holds no paper title to the land on the street in question, but had taken possession of the same in the circumstances and manner hereinafter mentioned. The Crown, by exhibit 4, taking the Municipal Corporation of the city of Welland as the owners of that street, notified them of having expropriated the same in the usual manner, the whole as appears by that exhibit.

Some time about the year 1877 one Herbert Griffith erected upon that part of Aqueduct street in question, his boiler works and blacksmith shops. Griffith having, in 1886, become financially embarrassed, an execution was issued against his property on Aqueduct street, and the sheriff acting thereunder sold to the suppliant the buildings, the machinery and tools, the latter subject to mortgage. No land was sold by the sheriff, no title was given him; but a receipt (which cannot at this time be found) for the moneys paid was given the purchaser.

From that day on the suppliant conducted the same class of business on that part of the street.

It is well to note that a certain part of these buildings is erected on the Crown's land adjoining the canal.

On the 14th April, 1926, and on the 25th November, 1926, the Crown duly expropriated this land or portion of street, for the limited period of three years only, beginning on the 14th April, 1926, and ending on the 13th April, 1929, after which period the said land was to revert absolutely in the Municipality of the City of Welland.

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On the 16th December, 1925, the suppliant bought the Carter property, being lots nos. 27 and 29, on the west side of Aqueduct street, for the sum of \$2,000. This purchase appears to have been made in prevision of his being turned out and ousted from Aqueduct street, as he says in his evidence: "I knew I would have to move in time"; and he adds that the period of two years or so was fixed in the agreement or undertaking with Council, hereinafter mentioned, because the aqueduct was to be then laid on that street.

That part of the street occupied by the suppliant was never fenced and there was always a space for traffic—a space, as will be seen by reference to the plan, allowing pedestrians and even horses and carts to pass onto the Government land.

The suppliant, in due course, having asked leave from the Municipal Corporation for the erection of buildings upon the Carter lot and to remove his buildings from Aqueduct street thereunto, the Municipal Council, evidently with the object of forestalling any litigation, passed the following Resolution reading as follows (Exhibit E.):—

TO WHOM IT MAY CONCERN:

This is to certify that the following is a copy of a resolution passed at the regular meeting of the City Council on Dec. 15, 1925.

Moved by Jas. A. Hughes,

Seconded by S. O. Mason,

That the request of Mr. Valencourt *re* the removal of certain sections of his plant be granted, and that Mr. Valencourt sign and agree to remove the remaining buildings on Aqueduct street, subject to six months from the City Council, notice of removal shall not take effect prior to January 1, 1928.

In compliance with this Resolution the suppliant gave the undertaking which has been filed as exhibit F.

It is well to observe that these two exhibits E. and F. establish conclusively that Aqueduct street is vested in the Municipality and that the suppliant has no title thereto.

Now the claim to a street or highway, as set out in this case, need not be discussed at length.

Once a highway always a highway is an old established maxim for, the public cannot release their rights, and there is no extinctive presumption of prescription.



*Dawes v. Hawkins* (1); *Cubit v. Maxse* (2); *Piggott v. Goldstraw* (3); *Nash v. Glover* (4); *Regina v. Hunt* (5); *Toronto Electric L. Co. v. Toronto* (6); 16 Hals. 151, 152; *Cline v. Cornwall* (7).

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There can be no doubt that the suppliant has established by the Resolution of the Municipality (Exhibit E) that he became thereunder a licensee and ceased to be a trespasser upon Aqueduct street. He received from the Municipality the permission to remain upon part of that street, subject to revocation. However, that permission or license, without consideration, permitted him to carry on at that place without possessing any estate therein. It was a permission to do lawfully what otherwise would have amounted to trespass. He was not a trespasser at the date of the expropriation.

Now at no time had the suppliant a right to encroach and build any portion of his shops upon the Crown property, and the Crown, at the date of expropriation and before, had the right to oust him of the occupation of its land.

However, I must find it is otherwise with respect to the street vested in the municipality and that in this respect he had a license from the proper authority to occupy it and that, in the result, the expropriation only accelerated by some 20 months, more or less, the time at which he would be compelled to get off the street.

Therefore the compensation, and the only compensation, which he thus becomes entitled to receive in this case is one for being compelled to leave from Aqueduct street 20 months or so before his time, bearing in mind he has, in any case, to leave at once and to move his buildings at once from the part of the Crown's property which is trespassed upon. That compensation must not cover the cost of removing, but only the value of his occupation during the period he was deprived of it by the expropriation. He may have purchased the Carter property 20 months before it was needed and he might have enjoyed the forbearance of

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| (1) (1860) 8 C.B.N.S. 848 at 858. | (5) (1865) 16 U.C.C.P. 145.                          |
| (2) (1873) L.R. 8 C.P. 704.       | (6) (1915) 21 D.L.R. 859; affirmed by Privy Council; |
| (3) (1901) 84 L.T.R. 94.          | (1916) 31 D.L.R. 577.                                |
| (4) (1876) 24 Gr. 219.            | (7) (1874) 21 Gr. 129.                               |

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the purchase moneys with return during that time. This occupation had a value to him; he could have moved during that period, at his pleasure and convenience. And if in the meantime he had vision of large profits made in this removal by consolidating his efforts in making it more costly than necessary, by employing skilled mechanics to do labour work, he himself only is to blame and will have to bear such cost.

For this acceleration in moving, be it 20 months more or less, taking all the circumstances of the case into consideration, and acting as I conceive a jury using its common sense might do in a case of this kind, I hereby fix the compensation for the value of the occupation of such land and for all damages arising out of the expropriation at the sum of \$900 with interest thereon from the 14th of April, 1926, to the date hereof, which the suppliant is entitled to be paid upon giving a satisfactory receipt or acquittance therefor. The whole with costs against the respondent.

*Judgment accordingly.*

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HIS MAJESTY THE KING.....PLAINTIFF;  
AND  
DOMINION PRESS CO.....DEFENDANT.

*Revenue—Sales tax—Section 19BBB. of the Special War Revenue Act, 1915—Sale by licensed manufacturer to licensed manufacturer.*

By a contract between it and its managing president (U.), the D.P. Co. was to obtain orders and sublet them to him to carry out, and U. was to give his entire time to the D.P. Co. and to pay D.P. Co. \$6,000 per annum for the use of its premises and plant for said purposes, the said \$6,000 to be paid by credit note upon the work done for the company, but said credit never to be in excess of \$500 for any one month. The D.P. Co. was to continue to purchase the paper and other supplies, to pay U. each week a sum sufficient to cover the wages of the workmen, for which U. was to give credit, to receive the completed goods in the shop, and pack and deliver same at its expense, and to pay U. at the end of each month, for work done by him, 60 per cent of the contract price thereof. U. remained, during all the period covered by the contract, president and manager of the D.P. Co., and also a large shareholder. Being sued for sales tax on the contract price to the consumer, the D.P. Co. refused to pay, claiming it should only pay 60 per cent of the tax as wholesaler's price, making allowance for retailer's profit, and the balance paid by the retailer, and also that, by reason of the contract, its transactions with U. were analogous to those between two corporations, and came under the exemption in the proviso to section 19BBB.

*Held*, on the facts, that the contract in question was but an attempt to avoid paying the tax and did not change the situation of the company under the law. That there was no sale from the company to the contractor, or by the company to a licensed manufacturer or producer; the only sale being that between the company and the outsider or consumer, and that the company could not claim the exemptions contained in the proviso in section 19BBB. of the Special War Revenue Act, 1915, and was liable for the full tax on the price to its customer.

2. That that section of the statute deals only with producers and manufacturers and that the tax is due by the producer and manufacturer upon his price and not upon the wholesaler's and the retailer's price.

INFORMATION by the Crown to recover from the defendant certain sales tax.

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

*Aimé Geoffrion, K.C.* for plaintiff.

*E. Lafleur, K.C.* and *E. Languedoc, K.C.* for defendant.

The facts are stated in the reasons for judgment.

AUDETTE J. now (April 21, 1928) delivered judgment.

This is an information, exhibited by the Attorney-General of Canada, whereby it is sought to recover, from the defendant company, the sum of \$490.17, as a balance of the amount due for "sales tax," under the provisions of sec. 19 BBB. of The Special War Revenue Act, 1915, and amendments thereto, covering the period extending between the 18th February and the 31st July, 1927.

The total amount of the duty or tax due for the period chargeable to the defendant, as producer and manufacturer, was \$1,213.79, and the defendant contends and claims that it should only pay 60 per cent thereof as wholesaler's price making allowance for the retailer's profit, and the balance of 40 per cent should be paid by the retailer. The whole as more fully explained hereafter, and as resulting or not from a contract between the company and its managing President. The amounts claimed by the information are not in dispute, the only controversy before the Court being as to whether in law the defendant is liable therefor, under the circumstances of the case.

It is alleged, proved and admitted that the defendant during the relevant period and since long before 1927 has

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been and still is producing goods of a value exceeding \$10,000 per annum (Reg. 16 etc.). This requirement has been reduced to \$3,000 after 1st May.

The material part of sec. 19 BBB., as affecting this case reads as follows, viz:—

19BBB. 1. In addition to any duty or tax that may be payable under this Part, or any other statute or law, there shall be imposed, levied and collected a consumption or sales tax of four per cent on the sale price of all goods produced or manufactured in Canada, including the amount of excise duties when the goods are sold in bond, which tax shall be payable by the producer or manufacturer at the time of the sale thereof by him; and in the case of imported goods the like tax upon the duty paid value of the goods imported payable by the importer or transferee who takes the goods out of bond for consumption at the time when the goods are imported or taken out of warehouse for consumption. 13-14 Geo. V, c. 70, s. 6 (1).

(Effective January 1, 1924.) 14-15 Geo. V, c. 68, s. 1 (1).

(Effective April 11, 1924.) 17 Geo. V, c. 36, s. 3.

For the purposes of this section, printers, publishers, lithographers and engravers shall be regarded as producers or manufacturers. 17 Geo. V, c. 36, s. 4. (Effective February 18, 1927.)

For the purpose of calculating the amount of the consumption or sales tax, "sale price" shall mean the price before any amount payable in respect of the consumption or sales tax is added thereto. 13-14 Geo. V, c. 70, s. 6 (1). (Effective January 1, 1924.)

Provided that the consumption or sales tax specified in this section shall not be payable on goods exported; or on goods sold by a licensed manufacturer or producer to another licensed manufacturer or producer if the goods are to be used in, wrought into, or attached to articles to be manufactured or produced for sale and which are articles subject to the consumption or sales tax . . . . (Effective January 1, 1924.)

On the 4th May, 1927, the Dominion Press Company entered into an agreement or contract with Henry Upton, its Managing President, for a period of 5 years,—the first five clauses thereof, which are of importance to this issue, reading as follows, viz:—

Dominion Press Limited has consented, agreed and promised, and does hereby agree, consent and promise to sublet to the said Upton all and every piece of work of printing, engraving, embossing, lithographing, etc., for which it may receive orders, upon the following terms and conditions, to wit:

1. The said Upton consents and agrees that he will do such work and that he will devote all his skill and experience as a printer exclusively to the service of the said Dominion Press Limited.

2. The said Upton shall pay the said Dominion Press Limited the sum of Six Thousand Dollars per annum for the five years following, for the use and enjoyment of that part of the premises, Nos. 529-531 Cathedral street, presently occupied by the Printing, Lithographing and Embossing Works of the said Dominion Press Limited and for the use of the

plant, machinery, tools, type, fixtures, furniture, etc., now in and upon the said premises, such payment to be made by a credit note upon the work to be done for the said Dominion Press Limited, but no credit shall be claimed in excess of Five Hundred Dollars for any one month, and then only at the end of the month. The said Upton shall further pay the cost of insurance of such plant and equipment.

3. The said Upton shall maintain in good working condition, at his own expense, the machinery, etc., hereby leased to him, and, at the expiration of this agreement, shall restore same to the said Dominion Press Limited in good order and condition, ordinary wear and tear excepted.

4. The said Upton agrees to execute promptly and correctly all orders entrusted to him and to deliver such goods, duly completed but not packed, on the floor of his shop, the packing and delivery to the customers of said Dominion Press Limited to be at the expense and cost of the said Dominion Press Limited. The said Dominion Press Limited agrees to pay the said Upton at the end of each and every month for the work executed by him at the rate of sixty per cent (60%) of the price at which it has contracted to deliver such work to its customers, provided, however, that no price shall be made without the consent thereto of the said Upton or his representative duly designated for that purpose.

5. To facilitate and simply the financing of this undertaking the said Dominion Press Limited shall continue, as heretofore, to purchase, in its own name and on its own responsibility, the necessary paper and other supplies, and shall pay each week to the said Upton a sum sufficient to cover the wages of the workmen engaged in the execution of its orders. The said Upton agrees to give a credit each month for the moneys so paid on account. 6, 7, 8, 9.

This contract is filed as exhibit No. 3.

The business of the company is that of "contracting printers and lithographers."

Henry Upton, the party to the above contract, was during the whole period combining the positions of President and Manager of the company, of contractor and was also a large shareholder. The company is to some extent a family company with, however, several outsiders connected with it.

By that contract the printing end of the business is taken over by the President and Manager. This is done with the intent of creating two ends to the business with the idea of involving two sales. In the result the company is willing to pay on the assumed wholesale price of the manufacturer or producer; but it is refusing to pay what it would be on the retail price to the individual consumer.

In other words, the defendant contends that by entering into this contract it intended to establish a parallel situation where there would be two separate corporations involved. Its contention being further that when the company is dealing with a retailer, that retailer incurs 40 per

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cent of the selling expenses. It further contends that if there is a wholesale transaction, the sale tax is collected and the Government is satisfied with the sales tax on the wholesale price. And if by chance the producer does his own retailing and incurs this assumed 40 per cent extra, then the Government insists upon him paying that 40 per cent and that is what the defendant is trying to avoid.

The contractor does not manufacture or do any work for anybody but the company defendant.

Now the present action is taken to recover a tax on the sales price by the producer or manufacturer and there can be no doubt that the defendant company is a manufacturer or producer, within the meaning of sec. 19BBB.

The contract is but an attempt to avoid paying the tax, and in analyzing the real situation and approaching the case on its true merits one must guard against taking the shadow for the substance. This contract does not change the situation of the company under the law. With or without the contract the tax is due. Indeed, it results from the contract that Upton, a printer, has done nothing else thereby than perform work and services. *Minister of Customs and Excise v. The Dominion Press Ltd.* (1); *King v. Irwin Printing Company* (2). He is a servant of the company, being paid in a given and special manner. He buys none of the materials used in producing or manufacturing. The company is a licensed manufacturer, but Upton is not. There is no sale here by a licensed manufacturer to another licensed manufacturer. There is no sale as between Upton and the company. Upton, the contractor, is in the same position as any of the other employees of the company receiving wages or remuneration for his work. The payment of the wages is financed by the company who buys the material unless supplied by the customer, and Upton prints or lithographs, as the case may be, for the company; and the goods are produced and manufactured by the company through its servants and employees, and the contractor does not sell to the public. It would seem, however, that it does not really matter whether Upton or anybody else does the printing. The defendant company is in the same position as any other

(1) (1927) S.C.R. 583 at p. 586

(2) (1926) Ex. C.R. 104.

producer or manufacturer who sells. Therefore the only sale and the only possible sale that takes place here is the sale made by the company to its customer or vendee of the finished product; and this sale is not made to another licensed producer or manufacturer, and that is what must control. The company does the financing, the contractor does the work. The contract practically makes no material change to effect the present case. This contract amounts to nothing more than a fictitious scheme that can neither deceive the Court nor escape the law. It fails entirely to create two ends to the business of the company, as above claimed. The business is carried on before and after the passing of the contract in a similar manner, excepting that the managing president is paid for his services in a different and roundabout manner. That is all.

Turning now to the language of the taxing clause (19BBB.) we find that the

sales tax is 4 per cent on the sale price of all goods produced or manufactured in Canada and that it shall be payable by the producers or manufacturers at the time of the sale thereof.

The Act further proceeds in defining printers as producers and manufacturers.

The tax is not upon the goods but in respect of the sale thereof and is calculated on the sale price. There is no question in this section of a wholesaler or a retailer. The tax is due by the producer and manufacturer upon his price and not upon the wholesaler's price which is quite different, and there is no question of a rebate such as that suggested by the defence. The statute deals only with producers and manufacturers.

There is in this case but one sale under the contract price between the company and the outsider or third party, and that is the sale and the only sale upon which the tax is due. It could not be otherwise: it could not be upon the sale (if it could be called a sale) of the services of the managing president—the contractor—because he does the work of the company under an internal agreement between the company and himself, using the company's machinery. The raw material is purchased by the company and the printing done upon remuneration by Upton, and the company sells the finished article to cover the cost of the work and the raw material. Upton the contractor never sells.

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It is contended on behalf of the defence that the sale price should be the wholesaler's price as distinguished from the retailer's price; the former to be 60 per cent and the latter 40 per cent of the price; and that if it is done otherwise an injustice is done. The defence further relies upon art. 6 of the Regulations saying that the Minister is to fix such prices. Now the statute says no such thing and if such a construction were to be placed upon the Regulations, it must be found that when the statute conflicts with the Regulations, that the statute is paramount. The Regulations cannot alter the statute; they are made only for the purpose of carrying the Act into effect and not for altering or varying the effect of the statutory provisions. No part of art. 6 of the Regulations apply to the present case. The statute only provides five cases in which the Minister is to make any determination, and they are to be found in secs. 13 and 15 of the Act and the present case does not come within the ambit of either of those cases.

Moreover, if the Minister has to fix the price, as contended by the defence,—a view I am unable to share—the Minister has then wrongly or rightly done so, as appears by the correspondence filed of record as exhibit No. 4, and the Court could not sit on appeal from such decision if exercised in its statutory and judicial discretion. Neither the Minister nor the Court are there to make the law. The Minister is there to collect the tax and the Court to construe the law.

I have, therefore, come to the conclusion that the text of sec. 19BBB. is unambiguous and is imperative. There is nowhere any question of wholesale or retail when it comes to fix the tax on the sale price, and the sale price contemplated by the statute is the one on the goods produced by the defendant, and which is payable at the time of the sale thereof by it. The defendant has failed to discharge the onus cast upon it to prove it fell within any of the exemptions mentioned in the statute.

There will therefore be judgment in favour of the plaintiff, as prayed, for the sum of \$490.17, with interest and costs.

*Judgment accordingly.*



ON APPEAL FROM THE TORONTO ADMIRALTY DISTRICT  
 EASTERN STEAMSHIP COMPANY LIMITED,  
 (DEFENDANT) APPELLANT AND RESPONDENT;

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AND

CANADA ATLANTIC TRANSIT COMPANY,  
 (PLAINTIFF) RESPONDENT AND APPELLANT.

*Shipping—Collision—Navigating with caution—Fog—Speed—Lookout—  
 Change of course—Appeal—Evidence*

*Held* (by the Trial Judge), that the absence of the master from the bridge in a dense fog, when fog signals are heard around, and the lack of a properly stationed lookout when the vessel is under way in a fog is *prima facie* negligent navigation.

2. That the rule relating to travelling in a fog overrides and controls rule 21, when a case arises in which these two rules come into conflict.
3. That the Maritime Conventions Act, 1911, not being in force in the Great Lakes, or above Lachine Canal, the Court is not called upon to minutely analyze every circumstance relating to the proportion of fault in the case, if in broad outline both ships are found to be to blame, as each must bear half the damage.
4. That the general rule is, apart from statutory provisions, that a statement previously made by a witness, whether on oath or not, has no evidential value in the case, unless it is acknowledged at the trial by the witness as being a true statement, whereas if he repudiates it, it can form no part of the testimony in the case; but that rule of evidence does not prevent the judge or jury from drawing, from other facts of the case, including the circumstances in relation to the origin and making of the statement, as well as the mode and reason for its denial, an inference consonant therewith.

*Held* (by the Trial Judge and on Appeal) that in a fog when one vessel cannot see another which is approaching from a point apparently not more than four points from right ahead, and is unaware of the actual course of that other, changing direction is not “navigating with caution.”

2. That speed in a fog which disables a vessel from avoiding another after it is seen should be deemed to be an excessive speed.

*Held, On appeal* (affirming the judgment appealed from) that where an appeal is taken from a local Judge in Admiralty to the Exchequer Court, presided over by a single judge, the latter should not interfere with the holding of the trial Judge on questions purely of fact, unless he comes to the conclusion that such findings are clearly erroneous. It is generally the duty of an appellate Judge to leave undisturbed a decision of which he does not clearly disapprove.

2. When vessels are travelling in dense fog and especially when hearing their respective fog signals not more than four points from right ahead, a speed of more than “bare steerageway” is excessive.
3. Where, from the fog signals, a vessel places an approaching vessel not more than four points from right ahead, on her starboard and where

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said vessel has given the one blast signal (I am directing my course to starboard) twice. if she is keeping her course and speed, and deems the signal injudicious, it is her duty to give the danger signal and to reduce her speed to bare steerageway, and if necessary even to stop and reverse.

Appeals by both plaintiff and defendant, separate and distinct appeals, from the judgment of the Honourable Mr. Justice Hodgins, Local Judge in Admiralty for the Toronto Admiralty District, which found both vessels to blame for a collision between the plaintiff's steamer *Dalwarnic* and defendant's steamer *Grammer*.

The appeals were heard before the Honourable Mr. Justice Audette, on the 5th day of March, 1928, at Ottawa.

*Francis King, K.C.*, and *J. P. Pratt* for the *Dalwarnic*.  
*S. C. Wood, K.C.*, and *G. S. Jarvis* for the *Grammer*.

The facts are stated in the reasons for judgment of the Honourable Mr. Justice Audette and Mr. Justice Hodgins, which follow.

AUDETTE J., now (April 11, 1928), delivered judgment.

This is an appeal from a judgment, of the Local Judge of the Toronto Admiralty District, pronounced on the 10th January, 1928, in an action arising out of a collision in a dense fog, on the 31st day of May, 1926, at 5.30 a.m., between the plaintiff's steamer *Dalwarnic* and the defendant's steamer *Grammer*. The *Dalwarnic* suffered injuries and the plaintiff sues for the damage done to that vessel while the defendant counterclaims for the loss and damage suffered by the *Grammer* which was sunk.

The details of the accident are clearly set out in the reasons for judgment of the learned trial judge and I feel therefore relieved from the necessity of repeating them here on appeal (1).

After reading the evidence and hearing counsel for all parties upon these issues, I am forcibly led to the same conclusion as that arrived at by the trial judge.

Moreover, sitting as a single judge, in an Admiralty Appeal from the judgment of a trial judge, while I might

(1) Note: The Reasons for Judgment of Hodgins L.J.A. are printed below.

differ in matters of law and practice, yet as regards pure questions of fact, I would not be disposed to interfere with the judge below unless I came to the conclusion that his finding was clearly erroneous. It is generally the duty of an appellate judge to leave undisturbed a decision of which he does not clearly disapprove.

Lord Langdale, in *Ward v. Painter* (1), said upon this point:

A solemn decision of a competent judge is by no means to be disregarded, and I ought not to overrule it without being clearly satisfied in my own mind that the decision is erroneous.

See also *The Queen v. Armour* (2); *Montreal Gas Co. v. St. Laurent* (3); *Weller v. McDonald-McMillan Co.* (4); *McGreevy v. The Queen* (5); *Arpin v. The Queen* (6).  
Coutlee's Dig. S.C.R. 93.

The Supreme Court of Canada also held that when a disputed fact involving nautical questions (as raised in this case) with respect to what action should have been taken immediately before the accident, is raised on appeal the decree of the court below should not be reversed merely upon a balance of testimony. *The Picton* (7).

Moreover, it cannot be overlooked that the learned trial judge had an opportunity of hearing and seeing the witnesses and testing their credit by their demeanour under examination. *Rickman v. Thierry* (8). And in the present case, there is more: there is a finding by the trial judge with respect to five witnesses, whom he has seen in the witness box, to the effect that he cannot accept what was sworn to by them at the trial when it conflicts with any other evidence, and qualifying their course of action in relation to this case as highly discreditable. I indeed quite appreciate that the signing of the statements referred to at trial takes away any reliability to be placed upon their evidence. All of which must influence in confirming, apart from the fact that there is ample evidence for the trial judge to have arrived at his conclusion set forth in the judgment appealed from. I accept his finding of fact and more especially with respect to the speed of both vessels,

(1) (1839) 2 Beav. 85.

(2) (1899) 31 S.C.R. 499.

(3) (1896) 26 S.C.R. 176.

(4) (1910) 43 S.C.R. 85.

(5) (1886) 14 S.C.R. 735.

(6) (1886) 14 S.C.R. 736.

(7) (1879) 4 S.C.R. 648.

(8) (1896) 14 R.P.C. 105.

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which is a controlling element in the circumstances of the case. There is evidence upon which the judgment appealed from could be maintained and an Appellate Court will not disturb such judgment. *Re Arnold Estate* (1). The engineer of the *Grammer* says at page 367, they never got dead slow on the night of the accident and the *Dalwarnic* stopped her speed and reversed only when the accident was inevitable.

I have, however, formed a distinct and personal opinion that both vessels, in dense fog and thick weather, were at fault in travelling as they were, at more than moderate speed, and more specially when hearing their respective fog signals not more than four points from the right bow ahead, to exceed a speed of bare *steerageway* as required by Rule 19. Both vessels were travelling at a speed which is excessive of that assigned by the Rules under the circumstances.

When the respective fog signals were given and when both vessels somewhat realized, as the evidence discloses that the sound of such signals was bearing on their respective starboard bow, there was no occasion in such a fog and position for the *Grammer* to cross the bow of the *Dalwarnic*, as she did, after changing her course twice to starboard, as indicated by the one blast signals.

There is no justification when two steamers are approaching one another in a dense fog, without sufficient indication to justify action, for either to alter their course. *The Bywell Castle* (2). Rule 19 provides that in such case you reduce your speed to bare *steerageway*. In each particular case, one must look to the circumstances, and in the present case each vessel should have kept her course and reduced her speed to bare *steerageway* or reversed and stopped. When these vessels heard the fog signal of each other that was the time to stop and proceed to navigate with caution. The *Grammer* was wrong in thus porting her helm and keeping her speed and the *Dalwarnic* was also at fault in keeping her speed under the circumstances instead of reducing it at the time of the fog signal to *steerageway*. *The Vindomora* (3).

(1) (1918) 44 D.L.R. 12.

(2) (1879) 4 P.D. 219.

(3) (1891) A.C. 1 at p. 4.

The most reasonable finding in *The Counsellor* (1), that as a general rule a steam vessel ought not to be going so fast in a fog that those in charge of her cannot pull up within the distance that they can see

should find application to the circumstances of the present case, and had it been followed no collision would have happened as it is abundantly shewn. See also *The Ceto* (2); *The Ship Clackamas v. Owners of Schooner Cap d'Or* (3). A steamer in a fog should be able to stop within the limits of observation; and a speed such that another vessel cannot be avoided after being seen is excessive. *Smith v. McKenzie* (4) and cases therein cited.

There was fault in the *Dalwarnic* not answering this one blast signal repeated twice as she was keeping her course and speed. She acquiesced in a wrong course. If she deemed this one blast signal injudicious she should have protested by sounding the danger signal, reducing her speed to bare steerageway, and if necessary have then stopped and reversed—instead of stopping and reversing only when the collision was inevitable. Had she protested instead of acquiescing, both vessels would have passed safely green to green under these special circumstances, as provided by Rules 37, 38 and 22, and the accident would have been avoided.

The situation not being unlike the one provided by the “third situation” in Rule 38; that is, by their fog signal they ascertained they were practically travelling green to green. Keeping their course without making any change they were passing to starboard of each other, which is *ruleable* in this situation,—and the *Grammer*, in this special circumstance, instead of giving one blast twice, announcing she was to cross the bow of the *Dalwarnic* to starboard, should have given a signal of two blasts instead,—or maintained her course, passing green to green. See Rules 37 and 38.

Had the *Dalwarnic*, as above mentioned, not approved by her silence of the *Grammer's* course, as indicated by her signals, or had she failed to understand her course and intention, she should have blown the “Danger Signal” (Rule 22); but approaching one another at any other rate of

(1) (1913) P. 70.

(2) (1889) 14 A.C. 670 at pp. 688, 693 and 695.

(3) (1926) S.C.R. 331

(4) (1917) 17 Ex. C.R. 493 at p. 498.

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speed than steerageway thereby keeping full control of her own vessel is negligence under the circumstances. When the *Dalwarnic* stopped and reversed, it was too late, she had been travelling at too great a speed to retain control, and the accident had then become inevitable through her own fault and also, among others, in accepting the wrong manoeuvres of the *Grammer*.

If the Rules of the Road had been properly adhered to by both vessels there would have been no collision. It is unnecessary to further analyze the course of these vessels. What I have already said leads me inevitably to the conclusion that both vessels were at fault. Had they sought a collision by prearrangement they could not have devised a better course. They seemed rather to have been standing off upon rights wrongly assumed, than to have been actuated in doing what would avoid an accident. Indeed the Rules of the Road are not made only with the view of preventing collision, but also for preventing risks of collision. They should be adhered to with reasonable intelligence, and by the desire to avoid any risk of collision. Safety first. Both vessels were at fault.

Both appeals are dismissed with costs.

Reasons for judgment of Hodgins L.J.A., on the first trial.

HODGINS L.J.A., (February 17th, 1927), delivered judgment.

This action arises out of a collision which occurred in a dense fog on the 31st day of May, 1925, at 5.30 A.M. between plaintiff's steamer *Dalwarnic* and the defendant's steamer *Grammer*. The *Dalwarnic* received injuries and the plaintiffs sue for damage to that vessel, while the defendants counterclaim for the loss and damage to the *Grammer* which was sunk.

The outlines of the event are found in the preliminary acts which in case of fog are unusually important.

There was no wind and no sea and the vessels were about 9 miles north of and 3 miles west of 30 Mile Point on the south shore of Lake Ontario. The course and speed of the *Dalwarnic* when the *Grammer* was first seen are given as "S. 88 W. and almost stopped." That of the *Grammer* is "S. 53 E., dead slow, between 1½ and 2 knots." The dis-

tance and bearing of the *Grammer* from the *Dalwarnic* at the same point of time "About 150 feet well on the starboard bow" with red and mast head light showing, and that of the *Dalwarnic* from the *Grammer* as "About 300 feet off the port bow" and no lights were seen. The stem of the *Dalwarnic* and the port side of the *Grammer* between hatches 6 and 7 were in contact.

The plaintiffs preliminary act then describes the measures taken by her to avoid the collision thus:

The *Dalwarnic* was being navigated with caution and her engines were checked to slow when the fog signals of the *Nisbet Grammer* were first heard, at 5.20 a.m. They were later stopped and then reversed at full steam; and the *Dalwarnic* was stopped or going astern when struck by the *Nisbet Grammer*. The *Dalwarnic* also blew proper fog signals.

It states the negligence attributed to the *Grammer* thus:

\* \* \* \*

The measures taken by the *Grammer* to avoid the collision are stated in her preliminary act as follows:—

The *Nisbet Grammer* had been checked to dead slow to pass another ship and was moving through the water at from one and a half to two knots when at about 5.30 a.m. the fog signals of a ship, which proved to be the *Dalwarnic*, were located apparently dead ahead. After an exchange of fog signals the *Nisbet Grammer* blew one blast passing signal and altered her course two points to starboard. The *Dalwarnic* did not reply to the passing signal but the two ships exchanged about five or six more fog signals and the *Dalwarnic* appeared to be drawing to port of the *Nisbet Grammer*. At about 5.27 a.m. the *Nisbet Grammer* blew another passing signal of one blast and altered her course two points more to starboard. The *Dalwarnic* did not reply to this passing signal except by a fog signal, and almost immediately thereafter appeared through the fog about three hundred feet off the *Nisbet Grammer's* port bow apparently heading so as to strike the *Nisbet Grammer* about midships. The engines of the *Nisbet Grammer* were immediately put full speed ahead, and her helm put hard starboard, so as to swing her stern away from the *Dalwarnic*, but the *Dalwarnic* struck the *Nisbet Grammer* with great force on the port side between hatches 6 and 7, inflicting such damage below the water line that the *Nisbet Grammer* filled and sunk. Immediately after the collision the engines of the *Nisbet Grammer* were stopped.

The vessels were steel, and canal size, the *Grammer* (length 263 feet) being lightly constructed, it is said, and each was loaded, the *Dalwarnic* with 1,300 tons of steel and the *Grammer* with 83,000 bushels of grain. The *Dalwarnic* (1,428 net tons and 256 feet 8 inches long) was proceeding from Kingston to Port Dalhousie and the *Grammer* from Port Dalhousie to Kingston. The latter ship had a freeboard amidships and forward of from 5 to 6 feet only.

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It will be observed that the *Grammer* while in the fog and unable to see the *Dalwarnic*, made 2 turns of 2 points each to starboard, and came out with the *Dalwarnic* 300 feet away on her port bow. She then went full speed ahead with a hard starboard helm to swing to port, but failed to clear the *Dalwarnic*. It was contended that the *Grammer's* preliminary act showed she was to blame in making 2 turns to starboard while the vessels were unable to see each other in the fog or accurately to ascertain the heading, as this was not navigating with caution, and that passing signals in a fog are likely to mislead and cause danger and should not be used.

I think the first of these propositions is fairly obvious, and the argument in support of it sound. It has much authority here and elsewhere. Most of the decisions establishing it are to be found in the *Kamouraska Shipping Co. v. SS. Farah Head* (1), a judgment by the late Mr. Justice Maclellan, a case not dissimilar to this in several particulars. Apart from that there is evidence that the speed of the *Grammer* was not in accordance with Rule 19 of the Great Lakes Rules. See also Pilot Rule No. 14 of U.S.A. The Master of the *Grammer* was not on the bridge at the time of the collision, but was in his berth, the mate in charge not having called him until after the vessels had met.

It remains to be considered whether these factors or any of them caused or contributed to the collision.

[The learned judge here analyzed the evidence given by those on both ships, and continued.]

Admittedly, then, when she first heard the *Grammer*, the *Dalwarnic* was going 7 knots or at the best at least 5.7 miles per hour when she was checked to slow—not dead slow. The Master of the *Dalwarnic* admits that if each vessel was going slow (2 m.) and each approaching the other, it might take 5 minutes to draw together. As a matter of fact at 2 miles per hour, each vessel in five minutes would go over 800 feet, so that the distance traversed in that time would be some 1,600 feet or over a quarter of a mile. But when from 100 to 150 or even 300 feet apart it would take less than a minute for them to come together



and with the accelerated speed of the *Grammer* even this short time did not elapse.

Taking the state of facts already given, as I do chiefly from the evidence of the Mate in charge, I think the *Grammer* must be found at fault in three respects, in that she altered her course in the fog before she had a view or definite knowledge of the *Dalwarnic's* position or heading, that she did not reduce her speed to bare steerage way, pursuant to Rule 19 but continued at too great a speed in a dense fog.

I also think she must be held blameworthy in that her Master was not on the bridge. Whatever the reason, his proper position was there, and the mate deliberately broke a custom which he and the Master knew to exist. Had he been in command the accident would probably have been avoided or at all events the defendant ship could not have been blamed for omitting a precaution so universally commended and adopted.

I find the *Dalwarnic* also to blame for proceeding at too great a speed through the fog and for some time before the collision and for neglecting to station a lookout at or near the bow of the vessel.

The fog in which these two vessels met was a dense one and had been so for some time, and there were other ships about—in fact they were in a well travelled track. The fog and their surroundings imposed on them an imperative obligation to conform to the rule which both Canada and the U.S. require to be followed in foggy weather by their lake navigators. Both vessels had been travelling through the fog at a rate of speed which was the reverse of safe, one at 5.7 miles and the other at 9 reduced at 5.10 to 4½.

One was without a lookout and in both cases the men in charge and others were in the pilot house and no one was stationed out in the open to listen for fog signals. It is of course possible to hear them in a pilot house with the windows down but a position clear of all enclosures is much more likely to be of use under fog conditions than within walls.

If each of these vessels had at 5.20 a.m. when their whistles were audible to one another, been going at dead slow or 1 knot, just bare steerageway, they would have had twice the time to estimate their relative positions and to reverse with effect when they came into view. It is of

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great importance that ships in a fog in busy waters should realize that undue speed may at any time bring them into serious difficulty, and that the absence of fog signals does not always make it safe to proceed at slow speed, which, at two miles an hour, gives a distance of 176 feet per minute. They may be confronted, as these ships were, with a condition quite easily handled but for the rapidity with which they found themselves moving over the water. This chance was taken by both vessels, as was that of proceeding without a proper lookout, or a lookout properly situated, and on one side there was the unnecessary and dangerous manoeuvre of changing course twice with the result that the vessels, instead of drawing together on courses crossing some distance behind the *Grammer*, became ships crossing each other's course. This is negligence or bad navigation. See *Canadian Pacific Railway Co. v. The Storstad* (1).

It was argued that passing signals such as the *Grammer* gave were not proper in a fog notwithstanding that Rule 21 begins with the words "In all weather." But a crossing case may occur complicated by fog or a fog case may develop a crossing case. So that it is impossible to say that passing signals are to be ignored. They indicate that a vessel is proceeding to starboard or port and once it becomes apparent by a momentary rift in the fog or in some other way what the course of the ship giving the signal is, they may become vitally important. I do not think this case calls for more to be said than that where a ship hears only the fog signals of another she can only get a vague and uncertain idea of her position, and none whatever as to whether she is coming, going, crossing or where her movements will bring her. Here the *Grammer* assumed to act upon her idea that the *Dalwarnic* was coming on a course which would bring the vessels port to port and thought to give herself more distance, with the result, that having mistaken the course or angle of the ship's bearing she precipitated a collision to which her own undue speed and that of the *Dalwarnic* contributed. In *China Navigation Co. v. Commissioners, etc. (The Chin Kiang)* (2), the Privy Council has said,—

(1) (1915) 17 Ex. C.R. 160.

(2) (1903) A.C. 251 at p. 259.

It was notorious that it was a matter of the very greatest difficulty to make out the direction and the distance of a whistle heard in a fog, and that it was almost impossible to rely with certainty on being able to determine the precise bearing and distance of a fog signal when it was heard, . . .

Both vessels being in the fog, and unseen by the other, the rule I have referred to would apply. The speed before the *Dalwarnic* heard the *Grammer* was too fast (5.7 m.) at which to proceed in a dense fog as was that of the *Grammer*, and slow speed (2 m.) after the vessels were conscious of each other, was not, under the circumstances, navigating in accordance with Rule 19, which requires that a steam vessel bearing, apparently not more than 4 points from right ahead, shall at once reduce her speed to bare steerage way and navigate with caution until the vessels shall have passed each other.

Sir M. Begbie, C.J. L.J.A., in *The Zambesi* (1), discusses this question in this way:

It is true, every vessel—steamer or not—has a right to keep herself safe; she cannot be safe unless under command; she cannot be under command unless she has steerage way; and therefore, it is certain that even the statute permits, and, indeed, compels, a steamer to make some progress through the water. The rate of progress, therefore, alone is in question. Now, as the assessors point out, the *Zambesi* had for three-quarters of an hour, on that very night deemed it quite safe, as far as here own navigation was concerned, to go dead slow. And if she had been going at that rate when the loom of the *Dutar* was first seen, I should have pronounced her free from blame. But she was at that time going half speed. This was an unnecessary rate for her own safety, and she must, unfortunately, stand to the consequences of having exceeded it.

In the *Glackamas v. Cap d'Or* (2), Newcombe, J., speaks of a rule which he says has frequently been enunciated and is well established by authority—namely that speed such that another vessel cannot be avoided after being seen is excessive. The distance between the two ships here was, according to the *Grammer's* evidence, some 300 feet, and according to that of the *Dalwarnic* 100 feet to 150 feet. At slow speed (2 m.) the distance travelled in a minute is 176 feet and as one is approaching the other they would come together when each had travelled 88 feet. Avoidance of disaster under the circumstances existing in this case after changing the course of the *Grammer* while in ignorance of the exact position and direction of the *Dalwarnic* was almost if not quite impossible.

There is in this case the fact that on the courses sworn to by each ship which were approaching each other when

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(1) (1891) 3 Ex. C.R. 67 at p. 69.

(2) (1926) S.C.R. 331.

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their mutual signals first became audible, they would have in all likelihood passed clear, and that by the successive changes to starboard made by the *Grammer* that vessel was brought right into the path of the *Dalwarnic*.

I regret that the Maritime Conventions Act, 1911, is not in force here because I feel that the largest share of the blame for the collision must rest on the *Grammer* owing to her changes of course in the fog.

But while that is so, it is equally true that both vessels were proceeding at too great a rate of speed under the circumstances, and that before and particularly when the passing signals were heard the Master of the *Dalwarnic* realized that another ship was ahead and crossing his course. Had the *Dalwarnic* and the *Grammer* been proceeding with bare steerageway as was their duty and the Mate of the *Grammer* had then reversed, he could, he says, have stopped in his own length. This chance that he neglected could only have been useful if the *Dalwarnic* had been proceeding similarly and if as her Master says that he could have got from slow to full stop in 52 seconds judging by his test, there might have been no collision. As it was, both ships on emerging into each other's view were travelling too fast to overcome their momentum and avoid coming together.

The disregard by both vessels of the provisions of Rule 19 is an essential element in the question of blame and in my judgment contributed in each case to the disaster,, though in the case of the *Dalwarnic* no other fault (except as to her lookout) can be attributed to her after 5.20 a.m. either in her dealing with the passing signals or in doing what she did to avoid contact though prevented from succeeding by her then momentum.

I cannot bring myself to the conclusion that either vessel when in view of the other could have avoided the accident by a different handling of the situation. The *Grammer* tried full speed ahead and a swinging course to clear and the other ship a movement astern.

The one aggravated the rate of speed and probably produced the serious injury she suffered while the *Dalwarnic* was at slow speed making substantial progress forward and so met the other's blow with more resistance than would have occurred had she been barely moving.

Of the cases to which the learned Judge in the Supreme Court of Canada makes reference, I may quote two. *The Oceanic* (1), and the *Counsellor* (2). In the former Lord Halsbury says (in reference to the English rule which requires a stop and then cautious progress):

Now the rule appears to me to be a very intelligible and commonsense one to avoid danger to vessels in the navigation of the seas, and the question what is or is not a moderate speed in a fog must depend in a great measure whether the fog is slight or dense, and whether there is an opportunity of seeing the near approach of a ship so as to know what can be done or ought to be done by nautical skill to avoid collision. Apart from any rule, one would think that where it was known that two bodies were approaching, and that there was no absolute means of knowing the direction in which they were coming and the danger which was to be avoided, the commonsense thing would be to stop until the direction was ascertained, and also whether it was possible to avoid the serious danger which might arise.

In the latter case, Bargrave Deane, J., states the rule thus:

I think a very fair rule to make is this, and it is one which has been suggested to me by one of the Elder Brethren: You ought not to go so fast in a fog that you cannot pull up within the distance that you can see. If you cannot see more than 400 feet you ought to be going at such a speed that you can pull up. If you are going in a fog at such a speed that you cannot pull up in time if anything requires you to pull up, you are going too fast. If you cannot retain steerage way at such a speed, then you should manage by alternately stopping and putting the engines ahead.

The rule has been enforced in cases later than those referred to. *In Tarrasa v. Channel Trader* (3), Hill, J. says:

Then, I think each is to blame for speed. I take the case of the *Channel Trader* first. She ran into fog at a speed of between eight or nine knots. The fog was so dense that from the bridge they could hardly see the man on the lookout 100 feet away. In such circumstances, it is vital that the ship, being under an obligation to travel at a moderate speed in fog, should at once do anything that can be done to comply with that obligation. At least the engines should be stopped to let the way off. That was not done. It is said that the engines were rung to dead slow by a double ring. There is no indication of that in the engineer's log; it only records "slow." But, even assuming it were so, that in such a fog and in such a locality, was not doing that which should be done.

In Canada the rule has been enforced in more than one case. MacLennan, L.J.A. in *Smith v. Mackenzie* (4), said

By article 16 of the Rules of the Road the steamer was obliged to go at a moderate speed, having regard to the existing circumstances and conditions. The meaning of this rule has been very frequently considered by the Courts and I think it is absolutely settled by the Court of Appeal

(1) (1903) 88 L.T.R. 303.

(2) (1913) P. 70.

(3) (1922) 13 Ll. L.R. 307.

(4) (1917) 17 Ex. C.R. 493 at p. 497.

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and by the House of Lords, that you ought not to go so fast in a fog that you cannot pull up within the distance that you can see, and if you are going in a fog at such speed that you cannot pull up in time if anything require you to pull up you are going too fast. A steamer should be able to stop within the limit of observation and, as a general rule, speed such that another vessel cannot be avoided after being seen is excessive.

As early as 1892 it was laid down in the *Heather Belle* (1), that

The word "moderate" in art. 13 is a relative term, and its construction must depend upon the circumstances of the particular case. The object of this article is not merely that vessels should go at a speed which will lessen the violence of a collision, but also that they should go at a speed which will give as much time as possible for avoiding a collision when another ship suddenly comes into view at a short distance. It is a general principle that speed such that another vessel cannot be avoided after she is seen is unlawful.

The nature of the damage was much emphasized on both sides as indicating the direction of the blow and the speed of the vessels. I have examined with care and attention the photographs and diagrams and considered as well the examination of the so called experts on the subject and I am satisfied that no real deduction can be made from the appearance of the actual damage in the absence of satisfactory evidence as to the nature, character and extent of the injury to the *Grammer*. It is rather odd that in two other cases similar damage occurred where the stem was also folded back and in neither of those cases was an experienced Judge able to use it as the decisive factor as to speed though treating it as some evidence on that point, *Wimborne v. Cheniston* (2), the *Robert Keoppen* (3). In those cases both vessels were in evidence on this point. But in the *Empress of Ireland* inquiry the same sort of injury occurred (p. 530/1 of Record of Enquiry) and those pages indicate the difficulty felt by the Commission and Counsel in formulating any reasonable theory based simply on the condition of one vessel's stem after striking, or being struck by another moving vessel, which had itself disappeared and could not be examined or compared.\* \* \* \*

The Court is not called on to deal with every circumstance in the case if in broad outline both ships are found to be to blame, because as I have stated, the rule under the Maritime Conventions Act is not in force on the Great Lakes and the exact proportion of blame which often de-

(1) (1892) 3 Ex. C.R. 40.

(3) (1926) 24 Ll. L.L. Rep. 289.

(2) (1921) 9 Ll. L.L. Rep. 496.

mands minute analysis, does not necessarily need to be established. The Court, however, cannot ignore the sequence of each event, which may lead to absolving one or other altogether, if the collision could have been avoided by some action which might have been taken by one of them. I do not see anything in this case giving rise to any such suggestion. \* \* \*

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There were some 7 diagrams produced on behalf of the defendants during the argument and used as illustrating Mr. Wood's argument. To avoid misunderstanding I may say that they are no part of the evidence in the case, and as I view the evidence at the trial, are in some important respects inaccurate.

I refuse Mr. Wood's application to amend the statement of defence as follows:

Para. 3—delete the words "apparently heading so as to strike the *Nisbet Grammer* about amidships" and substitute the words, "swinging to port under a starboard helm."

Delete the words "did not alter her course or speed" and substitute "continued to swing to port."

I do so because, while in Admiralty Jurisdiction amendments are generously allowed, this amendment is a serious departure from the allegation in the preliminary act and does not represent, in my view, the effect of the evidence given at the trial.

My judgment is that I must find both ships to blame for the collision and I direct that it be referred to the Local Registrar of this Court in Toronto to ascertain the damages on both sides. Each party will pay his own costs of action and counterclaim. Further directions and the costs of the reference will be reserved until after the Registrar has made his report.

\* \* \* \*

[Both parties having appealed from this judgment to the Exchequer Court, the case was upon motion of plaintiff, sent back for new trial. The facts as elicited at the new trial are set out in the reasons for judgment which follows:]

HODGINS L.J.A., now (January 10, 1928), delivered judgment.

On the 13th, 14th and 15th December, 1926, and the 13th and 14th of January, 1927, I tried this action giving judg-

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ment on the 17th of February, 1927, finding both the ships involved to blame. An appeal was taken to the learned President of this Court, coupled with an application for a new trial based on affidavits and statements attached thereto showing that members of the crew of the *Grammer* who testified before me had considerably varied their stories, as evidenced by the written statements. The motion for a new trial was granted and the appeal was not further proceeded with. No reasons were given for ordering a new hearing, beyond the fact that if a new trial were refused injustice might be done, so that the case comes again before me without any specific directions. Fortunately both parties were willing to use the evidence given at the former trial if supplemented as they might be advised. Had the defendants declined to give evidence at all on the new trial it might have been difficult for me to have given any judgment affecting their ship, for if the defendants' witnesses, who had recalled their former testimony, were to repudiate these later statements and were discredited by me, it would have left the case in a very difficult position with regard to a judgment against the defendant ship. As however, the former evidence was put in on both sides by consent and further testimony added, it is upon the whole of the evidence, both at the former trial and at this trial, that I give my present judgment.

At this trial five members of the crew of the *Grammer*, Kenneth Lang, the lookout, W. H. Sheppard, the wheelsman, Claude Deline the 2nd Engineer, Clarence Chaif, fireman, and Ernest Lowler, oiler, were put into the box by the defence for cross-examination by plaintiffs counsel and each and every one repudiated his statement in writing which had given rise to the new trial. They are not boys, their ages being given (except that of Sheppard) as 21, 24, 25 and 23 years, respectively, and they seemed to be quite intelligent and able to take care of themselves. Sheppard appears to be much of the same age as the others. The excuses for signing these statements, which affect vital parts of the evidence, were of the flimsiest possible character and betrayed an absolute indifference to truth and to the situation in which they had placed themselves. The reason, given by each and all, was, to quote the words of Deline, the second engineer, that two detectives bothered morning, noon and



night, until the statement was signed, and that it was signed so as to escape from them. All seemed to have agreed on this excuse. It is somewhat singular that the portions of each statement denounced as untrue were the vital parts and those as to which at the former trial, they had otherwise testified, so that the repudiation evidently had been carefully framed with a view of preventing any prosecution for perjury in connection with statements of fact made at the former trial. Each one professed to have given correct evidence on that occasion and that the statements as to the speed of the vessel and other material matters were incorrect, except where clearly unimportant.

It also appeared that these statements, although the witnesses stated that they were betrayed into making them through the constant endeavours of the two detectives, were nevertheless made later under circumstances of the utmost deliberation. They do not rest solely upon the signature of each of these five witnesses made in presence of the detectives, but were reiterated and recopied with full knowledge and plenty of time, in the offices of well known members of the Bar, Mr. A. B. Cunningham, K.C., of Kingston, in one case, Mr. Gideon Grant, K.C., in another, Mr. Arnold Wainwright, K.C., of Montreal, and Mr. Braid, of Windsor, in others. Under these circumstances it is not a matter of surprise that I am not able to accept what was sworn to by them at the former trial where it conflicts with any other evidence or where I am convinced from other testimony that the conclusion of fact should be contrary to what they had stated. I do discredit their evidence given at the former trial to that extent. The contents of these statements to which I have referred, are, of course, not evidence. Attention was called to this by Mr. Justice Newcombe in a recent case tried by me of *Ontario Gravel Freighting Co. v. Matthews SS. Co.* (1). What he pointed out was, of course, perfectly obvious. It has long been the law, that a statement of a witness previously made, whether on oath or not, has no evidential value unless acknowledged as true at the trial on the oath of the maker of the statement. If he repudiates it, it forms no part of the testimony in the case. But that rule of evi-

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dence does not prevent the judge or jury trying the case from drawing from the other facts of the case, including the circumstances in relation to the origin, the making and the mode and reason for the denying, of the statement, an inference consonant therewith. The case of *Rex v. John Williams* (1), a conviction for murder, is an illustration of this and, in view of the words of the learned judge in his charge, is apparently based upon the grounds I have stated. The witness there had previously testified to facts and circumstances as having happened on a certain day, which made them immediately relevant to the crime for which the prisoner was being tried. At the trial she repudiated that date and substituted another. The earlier date therefore was not one supported by any evidence, and the learned trial judge in charging the jury, charged them:

"Now she says that was not on the 9th, but was on the 8th. The question is which of those stories is true for this part of the case;" and "You have the two stories which she told, and the question is which of the two is true."

In the Court of Criminal Appeal, the learned Lord Chief Justice dealt with the charge in this way:

With regard to everything except the date she said the same before the jury as she did before the magistrates. To say that the judge, in the words that have been criticised, told the jury to decide simply whether the girl was telling the truth at the police court as to the date of the occurrences to which she spoke, is to put into the words used by the judge a meaning which the jury could not have put upon them, and is an unjust reading of the passage.

The decision of the Court is stated in the head note thus:

When a witness on a trial has varied the date of an event from that in his deposition, it is correct to direct the jury that it is clear that the event happened on one of the given dates, and that though they are not at liberty to assume the truth of the statements in the deposition without further evidence, yet they are entitled on the whole of the evidence at the trial to decide between the two dates.

I might, indeed, at the last trial, have drawn the conclusion, because of the two sudden changes of course to starboard in the fog and the speed at which the *Grammer* was seen to be going in making the rapid turn during which she collided with the *Dalwarnic*, that the *Grammer* had been in fact proceeding at a fast rate, and not at a slow one, through the fog, and that she had no need to accelerate on sighting the other vessel. If I did so now I would be drawing a conclusion entirely in accord with the statements on that

(1) (1913) 8 Cr. App. Cases. 133.

point, which were expressly withdrawn before me and which, therefore, are not evidence in the case. One might be fairly satisfied in his own mind that the truth was contained in the statements, and the untruth in the evidence given before and at the present hearing by these five witnesses, but that belief cannot be rested upon the contents of the statements themselves. The rate of the speed, however, is a fact, and an important and relevant one which must be dealt with and found, and the rule goes no further than I have stated. But I am not obliged in this case, to rest my judgment upon this reasoning, for I was and am still of opinion that whether the speed during the time in the fog preceding the collision was fast or slow, it was more than was allowable under the circumstances detailed in my former judgment.

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[The learned Judge then discusses the evidence given at the second trial and its value as argued by counsel, and continues:—]

It would be difficult to absolve a ship from blame whose Master, in a fog and after hearing a passing signal from a quarter which made him realize that he was crossing a vessel's course, deferred his stop and reverse until he had heard a second passing signal instead of getting down to his lowest speed at once. The distance of the *Grammer* from the bow of the *Dalwarnic* on emerging from the fog is given by the Master of the latter as about 150 feet, or from the course of the *Grammer* and the stem of the *Dalwarnic*, some 80 feet, while the time from the reverse to the collision is said to be about 1 minute.

Some new evidence was given at the present trial but in considering it in connection with what was before me at the former hearing, I see no reason to change the judgment I then pronounced. \* \* \*

[The learned judge then comments upon the expert evidence tendered at this trial, as follows:—]

The chart prepared by Captain Sollery was based entirely on what I think are false premises. He professed to disagree with the view expressed by the Privy Council which I quoted in my former judgment, and seemed to think that it was as easy to lay down the course of a ship from a bearing of a whistle heard in a fog as it would be from a

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lighthouse in view in broad daylight. I do not, however, think that he really expected that his chart would be received as anything more than an endeavour to express what might be the result on the basis of the information given to him and on the assumption that it was exactly accurate and comprised all the facts. Exhibit 41, he says, was prepared from the evidence of Cuthbert alone, but he admitted later that he had corrected that evidence by statements made to him both in writing and verbally by Mr. Jarvis, one of the solicitors for the defendants. He did not attempt to correct or check them by reference to any other evidence given in the case. Exhibit 42 was prepared wholly from Robson's evidence (the Mate of the *Grammer*) and likewise without any reference to any one else's testimony.

This is not a proper basis on which to ask a Court to follow and accept what appears upon the chart. I regard it as obviously impossible to trace accurately the course of an invisible ship from the bearings of signals heard in a fog when her heading is not known and that no certainty can be placed upon the precise bearing and distance of a fog signal when it is so heard.

These charts may impress others or may be of more advantage to them than they are to me, but I fail to derive much useful knowledge from them.

An application was made to me before and at the last trial for leave to amend by setting up that the *Dalwarnic* had shifted her course to port before or just at the time when the ships became visible one to the other. I refused before the trial to grant the amendment, reserving the question till the hearing. At the trial no evidence came out which directly supported any such amendment, and no one, not even the mate of the *Grammer*, Robson, ventured more than a surmise on the point. As the proposed amendment is therefore not sustained by any trustworthy testimony I decline to make the amendment which is contrary both to the preliminary act and the pleadings.

I find upon all of the evidence both at the former and present trials and for the reasons given formerly and in this judgment that both ships were to blame for the collision, and I refer it to the Local Registrar at Toronto to ascertain the damages on both sides.

Further directions and the costs of the reference will be reserved until after the Registrar has made his report. Each party will pay his own costs of the action and counter-claim, including the former trial and this trial.

I feel it my duty to direct that a copy of this judgment be sent to the Minister of Marine and Fisheries. One of the five witnesses has a second engineer's certificate and the other four, if they remain in a seafaring life may apply for certificates, and as I think their course of action in relation to this case is highly discreditable to them, the facts connected therewith should be known to the Department.

*Judgment accordingly.*

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ADAM B. MACKAY.....CLAIMANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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Dec. 12, 13  
& 14.  
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April 3 & 4.  
May 15.

*Requisition—Crown—Value of ship—Loss during requisition—Hire—  
Right to sue alone without co-owners—Rule 9, Order 16 (Eng.)*

The S. was requisitioned by the Canadian Government in 1918. In 1924 the claimant was notified of the release of the vessel. At that time she was lying partly submerged, at Kingston, a derelict hulk of no value, and claimant refused to take delivery thereof.

*Held*, on the facts, that the question of hire disappeared, and that the controversy resumed itself into a question of compensation for the value of the vessel so appropriated, as at the date of the requisition thereof, and not for the profits that could have been made out of the vessel during the period of requisition.

2. That there being no special rule in this Court dealing with the joinder of parties, the practice and procedure of the High Court of Justice, in England, obtains, and the claimant herein was entitled to bring the present action in his own name alone, without joining his co-owners or their assignees. That misjoinder or nonjoinder cannot now defeat a claim.

[As to the right to recover, the Court referred to and followed the judgment in *Gaston-Williams and Wigmore Ltd., et al v. The King* (1922) 21 Ex. C.R. 370.]

REFERENCE by the Crown under the provisions of the War Measures Act, 1914.

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

*C. C. Robinson, K.C.*, and *C. V. Langs* for claimant.

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

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The facts are stated in the reasons for judgment.

AUDETTE J., now (May 15), 1928, delivered judgment.

This is a Reference, by the Crown, under the provisions of sec. 7 of The War Measures Act, 1914, of a claim

for compensation alleged to be due by reason of the alleged appropriation by His Majesty of the steamship *Sarnor*.

This vessel was duly requisitioned by the Canadian Government on the 25th April, 1918, and on the 29th September, 1924, the claimant was notified by the respondent of the release or delivery of the same; but as at that time the vessel was lying, in the port of Kingston, partly submerged in the inner harbour, a derelict hulk and of no value, the claimant refused to accept delivery thereof. The respondent, by paragraph 4 of its statement in defence, admits that the vessel was at that time a derelict hulk of no value and that the claimant refused delivery of the same and further concurs in the claimant's refusal and accordingly withdraws the notice aforesaid.

In view of these facts, the questions of hire disappears, and the controversy resumes itself into a question of compensation for the value of the vessel so appropriated by the respondent at the date of the requisition, namely the 25th of April, 1918, and not, as was contended at trial what profits the claimant could have made out of the vessel during the period of the requisition. The alea surrounding the question of profit is too uncertain. The vessel in the hands of one person might prove profitable while in the hands of another person might result in insolvency.

However, there are some preliminary questions, raised by the Crown, which should be first dealt with as they both go to the jurisdiction and to the right of instituting the present action.

Counsel for the defence stated he was not raising the point as to whether the right to requisition resides in the Imperial or in the Canadian Government; but contends that the claimant has no right to recover having regard to the absence of statutory authority. Mr. Keith. Responsible Government in the Dominions. Vol. 1, p. 95.

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I had occasion to consider this point of law in the case of *Gaston, Williams & Wigmore, Ltd. et al v. The King* (1), and for the reasons therein set forth and which I deem unnecessary to repeat here, I find that the action was properly instituted in that respect, coming, as it does, within the ambit of sec. 7 of The War Measures Act, 1914, and that this Court has jurisdiction to hear, determine and adjudicate upon the same and that the Crown, in the rights of the Canadian Government, is the party that requisitioned in its own name and behalf the vessel in question here. See also *The King v. Halifax Graving Dock Co. Ltd.* (2).

The genius of the English common law is that no property should be taken from the subject by the sovereign power without proper compensation. See sec. 18, Exchequer Court Act, 1927, R.S., ch. 34. *DeKeyser's Royal Hotel Ltd. v. The King* (3); *Newcastle Breweries Ltd. v. The King* (4); and per Lord Atkinson in *Central Control Board v. Cannon Brewery Co. Ltd.* (5). And, as said in *The Aquitania* (6), the aim of the court is to work out principles which make for justice and seek to avoid the turning away of a *bona fide* suitor without remedy. See also Mr. Keith, *Responsible Government in the Dominions*, vol. 1, p. 531.

The second preliminary question raised by the respondent is that the claimant

is not entitled to bring this action in his own name alone without joining his co-owners or their assignees.

At the date of the Requisition the claimant Mackay was the sole owner of the *Sarnor*, which was under his full control and he was further entitled to the revenues derived from her, as established by a judgment of the Ontario Courts; but both Bonham and Johnson had, under the agreement of the 1st June, 1916 (exhibit 2), a floating right to an interest in the vessel provided they paid to Mackay the amounts therein mentioned. After protracted litigation between them, these parties—both Bonham and John-

(1) (1922) 21 Ex. C.R. 370.

(2) (1920) 20 Ex. C.R. 44.

(3) (1919) 2 Ch. D. 197 at p. 226.

(4) (1920) 1 K.B. 854.

(5) (1919) A.C. 744 at p. 752.

(6) (1920) 270 Fed. R. 239 at p. 240.

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son—made, in June or July 1922, the payments in question and became thereby interested in the *Sarnor*; and when the present action was instituted in 1926 the position was as above defined and hence the contention of the respondent that all parties having an interest in the vessel should have been made parties hereto.

For better understanding it is perhaps well to mention, *en passant*, that both Bonham and Johnson, after the institution of the present action by Mackay, made application before me to be added as claimants with Mackay; but, as the action was against the Crown, I could not allow them to sue the Crown without a fiat and refused their application. They then made an application to the Crown for a Reference of their claim, and this claim of Bonham and Johnson in respect of the *Sarnor* was duly referred to this Court under a separate reference standing as a case by itself. As all the owners were then before the Court, I suggested, and at my request, the claimants Bonham and Johnson apparently made a second application to be added as parties claimants in the Mackay case. However, this application was strongly and bitterly opposed, both by the Crown, who saw the Court in acquiescing in this application as invading the right of the Minister to refer cases in the manner he saw fit,—and by the claimant Mackay who foresaw as a result, the Crown adducing evidence detrimental to him if these two parties were added claimants.

In view of such strong opposition by all parties in this case to the adding of such parties at this stage, I will allow the matter to stand until after the compensation has been fixed and the time of the distribution of the proceeds has arrived, but I will now decide whether the present action was properly instituted and if Mackay had the right to sue alone. The case of Bonham and Johnson has been submitted to the Court on the evidence adduced in the present case as to the amount of compensation due on the requisition of the *Sarnor*.

The plea in abatement,—such as the one now set up by part 5 of the defence—has been abolished both in England and in this Court. Our Rule 91 reads as follows: “No plea or defence shall be pleaded in abatement. The question



should have been dealt with on motion. *Werderman v. Société Générale d'Electricité* (1).

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There is no special rule in this Court dealing with this question of joinder of parties; but both sec. 37 of the Exchequer Court Act and Rule 1 of the General Rules and Orders of this Court provide that in such cases the practice and procedure of His Majesty's High Court of Justice in England shall obtain.

Rule 9, of Order 16, found in *The Annual Practice, 1926*, p. 233, provides:—

9. Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued or may, \* \* \* \* \*

Therefore, misjoinder or nonjoinder cannot now defeat a claim. Cases are cited *ad infinitum* in support of that view in the *Annual Practice*, and I will limit my citations to the additional cases cited by the claimant, namely, *Sheehan v. Great Eastern Ry. Co.* (2); *Roberts v. Holland* (3); and more especially *DeHart v. Stevenson et al* (4), followed in *Janson v. Property Insurance Co. Ltd.* (5).

Turning now to the questions of the determination of the value of the *Sarnor*, at the date of the Requisition, on the 25th April, 1918, the evidence discloses that the *Sarnor* was a wooden steamer built in 1888 and rebuilt in 1896 (that is extensive repairs where renewals were made, probably to maintain her class), in the United States, gross tonnage 1,319.23,—net 1,151.74 and dead 1,978.84; length 227 feet, 36 feet beam, and after being imported into Canada in 1912 at a value of \$3,000 for duty, was engaged in the Lake trade chiefly carrying coal, or what is called coarse freight. She was a freighter of coarse cargo.

She was repaired in Canada in 1914 when witness Welch, managed of the Kingston Shipbuilding Co. said it was a shame at that time to lead any man into such a hole as to spending money upon her,—she was not worth repairing. He further said she was in a deplorable condition in 1917 (p. 99), her stern was down 2 feet on the port quarter and twisted. He refused to dock her, unless they put up a

(1) (1881-82) 19 Ch. D. 246. (3) (1893) 1 Q.B.D. 665.  
 (2) (1880) 16 Ch. D. 59 at p. 63. (4) (1875-6) 1 Q.B.D. 313; 45 L.J., Q.B. 575.  
 (5) (1913) 19 Conn. Cas. 36 (England).

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\$60,000 bond. The whole of the beams and cross fastenings were giving away and she was falling away. The vessel was never properly repaired after 1916. In 1918 she had a hog of about 40 inches. Witness Chayer who called her a "cemetery" in 1918 says she was rotten in 1914. Witness also testified to her poor condition in 1917. Witness Noble said it was impossible to repair a vessel and make her as good as new.

Witness Menard said she was in a remarkable bad shape in 1914, no grip in the wood,—would have to rebuild her from the keel up. It was impossible to make the boiler right, it had to be treated by electric welding. The machinery was very old.

In June, 1917, the American Bureau of Shipping refused to grant the *Sarnor* a class, as shewn by exhibit C1 which reads as follows:

June 26, 1917.

A. B. MacKAY, Esq.,  
 Hamilton, Ont.

Dear Sir:—

*SS. Sarnor*

The following is an extract from our inspection of this vessel:

On examination of the above vessel as requested at Welland, Ont., found the condition very poor throughout. The stem post is split and open about 1 inch to 2 inches full length inside; it is covered on the outside by a covering board and can only be seen from the inside. The inside ceiling planks are drawn away from the stem post and several of the timbers are very poor.

Pointers at bow drawn away from fastenings.

Wood Fore & Afters Under windless deck where made fast to stem gone.

Shelf pieces throughout holds all badly broken in way of hatches.

Stanchions and mold beams throughout holds several broken and drawn away from fastenings. Stanchions under boiler centre stanchions very poor. Pointers at stern rotten and inside ceiling around tube several planks very poor and rotten.

Caulking on deck hard and old. Top side planking and side planking to 14 foot watermark poor and very dry and in several places loose.

Bulwarks port side aft broken and rotten in places.

In this condition, we cannot grant this vessel a class. She will have to be extensively repaired before we can pass her. Kindly advise what will be done.

Yours truly,

AMERICAN BUREAU OF SHIPPING,  
 Great Lakes Dept.

Per Mgr.

I shall not tarry by entering into unnecessary details and going into her condition after the Requisition, and the litigation between the claimant and the Canadian Steamship Co. We find she was seized and sold, under an order of the Admiralty Court, at an auction widely advertised and was bought by claimant Mackay on the 25th of April, 1916, for \$6,700 when there were a number of bidders for her. Then in May, June and July, 1916, he spent on her \$2,800 in repairs including dry-docking and fitting her out. He operated her, but in November, 1916, the *Sarnor* encountered a gale of wind and put into Erie Harbour and sank at the dock. It appears, says witness Mackay, that the vessel had knocked her stem against the abutment of the Lachine Canal some time prior to that and with this terrific storm it opened the oakums out of the seams and she rested at the bottom. She was pumped and taken to Cleveland for repairs at the cost of \$1,658. She was finally laid up at Kingston in December where she was repaired and she stayed there until 1917 when she was operated until 8th August, 1917, when she struck the lock of the Lachine Canal and knocked her stem off, which necessitated repairing, and she then proceeded to Ogdensburg, where she was laid up, and claimant said he then had made up his mind to leave her there until he would have straightened out matters with Bonham and Johnson under their agreement exhibit No. 2. This settlement only took place in June or July, 1922.

It is unnecessary to go through the whole evidence establishing that the vessel was old, in bad condition, had a hog or twist. See Ansted, Dictionary of Sea terms, Vo. Hogging, p. 121

She had become an idle boat at a time when she was not fit to be used without extensive repairs for the reasons above set forth, and as in 1918 all available bottom had to be made use of for State purposes, in view of the World War, she was requisitioned.

On the question of the value and of the condition of that vessel at the date of the Requisition we have, as usual, conflicting evidence and the amount claimed is certainly startling, to say the least. We have fundamentally optimistic valuation by a witness who have never set eyes on the

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*Sarnor*. His valuation is made at his desk, so to speak, on the Kellock tables, using his knowledge of the shipping condition and arriving at an extravagant and inordinate valuation. This manner of fixing such a value upon a vessel may very well do or be told to the marines; but it will not do before a court anxious to do justice between the parties exacting the best evidence of which the case in its nature is susceptible and declining to take for foundation of a decision a conclusion arrived at on hearsay. The information must be traced to its fountain head. If the best evidence is not given it gives rise to thinking that the party had motives not to produce it. Taylor on Evidence, 10 ed. 303.

We are seeking here the market value of the vessel, not the speculative or theoretical value, but her actual value at the date of the Requisition.

On the question of value proper of the vessel at the date of requisition we have very little fundamental evidence. Practically none on behalf of the Crown; but the only and best evidence on this subject has been given by the claimant himself. Asked (p. 82) what the *Sarnor* was worth in April, 1918, at the time of the Requisition, he said that she was worth in April, 1918, the same as in 1916 when he bought her and paid \$6,700. And there was this further question put to him, viz.:

Q. As you go on you say: She was bought by public auction, and I suppose our bid would be \$25 more than the next highest bidder and that I presume would be the value of that boat at that date?—A. Yes.

Then further on at p. 83 the further questions were asked and answered, viz.:

Q. Then the action (with respect to the *Neff* continued from that time until early in 1918, when it came on for trial before Mr. Justice Hodgins at Toronto?—A. Yes. The *Neff* never came to Canada and we were not going to sue her in the United States.

Q. You did not get the action on accordingly?—A. No. She only came to Canada because I bought her and brought her here, which was the motive for buying her.

Q. And you remember that in your evidence at the trial on that occasion you said at that time, at the time the services were rendered, the *Sarnor* was worth \$11,000 if I could have got it out of her?—A. I said that. That is correct.

Now by way of confirmation of claimant. Mackay's testimony on this statement that the *Sarnor* in April, 1918, was worth what he paid for her in 1916, there is the testimony of witness Barnet speaking as to the general market

price of vessels in 1915 and in 1918. His testimony upon that point is that there was a slight drop in 1918 as compared with the year 1915 and that the peak was in 1920.

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Moreover, between April, 1916, when the boat was bought and April, 1918, when she was requisitioned, she met with a number of accidents which, although partially repaired, did not obviously tend to improve the vessel.

Taking all the circumstances of the case into consideration, I have come to the conclusion to fixe the compensation for the *Sarnor* at the sum of \$11,000, which is the most the vessel could be worth at the time of the requisition.

Therefore there will be judgment as follows:—

1. The compensation for this requisition vessel is hereby fixed at the sum of \$11,000, with interest thereon from the 25th April, 1918, to the date hereof.

2. This compensation money however will only be paid after hearing all parties claiming to be entitled to the same, or any part thereof, and the matter of the distribution of these \$11,000 may be brought on before the Court by any of the parties interested making a claim thereto, upon giving notice to all interested parties.

3. The claimant is further entitled to the costs of the action.

*Judgment accordingly.*

TORONTO ADMIRALTY DISTRICT

BETWEEN:—

H. GRANT DUFF..... PLAINTIFF;

AND

THE SHIP *PROGRESS*..... DEFENDANT

*Shipping and Seamen—Collision—Damage—Sale of ship after collision—Maritime Lien*

*Held:* That in an action for damages by collision, the sale of one of the ships by the owner does not disentitle him from enforcing a Maritime Lien on the other ship. Such a lien is in general, and in such a case as this, is unassignable.

This was an action for damage by collision brought by the owner of the ss. *Althea* against the ss. *Progress*, which collision took place in the Livingston Channel; the *Althea* being down bound and the *Progress* up bound.

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Apr. 16 & 17  
Apr. 18.

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The Action was tried before the Honourable Mr. Justice Hodgins at Windsor, on the 16th and 17th days of April, A.D. 1928.

*H. F. Hough* for plaintiff.

*F. Wilkinson* for defendant.

Part of the facts and the points of law raised are given in the reasons for judgment.

HODGINS L.J.A., now (18th April, 1928), delivered judgment:—

I find that a collision did take place in the Livingston Channel between the two vessels.

[The learned judge, after discussing the evidence, proceeded as follows:—]

Both vessels, I must therefore find, are to blame for the collision and each must bear an equal share of the blame and of the damages. Final judgment however will be reserved to ascertain whether the sale of the *Althea* by the plaintiff prevents him from enforcing a maritime lien on the defendant ship. I have little doubt that he has the right to enforce it, but as Mr. Wilkinson has raised the point, I shall consider it and I therefore defer giving my final judgment.

18th April, 1928: Upon the question raised by Mr. Wilkinson, I think the sale by the plaintiff of the *Althea* has no bearing upon his right to enforce his maritime lien. Such a lien is in general and in such a case as this, is unassignable, and any assignment would therefore be void. Had the *Althea* become a total loss the plaintiff's lien would have been maintainable.

There will be judgment for the plaintiff for one-half of the damages caused by the collision, but no costs, to either party, of course, as each is to blame. A reference to the Registrar in Toronto will be directed to assess the plaintiff's damages.

*Judgment accordingly.*

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CLATWORTHY &amp; SON LIMITED.....PLAINTIFF;

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May 10.  
June 29.

AND

DALE DISPLAY FIXTURES LIMITED..DEFENDANT.

*Trade-Mark and Design Act—Industrial Designs—Definition of design  
—Requirements of—Trade Variants*

*Held*, that as the Trade-Mark and Design Act does not define what industrial designs are within the meaning of the Act, the word Design therein must be taken to be used in its ordinary, and not in an artificial, sense.

2. A design to be registrable must be original and not in use by anyone else at the time of its adoption. Invention or utility is not a requirement to valid registration. A Design cannot be rendered original merely by a change in the mode of the construction of an article. A design to be registrable must be distinguishable from what previously existed by something that is essentially original. The introduction of ordinary trade variants into an old Design cannot make it new or original.

ACTION by plaintiff to restrain the defendant from infringing its industrial design registered on the 26th November, 1926.

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

*R. S. Smart, K.C.*, and *B. H. L. Symmes* for plaintiff.

*B. Macpherson* and *H. G. Fox* for defendant.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now, June 29, 1928, delivered judgment.

This is an action to restrain the defendant from making, selling or displaying for sale a certain display stand which it is alleged, is in imitation of a design of a display stand registered by the plaintiff pursuant to the Trade-Mark and Design Act, on November 26, 1926. The Design as registered is shown below.

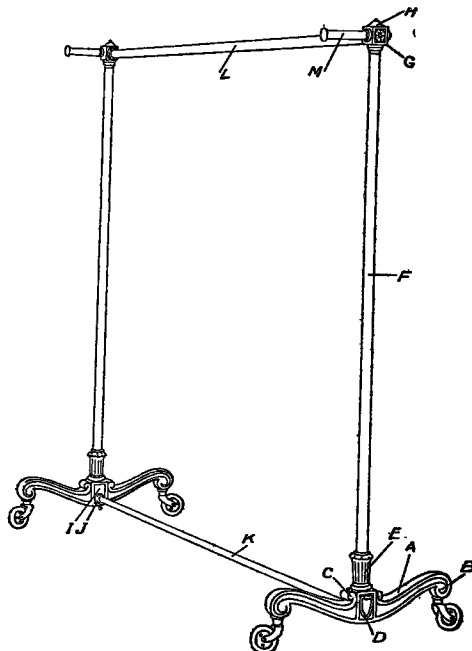
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The application for registration is as follows:—

I, Egerton Ryerson Case, of the City of Toronto, County of York, Province of Ontario, Canada, hereby request you to register in the name of Clatworthy and Son, Limited, of the City of Toronto, Province of Ontario, Canada, an Industrial Design for Display Stands, of which the said Company is the proprietor.

I declare that the said Industrial Design was not in use to my knowledge, by any one other than the said Company at the time of their adoption thereof.

A drawing of the said Industrial Design hereunto annexed shows the Display Stand in perspective.

The said Industrial Design embraces a base composed of oppositely-disposed curved arms, A, the outer ends of which terminate in a spiral scroll B. The upper side of the inner end of each arm also terminates in a spiral scroll C.

The outer side of the said base is provided with a heart-shaped panel D. The top of the base is flat between the scrolls C, and supports a fluted boss E. The top and bottom of this boss are ornamented.

The said boss supports a standard F, and the top of this standard is provided at the outer side with a panel G which carries an ornamentation. A fluted conical-shaped cap H ornaments the upper side of the top of the standard F.

The inner side of the base is provided with a panel which has a boss J. There are two bases forming this display stand, both alike in appearance, and they are coupled together by a bar K the ends of which are held in the bosses J.



The tops of the standard are coupled together by a bar L. M are bars held in the tops of the standard F, and disposed at right angles to the bar L.

Although casters are shown, these do not form part of the Design.

It will be seen from the application and certificate that the design or pattern of the whole of the display stand is registered as the Design; it is only the casters that are said not to form a part of the Design. It was not sought to register the configuration or pattern of the base, or the ornamentation upon it. There is no claim to any particular portions or features of the display stand as shown in the drawing, as the Design. In fact there is nothing in the way of a specific claim to the shape or configuration of the whole Design, the claim is merely the description of the Design. It is unfortunate I think that neither the statute or the Rules require the applicant for registration to file with his application, a statement of the matters which he claims constitute the novelty of his Design.

The design or configuration of the display stand made and sold by the defendant is the same as the plaintiff's, except that ornamentation work on the outside of the base and on the top of the standard is different; as a whole the plaintiff's display stand is said to be of a Grecian pattern while the defendant's is Gothic. To the casual observer the distinction in this respect would hardly be noticeable, although in the opinion of Mr. Smeal who was the author of the complete designs of both display stands, they would not be confusing to any persons understanding anything about designing, and are readily distinguishable on account of the different ornamental work deliberately applied to each by him, in order that they might be in contrast. The ornamental work applied to each is well known to the art though in detail they are quite different; the general configuration of both display stands, are the same.

Part II of the Trade-Marks and Design Act, dealing with Industrial Designs, contains no definition of an Industrial Design, neither do the Rules provide any; in fact I am not at all sure that there are in existence any Rules applicable to Part II of the Trade-Mark and Design Act. A design is therefore a design, and must be taken to be used in its ordinary sense. It is required that a design be original, and that it was not in use by any person other than the pro-

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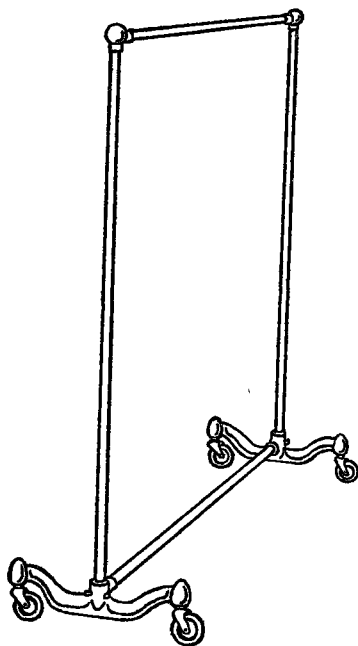
prietor, to his knowledge, at the time of his adoption of it. Invention or utility is not a requirement to a valid registration, and the general principles of Patent Law are not applicable here. According to the statute the design must, it would seem, be something capable of application to any article of manufacture or other article, for the ornamentation thereof. The words "to the ornamenting of any article of manufacture or other article to which an industrial design may be applied or attached" are used in more than one section of the statute.

The scope of this part of the Trade-Mark and Designs Act is difficult of definite ascertainment or construction. It is a piece of legislation that seems flimsy and incomplete, ill adapted for its intended purposes, and is seriously in need of amendment. I think it is clear that a design within the Act may be some ornament, printed, woven or produced on such articles as textile fabrics, paper hangings, floor cloths, lace, etc., or some ornament produced in such things as metal articles, glass or tiles. The Act seems confined to designs applicable to manufactured articles, and the application of such design to such articles; it does not apply to the things to which a design is applied. The Act is not clear when the design is merely for the shape of a thing, and it may be doubtful if a design for shape or configuration, which can only be applied to a thing by making it in that shape, comes within the Act. In the corresponding English Act, 1907, it does, but the statute there states that "Design" means any design applicable to any article, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, etc., and the same was true of the English Act of 1883.

For the purposes of this case I am going to assume that under the Act a design is applicable for the shape or configuration. The statute is clear that novelty is in all cases essential to a valid registration, and prior publication is fatal. Display stands had been made and sold by the defendants since 1910, the general configuration and purpose of some of them, was the same as the plaintiff's design here in question, except that they particularly lacked ornamental work, being very plain in design and without casters. The general characteristics and the prin-

ciple of construction was the same. The underslung base of the plaintiff's design was stressed before me, but the defendant, in the latter part of 1925 or early in 1926, and prior to the plaintiff's registration, obtained a display stand manufactured in the United States with this form of base and having the general outlines of the plaintiff's display stand, and he then placed it in the hands of his designer to produce a display stand similar to it. Practically the same display stand was advertised in February, 1925, in a trade journal published by Hugh Lyons & Co., Ltd., of Lansing, Michigan, featuring display stands. Below is a figure of the display stand obtained by the defendant in the United States prior to the plaintiff's registration, showing an underslung base without ornamentation, and it is said of Romanesque style.

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In my opinion there is nothing more whatever in the plaintiff's design, than is shown in the above figure, excepting the ornamental work; that is not by itself claimed as a design, and none of it as such is original. It is a method of construction and not a configuration, pattern, or ornament that the plaintiff claims. It is well settled, I think, that however constructed, an article of the same configura-

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tion is equally within or without the scope of a registered design. A design cannot be rendered original merely by a change in the mode of the construction of the article. I cannot reach the conviction that this is the sort of thing to which protection should be granted. No design should be counted as original unless it is distinguishable from what previously existed, by something which is essentially original. The introduction of ordinary trade variants into an old design cannot make it new or original. The requirement of novelty or originality by the statute, precludes the introduction of ordinary trade variants from making a design new or original if it is not new or original without them. The public is entitled to its choice of ordinary trade variants for use in any particular instance, and no registration should prevent its using or not using trade knowledge of this kind.

I might appropriately quote from Bowen L.J. in *Le May v. Welch* (1), where a registered design for a shirt collar was in question. He said:—

In order to enable the respondents to maintain the registration, they must be, or claim to be, the proprietors of a new or original design. In the present case is there any new or original design shown by this drawing? In considering whether the design is new or original, we must remember in the first place that we are dealing with a design which purports to found itself on shape, and to deal with outline; and secondly that we are considering the question with reference to an article of dress of the very simplest and least complicated kind, an article of dress which may well vary in form in every town in England, and in every year in which collars are worn. We must not allow industry to be oppressed. It is not every mere difference of cut, every change of outline, every change of length or breadth, or configuration, in a simple and most familiar article of a dress like this which constitutes novelty of design. To hold that would be to paralyze industry and to make the Patents, Designs, and Trade-Marks Act a trap to catch honest traders. It cannot be said that there is a new design every time a coat or waistcoat is made with a different slope or a different number of buttons. Tailoring would become impossible if such were the law, and it does not appear to me that such is the law. There must be, not a mere novelty of outline, but a substantial novelty in design having regard to the nature of the article. Now in the present case is there substantial novelty? That is an issue of fact to be decided by the view. Mr. Higgins says, and in that I am disposed to agree with him, that a new combination of old elements of design will satisfy the Act, and he asks us to find such novel combination in the presence, for the first time, in his article, of three characteristics; the absence of band, the downward curved opening and the large share of collar above the button. Now the answer which seems to go to

(1) (1885) 28 Ch. Div. 24 at p. 34.

the root of his contention is this, that if you take the specimen which the Lord Justice has dwelt upon as the most conspicuous instance, you will see that Mr. Higgins' contention is not well founded. The plaintiff's collar it is true, differs from A.H.K. 1 by exaggerating one or more of the characteristics which are there combined; but I can find in it no other novelty. It would be a most dangerous view of this Act to allow a design which presents no other element of novelty than this, to have the benefit of registration.

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If cases of this kind cannot be disposed of in the manner I have indicated, then the only safe course for a court to pursue will be to insist on absolute identity between the infringement and the registered Design. This view was in fact strongly expressed by Halsbury L.J. in *Gramophone Company Ltd. v. Magazine Holder Company* (1), in discussing the proper method of applying the provisions of the English Act respecting Designs.

I am of the opinion that there is no novelty or subject matter in the plaintiff's registered design, and that the same is invalid. The plaintiff's action is therefore dismissed with costs.

*Judgment accordingly.*

JOSEPH RINFRET ..... PLAINTIFF;  
v.  
CANADA STEAMSHIP LINES LIMITED. DEFENDANT.

1928  
Feb. 14, 16.  
March 1.

*Shipping and seamen—Collision—Harbour—Boat leaving dock—Overtaking vessel*

The *G. C.* was a ferry boat plying between Montreal and St. Helen Island. She was scheduled to leave Victoria Pier at 1 p.m. every day for the Island. This pier forms the south side of Market Basin in Montreal Harbour and is parallel to section 22 on the north side of the Basin at which the *R. P.* was docked. Every day one of the defendant boats was scheduled to leave their dock at 1 p.m. for the Lachine Canal, as was well known of the captain of the *G. C.* The space between the piers is about 325 feet, and at the end of the piers there is a seven mile current down the St. Lawrence River. On the day in question the *R. P.* gave one long blast and cast off her lines. She went 100 feet ahead and then 300 feet astern and as the current caught her she went full speed ahead upstream intending to pass a short distance from the southeast end of Victoria pier. When abreast of the *G. C.* the latter cast off; the *R. P.* then gave danger signal and immediately after the two-blast, indicating she was going to port. As

(1) (1911) 28 R.P.C. 221 at p. 226.

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the *G. C.* began to move out, the *R. P.* ordered her engines full speed astern. The *G. C.* paid no attention to signals, started for the Island, and as the current struck her she was borne down unto the *R. P.* which was then going astern, and was struck by the stem of the *R. P.* on her port side. One man only acted as captain, wheelsman and lookout on the *G. C.*

*Held*, on the facts, that the *G. C.* should not have left her dock without ascertaining exactly the position of the *R. P.* and she was wholly responsible for the collision.

2. That the present case is not one in which the Court should look into the Regulations for preventing collision, but one in which it should simply consider if there was neglect of any precaution under the special circumstances.
3. *Held*, further, that the *R. P.* could not be considered as an overtaking vessel.

Action by plaintiff to recover damages from the defendant for collision in the Montreal Harbour.

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

*E. Languedoc, K.C.* for plaintiff.

*A. R. Holden, K.C.*, for defendant.

The facts are stated in the reasons for judgment.

ARCHER J., now (March 1, 1928), delivered judgment.

This is an action *in rem* in which the plaintiff claims damages from the defendant for a collision which occurred in the harbour of Montreal on July 1, 1925.

In substance plaintiff's Statement of Claim is as follows:—

[The learned judge here cites the Statement of Claim verbatim.]

The defendant by its Statement of Defence alleges:

[The defence is here given verbatim.]

The *Garden City* is a paddle wheel ferry boat plying between Montreal and St. Helen's Island, a distance of approximately 1,700 to 1,800 feet. She is 180 feet long, 44 feet beam, and draws 5 feet 9 inches to 6 feet.

The *Rapids Prince* is a passenger steamer equipped with twin screw engines. She is of 955 tons register, and is 200 feet long.

On the date in question the *Garden City* was moored to her dock, Victoria Pier, and the *Rapids Prince* was moored at Section 22, in the Market Basin, pointing westward. The distance between Section 22, Market Basin, and Victoria Pier is about 325 feet. The east end of Victoria Pier, where the *Garden City* was moored, measures about 250 feet. During the summer season there is always one of the Canada Steamship Lines' boats scheduled to leave Section 22 at one o'clock p.m., and the *Garden City* is also scheduled to leave at one o'clock p.m. for St. Helen's Island. The Captains of the two vessels knew this, and Captain Rinfret, of the *Garden City*, tells us:

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Q. Est-ce que vous avez souvent l'occasion de vous trouver dans le voisinage des bateaux du Canada Steamship, le *Rapids Prince* en particulier?

R. Tous les jours il y en a un.

Q. Ce sont les bateaux qui descendent les rapides de Lachine?

R. Oui. Une journée c'est le *Rapids Prince*, et l'autre journée le *Rapids Queen*.

Q. Y a-t-il une règle pour passer là et pour se rencontrer? Quelle est l'habitude, s'il y en a une?

R. Quand un part et que l'autre voit qu'il va se trouver dans son chemin, alors il attend; si c'est lui qui doit partir, alors j'attends que ce soit clair pour partir.

See also paragraph 9 of Plaintiff's Preliminary Act.

At one o'clock p.m., her usual time of departure to go up to the Lachine Canal, the *Rapids Prince* gave a signal of one long blast, and her lines were cast off. She then went 100 feet ahead first, and afterwards went astern about 300 feet, and as the current struck her she took her course full speed ahead upstream with the intention of passing a short distance from the southeast end of Victoria Pier. These movements or manoeuvres must have taken about three minutes.

When abreast of the *Garden City* it was noticed on the *Rapids Prince* that the lines of the *Garden City* were being cast off. The Master of the *Rapids Prince* then gave a danger signal of five short blasts on the whistle. Immediately after he gave two blasts, to indicate that he was directing his course to port, and he immediately put his helm hard astarboard. Noticing that the *Garden City* was commencing to move from her dock, the Captain of the *Rapids Prince* ordered the engines full speed astern.

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The *Garden City* not having taken any notice of the signals which had been given, left her dock to cross to St. Helen's Island; and as she reached the current, which runs at about seven miles an hour, she came down towards the *Rapids Prince* and was struck by the stem of the *Rapids Prince* on her port side thirty or forty feet from the stem. The *Rapids Prince* was going full speed astern at the time, had not gathered sternway, but had very little headway.

When the *Garden City* left her pier Captain Rinfret was on the bridge with a passenger, Captain Massicotte. Captain Rinfret acted as Captain, wheelsman and lookout, as there was no other member of the crew with him. After giving the order to cast off the lines he gave the signal for full speed ahead. The engineer informs us that after the first order for full speed ahead he received another full ahead order. Captain Rinfret then went to the wheelhouse and put his helm hard aport.

After the *Garden City* had reached the current Captain Rinfret put his helm amidships with the intention of crossing straight toward St. Helen's Island. Suddenly, he says, he was informed by Captain Massicotte that the *Rapids Prince* was coming up towards him—although Massicotte tells us it was Rinfret who saw the *Rapids Prince* first. According to Captain Rinfret, the bow of the *Garden City* had reached the current then, and knowing that he was being carried down by the current he called out to the *Rapids Prince* to stop. No signals were given by the *Garden City*.

It is clearly proven that the *Rapids Prince* left her dock some few minutes before the *Garden City* left hers. Before leaving the *Rapids Prince* gave a long blast on her whistle, which was an indication to all interested that she was about to depart. As I have said before, the Captain of the *Garden City* knew perfectly well that the *Rapids Prince* would leave at one o'clock, and it was his duty to look out for her. Probably he was busy looking after the crowd which was getting on his boat, and he forgot all about the *Rapids Prince*. It is evidence he was a few minutes late in leaving. He had no proper lookout on his vessel, and that is the reason the *Rapids Prince* was only seen after she had left her dock a few minutes and was so near.



I do not think this is a case in which we have to look to the Regulation For Preventing Collisions but we have simply to consider if there was neglect of any precaution under the special circumstances of the case.

The *Rapids Prince* cannot be considered as an overtaking vessel, and when the *Garden City* left her dock the *Rapids Prince* was abreast of her and was only a very short distance away. (See Marsden, Eighth Edition, page 380).

I agree with my assessor, who advises me that under the special circumstances the *Garden City* should not have left her dock without ascertaining exactly the position of the *Rapids Prince*. When the *Rapids Prince* took the current her Master had a right to assume that the *Garden City* would not leave her dock before the *Rapids Prince* had passed the Victoria Pier. If the *Garden City* had had a proper lookout, surely the *Rapids Prince* would have been seen, and the *Garden City* would not have left her dock at the time she did, especially when her Captain knew the effect of the strong current.

I am advised by my assessor that when the *Garden City* got into the current her Captain should, under the circumstances, have kept his helm hard aport instead of putting it amidships, so as to stem the current and decrease her speed. I am also advised by my assessor that under the circumstances the *Garden City* could have reversed immediately after casting off her lines, without any danger to her safety. I am further advised by my assessor that the *Rapids Prince* was navigated in accordance with the rules of good seamanship, and nothing else could have been done by her to avoid the collision. I agree with my assessor.

I am, therefore, of opinion the *Garden City* is alone to blame, and the action is dismissed with costs.

*Judgment accordingly.*

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June 22.  
July 9.

HIS MAJESTY THE KING..... PLAINTIFF;

AND

THE DOMINION DISTILLERY PRO- }  
DUCTS CO., LTD. ET AL..... } DEFENDANTS.*Revenue—Sales Tax—Excise Duty—Specially denatured alcohol—Excise Act, Sections 154, 155 and 369*

The defendant Corporations imported liquor in bulk in Canada and later diluted and bottled the same in a bonded warehouse, and then in this form sold the same to the consumer. They also manufactured denatured spirits of grade known as “specially denatured” alcohol, (grade 1-F) and procured release thereof from bond without the payment of excise duty, which duty is claimed by this action.

*Held*, that where goods imported are so changed before taking them out of the bonded warehouse for consumption that they take on a form altogether different from that in which they were imported, the sales tax, under the Special War Revenue Act, 1915, should be calculated on the sale price of the goods after such change, and not upon the duty paid value thereof as imported in bulk.

2. That specially denatured alcohol is not “distilled spirits” within the meaning of Sections 154 and 155 of the Excise Act, and is not subject to the payment of the excise duty provided for in said sections.

INFORMATION by the Crown to recover certain amounts alleged to be due as excise duty.

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

*R. L. Calder, K.C.* for plaintiff.

*John D. Kearney* for defendants.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (July 9, 1928), delivered judgment.

In this action the defendant corporations are sued upon three separate claims. The first is for \$27,720.33, being an amount alleged to be due to the plaintiff under the provisions of the Special War Revenue Act, for the consumption or sales tax upon spirits and other alcoholic liquors sold by such defendants. The second claim is for \$16,289.10 for customs or excise duties alleged to be due the plaintiff on alcoholic liquors sold by the defendant corporations. It was conceded at the trial that in any event, some deduc-

tions should be made upon these two claims, and it was agreed that counsel should confer upon these matters, and that I should later be informed as to the deductions agreed upon. It was intimated at the trial also, that if judgment were pronounced upon the third claim, being one for excise duty upon certain denatured alcohol, that an agreement might be reached by counsel upon the amount of the sales tax payable under the first claim, and the amount of the customs or excise duty payable upon the second claim. For the present therefore I reserve judgment upon the question of the liability of the defendant corporations upon the first two claims, with the exception of one point to which I shall next refer; if counsel are unable in the end to entirely agree upon the amounts payable to the plaintiff upon each of these two claims, the same will be disposed of by me later, and after I am advised of the deductions or adjustments which have been agreed upon.

In connection with the first claim, a point was raised upon which perhaps I should presently pronounce, as it may assist counsel in reaching an agreement upon the amount of sales tax payable to the plaintiff by the defendant corporations.

On all goods produced or manufactured in Canada, there is payable to the Crown a consumption or sales tax of five per cent on the sale price of all such goods, except when exported. In the case of imported goods it is of course necessary to impose the like tax, and if nothing more were done to the imported goods before they were sold for consumption, the sales tax would be calculated upon the duty paid value of the goods. The defendant corporations imported certain liquors in bulk, and later diluted and bottled the same in bond or in a bonded warehouse and in this form they were sold. The defendant corporations claim that the consumption or sales tax should be calculated upon the duty paid value of the goods as imported in bulk, while the plaintiff claims it should be calculated upon the selling price of the goods after being diluted and put in bottles. The section of the statute upon which the defendants' advance their claim in the latter part of sec. 19 BBB (1) which reads as follows:—

and in the case of imported goods the like tax upon the duty paid value of the goods imported payable by the importer or transferee who takes

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the goods out of bond for consumption at the time when the goods are imported or taken out of warehouse for consumption.

I do not think the defendants' contention should prevail. If goods imported are subsequently so changed before taking them out of bond or warehouse for consumption that they take on a form altogether different from that in which they were imported, and so that the basis of the selling price becomes altered or enhanced, then in my opinion they are not the same goods as imported. The Canadian manufacturer or producer of excise duty paid bulk spirits would be discriminated against, if he were obliged to pay as well the sales tax upon the sale price of such spirits after being diluted and bottled, while the importer paid sales tax only upon the duty paid value of the bulk goods. It seems clear I think from the provisions of Part IV of the Act that the consumption or sales tax was in all cases to be payable upon the selling price received by the manufacturer, producer, importer or transferee. The selling price for consumption is the basis of taxation under the statute. The tax being primarily one upon consumption, one must inquire what was the selling price when it went into consumption. In this case it was not the imported bulk goods, but the diluted and bottled goods, that went into consumption, and these goods I think were, for the purposes of the Act, another class of goods altogether from that imported.

I think it is clear that the latter part of section 19 BBB (1) of the Special War Revenue Act, which I have quoted, means that the sales tax upon the duty paid value of imported goods has reference only to goods taken out of bond or warehouse for consumption at the time the goods are imported, or if later, then also in the condition in which they were imported. Therefore I am of the opinion that the contention of the plaintiff is the correct one, and if in any such case any sales tax is in fact or in law payable, it is to be calculated upon the selling price of the goods in the form in which they were sold for consumption, and not upon the duty paid value of the goods as imported in bulk.

The third claim is the largest in amount, and is now to be considered. The information pleads that between November 1, 1925, and January 31, 1926, the defendant corporations, or one of them, manufactured 82,989.59 proof

gallons of denatured spirits of the grade known as specially denatured alcohol, grade 1-F; that such defendants procured the release of this specially denatured alcohol from bond without payment of the excise duty payable thereon; and further, that the defendant corporations intended to sell and did in fact sell the specially denatured alcohol for potable purposes in Canada and not for export, and in violation of the provisions of the Excise Act. The plaintiff claims that there is due as excise duty upon this specially denatured alcohol, the sum of \$749,386.09. The specially denatured alcohol in question was entered out of warehouse for export by the defendant corporations, and they had the leave of the Department of Customs and Excise to export the same subject to certain regulations as to their transportation, and upon furnishing a bond to be cancelled upon production of a certificate of the Collector of Customs at the port of exit, that the goods had been cleared for export at such port. The required bond was furnished and later cancelled, at all times material here. The plaintiff claiming that the goods were not exported but sold in the domestic market, asserts they are now subject to excise duty in the amount mentioned. In my view of the case, I think I need not enlarge upon a discussion of the facts alleged by the plaintiff and defendants respectively in this connection, as I do not think they are of importance in so far as the claim for excise duty is concerned.

It is Part X of the Excise Act that is applicable to the article or commodity upon which the excise duty is claimed. Part X seems to deal with non-potable alcohol, sec. 371 (3) enacting that no alcohol shall be manufactured or sold under the provisions of Part X for beverage purposes. There is no definition of "alcohol" and nothing to indicate wherein it differs from "distilled spirits" referred to in previous Parts of the Act, but denatured alcohol and specially denatured alcohol, are defined. Sec. 368 is as follows:—

- (a) "denatured alcohol" means alcohol in suitable admixture with such denaturants as to render it in the judgment of the Minister non-potable and to prevent recovery of the ethyl alcohol;
- (b) "specially denatured alcohol" means alcohol in suitable admixture with special denaturants as have been approved by the Minister;

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Subject to limitations, as to their uses, denatured and specially denatured alcohol, may be manufactured in Canada free from excise duty. Sec. 369 enacts that:—

Denatured alcohol and specially denatured alcohol as defined in the next preceding section which is intended for use in the arts and industries, or for fuel, light, or power, or for any mechanical purpose, may be manufactured in Canada free from excise duty.

Section 370 provides that no alcohol shall be manufactured, denatured or recovered in Canada, except in licensed distilleries. The sale of specially denatured alcohol is limited by the terms of sec. 371 (2) and its transportation is subject to such conditions as the Minister may by regulation prescribe. That provision is as follows:—

Specially denatured alcohol shall only be sold or delivered under a departmental permit to dealers and manufacturers to be used in the arts and industries in cases where denatured alcohol would be unsuitable, and shall only be moved or transported under such conditions as the Minister may by regulations prescribe.

It is not claimed that the alcohol in question was not specially denatured when sold and removed from the distillery of the defendant corporations. There was not granted on account of its sale, any departmental permit to any proposed purchasing dealer or manufacturer, it being for export. Sec. 371 (2) does not appear applicable to the matter of the export of specially denatured alcohol, and accordingly a special regulation was made permitting the export of specially denatured alcohol subject to the conditions already stated. It is difficult to see why this was necessary, as the Customs Act would seem to contain every provision necessary to govern any export. There is no evidence that the ethyl alcohol was ever recovered by any person, in fact one of the shipments of specially denatured alcohol was examined while in transit and was found to be as represented. Part X of the Act provides a penalty for selling specially denatured alcohol, except as provided in this Part.

Sec. 373 (2) is as follows:

Except as herein otherwise provided, any person who holds in possession, sells, exchanges or delivers any alcohol or specially denatured alcohol contrary to the provisions of this Part shall be liable upon summary conviction to a penalty of not less than two hundred dollars and not exceeding five hundred dollars.

When the specially denatured alcohol in question was manufactured, it was not subject to excise duty; the statute specially states it to be free from excise duty. As denatured, it was in practice released from the dutiable list of warehoused commodities, and placed in the non-dutiable list. The only limitation upon its sale was, that it could only be sold and delivered under a Departmental permit to certain users, and could only be moved or transported under such regulation as the Minister might prescribe. The statute does not suggest that if sold contrary to such conditions, the alcohol became subject to an excise duty. If it was sold contrary to the provisions of Part X, the offender was liable upon summary conviction to a money penalty, and so far as I can see this would be the only offence under the statute. It is charged that the specially denatured alcohol was sold in Canada, and was never in any sense exported by the defendants. That in itself might be an offence if sold without a permit, or if transported contrary to the regulations prescribed therefor by the Minister. It would not in my opinion be ground for making it liable to an excise duty. It could not well be an offence to fail to pay an excise duty, when there was no such duty payable. Failure to pay an excise duty, if the alcohol was sold in Canada, is not the essence of the offence, if any, committed by the defendants. If the alcohol was sold in Canada contrary to the provisions of Part X of the Act, this did not have such legislative effect as to make a manufactured specially denatured alcohol subject to excise duty.

It is under sections 154 and 155 of Part III of the Act, that a claim for excise duty is now made upon this specially denatured alcohol. Sec. 154 states that an excise duty shall be imposed on distilled spirits, and that duty varies slightly in amount according to the material used in the manufacture of such spirits. The method of the computation of the excise duty is elaborately set forth in sections 155 and 156 of this Part of the Act. I cannot see how specially denatured alcohol can be brought under these sections of the statute and become liable to excise duty, even under the state of facts alleged by the plaintiff. Sec. 154 was never intended to apply to any denatured alcohol, it is applicable to another class of goods. If specially denatured alcohol is sold in or out of Canada contrary to the

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statute, it does not follow that it automatically becomes another thing, and subject to an excise duty that was intended to apply to another article altogether; it cannot be exciseable under sec. 154 and free from excise under sec. 369.

Inasmuch as the manufacture of specially denatured alcohol can only be carried on in a licensed distillery, sold or delivered in the domestic market under a departmental permit to a limited class of users, and moved or transported only under such conditions as the Minister may by regulation prescribe, it seems to me that the only offence that the statute could reasonably be expected to create or provide, would be that of selling without a departmental permit, or moving and transporting it contrary to the regulations. For that offence the statute prescribes a certain penalty. I assume that it was because this commodity is so strictly regulated in production, sale and transportation by the statute, and by excise officers in whose control it is, that the creation of any other offence or liability was considered unnecessary by the legislature. I cannot reach the conclusion that the offence of the defendant corporations was, at the most, more than a sale of specially denatured alcohol in Canada without a permit to the purchaser as by statute required. If this were all conceded, it seems to me that it would not warrant the conclusion that the alcohol thereby changed from a commodity made non-exciseable by the statute, to an exciseable commodity. There is nothing in the statute in my opinion in support of that view, and it would be a strange excess of caution I think, if the legislature enacted a provision of such a nature. If that was intended it was not expressed, and one may at least very safely say that it is not so clear as to justify the finding that the goods in question are subject to the excise duty prescribed by sec. 154. Altogether I think this claim is without ground whatever. If the goods were exported the question of excise duty does not arise.

A portion of the specially denatured alcohol was manufactured from alcohol purchased by the defendant corporations, from the Department of Customs and Excise, and it is not asserted that such alcohol was manufactured in a licensed distillery in Canada. Excise duty under sec. 154 is payable, it seems, only upon spirits distilled in Canada.



I think it is quite clear, that no excise duty was payable upon the alcohol purchased from the Department. This is only important in that it would affect the total amount alleged to be due under this claim by these defendants, if my opinion in regard to the liability of the specially denatured alcohol for excise duty, is found by another Court, to be erroneous.

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In the view I take of this matter it is not necessary for me to decide whether the regulations made by the Minister or the Department to export specially denatured alcohol was authorized or not, or whether the same was necessary, or whether the alcohol in question was exported or not.

I am of the opinion therefore that the plaintiff's claim in respect of the excise duty claimed upon the specially denatured alcohol must fail.

The defendants in this action comprise some five individuals who are sued in their personal capacity, in addition to the defendant corporations. It is alleged that those defendants controlled the defendant corporations, they being the shareholders and directors thereof. In the Information it is pleaded that it was the defendant corporations which failed to pay the sales tax, the customs and excise duties, and which made misleading, false and fraudulent returns in this connection to the plaintiff. It is pleaded that it was the defendant corporations, or one of them, that procured the release of the denatured alcohol from bond without payment of the excise duty claimed to be payable thereon. It is also pleaded in the Information that the individual defendants conspired to procure the defendant corporations to commit the acts complained of whereby His Majesty's revenue was defrauded; that they conspired to receive and retain the proceeds of the transactions mentioned in the three claims; that they received and retained the proceeds of these transactions for their own use, and that the defendant corporations never did receive the said proceeds and were thereby unable to pay the duties and taxes lawfully payable by them in connection with such transactions. It is claimed that the individual defendants are severally and jointly liable along with the defendant corporations for the total amount claimed. I do not think that there is any substance whatever in this

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claim against the individual defendants, and there are no facts before me to sustain it. This claim is based upon an alleged conspiracy entered into by such defendants as pleaded, but it can hardly be said that any serious attempt was made to establish any facts upon which to base such a claim. It cannot succeed upon pure inference. The individual defendants or some of them, may have for one reason or another conducted the company's affairs in a somewhat irregular way, but this is a matter I think which concerns alone the defendant corporations and its shareholders. All the transactions in question here were carried on in the name of the defendant corporations, or one of them, and the plaintiff knew no one else but such defendants. I do not think there is anything in fact or in law to sustain this claim against the five named individual defendants, and this part of the Information is therefore dismissed.

I reserve for the present question of costs upon all the issues herein disposed of.

*Judgment accordingly.*

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Feb. 20 & 21.  
March 6.

THE SS. *WENCHITA*..... PLAINTIFF;

v.

THE STEAMER *BEECHBAY*..... DEFENDANT.

AND

THE BEECHBAY STEAMSHIP COM- } PLAINTIFF;  
PANY, LIMITED .....

v.

THE SS. *WENCHITA*..... DEFENDANT.

*Shipping and seamen—Collision—Canal navigation—Right of way—  
Lookout*

The *W.* was proceeding down the Lachine Canal, with the current, and before reaching Wellington Bridge and the railway bridge, she blew the usual whistle signals, which were heard by the first officer of the *B.* The *W.* then went through the north draw of the railway bridge. At that time the *B.* was backing out of Wellington basin, where she had been moored, on the east side, heading in. At this time the *B.*'s stern had reached a certain distance out of the dock, and there was still one line out. Instead of going ahead the *B.* continued to go astern, and answered with a danger signal, followed by two short

blasts. The *W.* gave a second danger signal and reversed her engines, but the *B.* came across the *W.*'s. course and the collision occurred, about 350 feet from point where *W.*'s. first danger signal was given. The *B.*'s. captain was in the wheelhouse and no lookout was on the *B.*, and the *W.*'s. bridge signals though heard on the *B.* were not reported to her Captain. The *W.* could not pass astern of the *B.* because of the *B.*'s. continued backing.

*Held*, that the *B.* was negligent in leaving her dock before making sure that there were no ships within reasonable distance; in backing out and across the *W.*'s. course; in failing to respect the *W.*'s. right of way; in not having a proper lookout, and in her lack of reasonable care and prudence, which was the sole cause of the collision, and that she was alone to blame therefor.

Actions *in rem* to recover for damages due to a collision in Lachine Canal near Wellington Basin.

The actions were tried before the Honourable Mr. Justice Archer at Montreal, assisted by L. R. Demers and A. Barrette as assessors.

*A. R. Holden, K.C.*, for plaintiff.

*E. Languedoc, K.C.*, for defendant.

The facts are stated in the reasons for judgment.

ARCHER L.J.A., now (March 6, 1928), delivered judgment.

These two actions *in rem* were joined for the purpose of trial and judgment.

About 5 p.m. July 14, 1927, the SS. *Wenchita* and the SS. *Beechbay* came into collision in Basin No. 2 of the Lachine Canal, opposite Wellington Basin, and just below the railway bridge at Wellington street.

The *Wenchita*'s tonnage is 1,276 gross and 731 net; her length is 235 feet, and her beam is 36 feet. She was fully loaded and was drawing 13 feet 11 inches forward and 14 feet aft. At the time of the collision Captain Ugelstad was on the bridge, with the pilot, Captain Lacroix.

The *Beechbay* is 218 feet 9 inches long, 34 feet beam. Her tonnage is 1,219 gross, 658 net. She was light. At the time of the collision Captain Hornsby was alone in the wheelhouse.

The *Wenchita* in her Statement of Claim alleges:

[The learned judge here cites from the Statement of Claim.]

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*Beechbay*  
 AND  
 BEECHBAY  
 STEAMSHIP  
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*Wenchita*.  
 —

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The *Beechbay* by her Statement of Claim alleges:

THE SS.  
*Wenchita*.

[The learned judge here cites from said Statement of Claim.]

STEAMER  
*Beechbay*  
AND  
BEECHBAY  
STEAMSHIP  
Co., LTD.  
v.  
SS.  
*Wenchita*.

It is proven that the *Wenchita* was proceeding down the canal with a current of about one to two miles an hour. Before reaching the Wellington Bridge and the railway bridge she blew the usual whistle signals for those bridges. Those signals were heard by the First Officer of the *Beechbay* who was on the main deck at the bow. The two bridges having been opened, the *Wenchita* proceeded down through the north draw of the railway bridge, and the *Beechbay* at that time was backing out from the Wellington Basin where she had been moored.

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The *Wenchita* then passing through the railway bridge blew a danger signal of five or six blasts. The *Beechbay* continued to back out of the dock and answered with a danger signal, which was followed by two short blasts. The *Beechbay* having continued to back across the canal came across the *Wenchita's* course and the collision occurred.

The *Wenchita* was coming down with the current, and had the right-of-way. My assessors and I agree that it was negligent for the *Beechbay* to leave her dock, situated as it is, and come across the canal without making sure before casting off her lines, that there were no ships within a reasonable distance.

There was no proper lookout on the *Beechbay*. The Captain was alone in the wheelhouse, and there was no one on the bridge. It was only when Captain Hornsby heard the danger signal that he discovered the *Wenchita* was coming down the canal in the north draw of the railway bridge. Had there been a proper lookout the signal given by the *Wenchita* for the bridge would have been heard, and the opening of the bridges would have attracted the attention of the lookout and the *Wenchita* would have been seen coming through the Wellington Bridge.

True it is the bridge signal was heard by the first officer of the *Beechbay*, but this fact was not reported to the Captain. When the *Wenchita* was at the railway bridge and gave the first danger signal the *Beechbay* was backing out of the Hall Coal Company's dock. This is even ad-

mitted in the *Beechbay's* Preliminary Act. It is in proof that at that time her stern had reached a certain distance out of the dock. There was still one line out on the port side of the bow. Instead of putting her engines ahead the *Beechbay* continued to back with the result we know.

The *Wenchita* seeing that the *Beechbay* continued to back after the first danger signal, gave a second danger signal, reversed her engines, which had at least the effect of reducing her speed to some extent, and lessened the impact.

There are two draws at the railway bridge, the north draw through which the *Wenchita* came down being about 75 feet wide. The width of the canal from the Hall Coal Company's docks to the north side is about 375 feet.

Just before casting off her last line the *Beechbay* was moving out into the channel, and at the time the first danger signal was given by the *Wenchita*, the *Beechbay's* stern was some distance out of the dock, reducing the distance to the place of the collision by a certain number of feet.

The distance covered by the *Wenchita* from the time the first danger signal was given to the approximate place of the collision would be about 350 feet.

It is claimed by the *Beechbay* that it was impossible for her to get across the canal in such a short space of time. It must be remembered, however, that when the first danger signal was given the *Beechbay* had sternway on, and her stern was several feet out of the dock. Moreover, the *Wenchita* was coming down at a slow speed, and her engines were reversed before the collision.

My assessors advise me that the *Beechbay* could under the circumstances come across the canal from where she was, while the *Wenchita* covered about 340 to 350 feet from where she was when she gave the danger signal to the place of the collision.

The weight of evidence is in favour of the *Wenchita*, and my assessors and I agree that the *Beechbay* negligently and improperly backed out of the Wellington Basin across the course of the *Wenchita*, that the *Beechbay* failed and neglected to respect the right of way of the *Wenchita*, that the *Beechbay* had no proper lookout, that if the *Beechbay*

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had exercised ordinary and reasonable care and prudence no collision would have occurred.

The *Wenchita* was going at a slow rate of speed.

It is claimed by the *Beechbay* that the *Wenchita* having answered her two-blast signals by two blasts had agreed to pass to starboard and astern of her. This may be true but the *Wenchita*, though she wanted to pass astern of the *Beechbay*, could not do so as the latter persisted in going farther astern across the *Wenchita's* course on the north side of the canal.

I am also advised by my assessors, and I agree with them, that the *Wenchita* did all that could be done to avoid the collision and she was handled in a good seamanlike way.

I find the *Beechbay* alone to blame, and there will, therefore, be judgment against the SS. *Beechbay* and her bail for the damages proceeded for, and for costs, with the ordinary reference to the Deputy Registrar to assess the amount of damages.

The action of the Beechbay Steamship Company, Limited, is dismissed with costs.

*Judgment accordingly.*

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April 4, 5  
and 10.  
April 27.

SINCENNES McNAUGHTON LINES.....PLAINTIFF;

AND

JOHN J. HARRIGAN.....PLAINTIFF;

v.

SS. "STEEL CHEMIST" .....DEFENDANT.

*Shipping and seamen—Collision—Canal Navigation—"Check" signals—  
Overtaking vessel—Standing by.*

*Held*, that where a vessel is overtaking another in a narrow channel such as the Welland Canal and signifies her desire to pass by blowing one blast, but receives no reply, she is bound to wait and not attempt to go forward so as to affect the overtaken vessel until permission is obtained. Rule 29 of the Rules of the Road for the Great Lakes is imperative and overrides the General Rules which deal with conditions not covered expressly by said Rule. (The SS. *Helen v. The Donovan*, 1925 Ex. C.R. 114; 1926 Ex. C.R. 59; 1926 S.C.R. 627; 28 Lloyd's List L.R. 165 referred to.)

2. The "check" signal is not recognized by the Great Lakes Rules and its meaning and effect can only be determined by the circumstances under which it is given and received. Rules 28, 29 and 36 are definite in their terms, and where the "check" signal is received by a vessel desiring to pass the onus is upon the overtaking vessel to demonstrate that said signal constituted a permission to pass slowly.
3. The enactment in section 920 of the Canada Shipping Act, R.S.C. (1906), c. 113 requiring the rendering of assistance in case of collision, by the Master of one ship to the other, and providing that in case of default, it is presumed that the collision was due to that wrongful act, is still in force in Lakes Ontario and Erie and their connecting canals.

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Two actions tried together for damages brought by owners of the tug *Escort* and her tow against the defendant ship, caused by collision between them.

The actions were tried before the Honourable Mr. Justice Hodgins at Toronto.

*F. Wilkinson* for plaintiffs.

*A. H. Elder* and *A. J. Thomson* for defendant.

The facts are stated in the reasons for judgment.

HODGINS L.J.A., now (April 27, 1928), delivered judgment.

Action for damages to tug *Escort* and her tow the barge *Compton* against the defendant ship for damages caused by a collision between them.

The *Escort* towing the *Compton* was upbound, i.e., going south, and in the narrow part of the Channel of the Welland Canal between the Air Line Bridge and Raney's Bend when the defendant ship, also upbound, attempted to pass them on their starboard side. The barge came in contact with the ship and then hit the tug, which itself ran or was carried against the *Steel Chemist* and was drawn on and steamed with her for some minutes to get loose. This contact injured the tug's forefoot and let water into her so that finally she had to be beached in a sinking condition, the barge also going ashore.

The beam of the tug *Escort* is 15 feet and it draws 11 feet, while the barge is 34 feet wide and, being light, drew 4 to 6 feet. The *Steel Chemist* is a motor steamship of 43 feet beam and is 257 feet long, drawing at the material time 7 feet forward and 11 feet 3 inches aft. She had on board half a full cargo of paper (1,000 tons.)

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The accident occurred at about 11.30 p.m. on the night of October 19, 1927. It was hazy and raining hard with a fresh north-west or north-east wind blowing. It is contended for the defence that the stern light of the barge was unlit at and for some time previous to the accident but no objection is made as to the tug's lights. On the other hand the action of the *Steel Chemist* is denounced by the plaintiffs as a wanton attempt to pass the tug and tow in a narrow channel regardless of the danger to all parties. It is also asserted that the tug after receiving her injuries and making water whistled for help but that the *Steel Chemist* disregarded these signals, and went on her way, leaving the tug and the men on board in danger till rescued by a tug from Port Colborne.

There is a wide discrepancy between the stories told by each side as to what occurred and how it occurred.

[The learned Judge here sets out the accounts given by those on the three vessels].

The width of the level where the collision occurred is stated by the plaintiffs to be about 150 feet from bank to bank (162 feet is the true width) and the navigable channel 100 feet, which by the defence is put at 112 feet wide.

[The learned Judge then proceeds:]

I find it hard to credit the Master (of the *Steel Chemist*) and his supporters when they say that the barge was seen only 75 or 100 feet away. The canal is well lit (see Exhibits and the evidence of the Master of the Tug) and being about 162 feet wide on the surface it may fairly be inferred that the lights, to be useful, would reach the tug and tow when in the middle of it, their sides being not more than about 60 or 70 feet from the bank where the lights stood.

The exhaust of the tug is sworn to be a very loud one which could be heard for about half a mile, according to the evidence of Carr, an independent witness, and certainly ought to have been detected if attention by the lookout and the officer of the watch had been properly directed forward. This fact as to the exhaust receives some confirmation from what the Master of the *Steel Chemist* mentions. He says that the tug having put her stem against the port quarter of his vessel and shoving was "going ahead hard."



As she was then about 160 feet behind the pilot house, it is not difficult to conclude that his knowledge as to just what her speed was was due to the sound of her exhaust. On sighting the barge the speed of the *Steel Chemist* was not checked, because, as the Master alleges, he did not have room enough to reverse and fall behind, and he ported his vessel to go to starboard and sounded one blast. This he says was at "S" on Ex. 9 where the canal is about 326 feet wide between banks with only 276 feet of a navigable channel. Getting no answer, another single blast was blown by him when his bow had got about opposite amidships of the barge. The tug then blew 3 blasts, i.e., a check signal, but he did not regard that signal, which he understood to mean, "go slow", and if so must have meant to go slower than his then speed. He could have gone dead slow, i.e., 2.5 miles per hour.

The Master says he recollects no alarm signals at any time. He also testifies that when the barge and the *Steel Chemist* "rubbed" together at a point marked "T" on Ex. 9, a little above where the tug puts it, his vessel was up parallel to the bank and rubbing it under water, and that he did not carry the barge forward. I cannot think that any helm action on the barge would have helped, as was argued, to avert being carried against the *Steel Chemist* and so far as I recollect no one suggested it. The helm of the barge is largely controlled by the tug's movement and is generally of no use except to enable it to follow that movement.

The lookout of the *Steel Chemist*, Daniel, however admits that he scraped the barge and slid along, and that the tug "came along with us" but seems to wish to attribute this to the working of the tug's engines. That may be so, but the position of the tug was a very dangerous one and the Master of it was justified in trying to prevent his vessel from being capsized after being drawn over to the *Steel Chemist*. The barge and the *Steel Chemist* had parted and were then ten feet apart. The Master of the *Steel Chemist* asserts that the tug went hard ahead working its bow into his port quarter and shoving the *Steel Chemist*, with a view of pushing the stern of that vessel into the west bank and throwing its bow across the canal,

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blocking the channel and lying at an angle athwart the waterway. He says he had to put his helm to port and go full speed ahead to avoid being forced across the canal by this means. He was not able to suggest any motive for this manoeuvre nor advantage to the tug therefrom. After two or three minutes the *Steel Chemist* got into the middle of the canal working up speed and then drew ahead. Her Master heard nothing from the tug, except its exhaust, nor did he see any part of it during this time, except the top of the cabin, he remaining in the wheel-house with the three front windows open, but the other six shut, one of these being on the port side.

He denies that suction had anything to do with the collision, which he describes as merely "rubbing" the barge and his contact with and influence on the tug as being entirely due to the shoving by the tug which I have described. He finally admits that he "had to go past" under the circumstances. In this his second officer agrees, and on cross-examination testifies that when the first blast was sounded they could not have done anything but what they did, no matter what signal was given. This may be so, but the cause was the speed at which the vessel was travelling. From the engineer's log between 10.55 to 11.32, the following is the record: 10.55, slow ahead; 10.06, slow ahead; 11.17, half ahead; 11.20, slow ahead; 11.29, full ahead; 11.29, slow ahead; 11.29, full ahead; 11.30, slow ahead; 11.30, full ahead; 11.32, slow ahead; 11.32, half ahead; 11.32, full ahead; 11.32, slow ahead.

According to the evidence of the *Steel Chemist's* engineer, this half speed means 6 miles per hour, for 3 minutes, 10.17-10.20, and again at 11.32,—full speed ahead in the canal probably 6 or 8 miles per hour, at 11.29 (twice) and at 11.30 and 11.32. In between comes slow ahead which in the canal is 4 miles per hour.

This indicates in the average more than slow speed throughout and casts doubt upon the chief engineer's deductions as to speed from the revolutions of the engines which were not going at any set pace for any length of time, and upon his estimate of the length of time necessary to stop the vessel which I regard as wholly excessive. There was no satisfactory evidence given as to the time within which the vessel could be stopped.

It must be noted in this connection that if the distance necessary to stop was 100 feet, the tug and tow would at three miles per hour have gone 75 feet while the *Steel Chemist*, at 4 miles per hour would traverse 100 feet, so that it would allow 175 feet, or more than enough for a stop before the barge would be reached. This accords with Stinson's evidence that he could stop sufficiently to stay behind if 25 to 50 feet distant from the barge, provided she was going 1 mile per hour slower. I should say that to assume an average of 5 miles per hour for the *Steel Chemist* would not be unfair, but as the *Steel Chemist* could travel at 2½ miles dead slow there was no excuse for passing these vessels at a greater rate, either at 4 or 5 miles per hour, regardless of the safety of the other craft.

The speed of the tug and tow is given by the tug master at 6 m.p.h. and by the master of the *Steel Chemist*, as I recollect it, at 10 m.p.h. while the tug was, as he says, shoving his vessel's port quarter. I do not think such speeds were ever attained. If the tug and tow were making 6 miles per hour and the *Steel Chemist* at 4 or 5 m.p.h. the latter would never have caught up to the former and I imagine the tug master is giving his engine revolution speed instead of his progress over the ground. His engineer estimates the tug's speed at 5 to 6 m.p.h. and that of the *Steel Chemist* at 10 m.p.h., both rather absurd estimates of speed in a canal by either vessel.

The absence of the stern light on the barge at the Air Line bridge just before the collision is affirmed by all the defence witnesses and denied by those called by the plaintiffs.

I have little doubt that the stern light on the barge was out more than once during the evening. The description of the light, the anxiety of the Captain of the barge and his frequent visits to it, the force of the wind, and the unanimous evidence of those on the *Steel Chemist* whose duty it was to look ahead and who saw her ahead, all point to its failure at the critical time.

I think I must accept the evidence against its existence as a warning signal as outweighing that of its continuance during the approach to Raney's Bend. Whether this finding must result in condemning the tug and tow for a breach

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of Rules 5, 12 and 38 of the Great Lakes Rules, as causing or contributing to the collision, I will deal with later.

But whatever the proper conclusion on that point may be, I am unable to hold that it forms a sufficient excuse for the action of the *Steel Chemist*. The tug and tow were clearly seen by those on that vessel when passing through the Air Line Bridge, and they say she then carried no stern light. These vessels had been in evidence on two occasions just before passing through the Air Line bridge, and there can have been no misapprehension as to the fact that both were proceeding upbound, the tug towing the barge. That they were just ahead of the *Steel Chemist* is patent, and when that vessel got through the Air Line Bridge and proceeded, its navigators were well aware that in the stretch of some two miles before the canal narrowed, on which they were entering, this tug and tow were in advance and must be passed, or, when caught up with, would be in a position demanding care and caution. Both overtaken and overtaking vessels were in fact proceeding up the centre of the canal, the tug and tow at 3 miles per hour and the *Steel Chemist* at, at least, between 4 or 5 miles per hour or at speeds differing by one mile per hour. When the tow came into sight later in the night the *Steel Chemist* at once signified her desire to pass by blowing 1 blast, and not having received a reply was bound to wait and not attempt to go forward so as to affect the tug and tow until permission was obtained. This is the effect of Rule 29 of the Great Lakes Rules which with Rules 28, 29, 34, 35 and 36 controls Canal Rule 18. Rule 29 is imperative and distinctly applicable to the situation here and overrides the general rules which deal with conditions not covered expressly by Rule 29. These navigation rules have been held to be binding on vessels navigating Canadian canals, see for example, the *Honoreva* (1), and *The Beechbay* (2). The *Steel Chemist*, however, while still going on, again blew a blast when passing the barge, repeating her desire, and received a signal of three blasts from the tug, denominated as a "check signal", and I have to determine whether this can be considered as

(1) (1916) 54 S.C.R. 51.

(2) (1925) Ex. C.R. 23.

signifying assent to the passage of the *Steel Chemist* under Rule 29—it was not the signal required by navigation Rule 28.

Now a check signal is not recognized by the Great Lakes Rules and its meaning and effect can only be determined by the circumstances under which it is given and received. The *Steel Chemist* had lapped up, as I find, on the barge when this signal was given and was therefore committed to passing the tug and tow. It is certainly a warning notice and in the case of *Keystone v. Ottawa* (1), meant “stay where you are till I get past.” In the *Norwalk* (2), it meant, “check down and wait below altogether.” See pp. 443 and 447, 460. Here it is said to mean “go slow” or “go past slowly.” As Rules 28, 29 and 36 are very definite in their terms, it is incumbent on the *Steel Chemist* to demonstrate that the meaning of that check signal when given was permission to pass slowly and this she has not done. But when it was given, it was an appropriate warning against excessive speed and a demand that the *Steel Chemist* should at once moderate her then speed, if she intended to force her way past. It is not a signal with a definite authorized meaning and the onus is on those asserting that it signified assent and that the other party knew and agreed to or was bound by that meaning. The tug and tow did not follow Canal Rule 18 in drawing in to their side of the canal at the first blast from the tug, and the *Steel Chemist* should have realized that the proper inference from that circumstance was one inconsistent with consent. The *Steel Chemist* was not entitled to construe the signal as she did and it does not excuse her. *The Ravenna* (3). Indeed she had, by her rapid approach, put herself where, as her Master and his second officer expressed it, he “had to go ahead” and try to pass irrespective of any signal.

The navigable water where the accident occurred is between 100 and 112 feet in width and the channel is under 500 feet wide (see Rule 29).

(1) (1927) Ex. C.R. 123.

(2) (1909) 12 Ex. C.R. 434.

(3) (1918) P. 26.

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It is argued that if the tug and tow had moved over to the bank on their port side the passing would have been accomplished in a navigable channel 212 feet wide or more. I am of opinion that Rule 29 is imperative and that if refusal to allow a passage is given, as I believe it was here, in good faith, no right to pass can be established. But assuming such a position as is contended for, I find the distance traversed before the canal narrowed to about 100/12 feet is about 1,000 feet (xx to Station 1,255) which is much too short a distance to allow of a vessel at 4 miles per hour passing successfully one going at three miles per hour, giving only about a boat length of the *Steel Chemist* in which to pass the bow of the moving tug and tow before getting into the middle of the narrowed channel. This alone would render the passage (which would and did occupy about 10 minutes) dangerous, and demonstrates the difficulty which I should think would follow even from the situation argued for in this respect. The tug did not increase her speed until some minutes after and then when compelled to do so for her own safety.

The beam of the *Steel Chemist* is 43 feet, and, accepting her Master's rather curious statement that she was exactly parallel to the bank in moving past the tug and tow, that left only 6 feet (or 18 feet if the width of the navigable channel is taken at 112 feet) beyond her to the centre of the channel for the tug and tow. As the tow is 34 feet wide and was in the middle of the channel she would occupy some 17 feet of that half, which shows what an extraordinarily dangerous attempt was made by the *Steel Chemist*. If the tow had been right up against the other bank that would leave only, on the evidence of the Master of the *Steel Chemist*, from 22 to 26 feet clear between the vessels, and as she was not close to the bank, but further out, the *Steel Chemist* must have got well within a distance where suction would operate. It is admitted in the written argument for the defence, that when the check signal was blown from the tug, there, it was impossible for the *Steel Chemist* to pass with safety to the other vessels unless they had hauled to port.

I have discussed the distance at which suction operates, in *Merlo v. SS. Jones* (1), and the *Poplar Bay v. SS. Charles Dick* (2). It has also been considered in *Cadwell v. SS. Bielman* (3) (where the evidence indicated that what happened here might be expected to occur); and in *The Steel Motor* (4), and I have no hesitation in finding that what brought the vessels together was the effect of the water pressure and suction set up by the *Steel Chemist*. When the evidence of the experts who testified as to how that force would act under the circumstances here is examined, it will be found from that on behalf of the tug and tow that these two vessels made movements quite in accordance with the expert opinion of what was likely to happen. What is said to have occurred is that the barge hit the star-board quarter of the tug after the collision with the *Steel Chemist*, and threw the bow of the tug against the side of the latter, damaging the former's fore-foot below the water line, causing her to take in water.

The larger vessel's proceedings are not, in my judgment, in any way excused by the absence of the stern light of the barge. However negligent that was, it only deprived the Master of the *Steel Chemist* of visible notice of what he already knew, and his position when he did make out the tug and tow ahead was due to his keeping up too great a speed, which his knowledge of what was ahead of him should have caused him to modify considerably. I find his speed from the Air Bridge to have been between 4 and 5 miles an hour over the ground, and that he could have got along with safety at dead slow or 2·5 miles per hour.

Experts were called on both sides, whose evidence I summarize thus:

*Stinson*, who is very familiar with the canal, says that the barge would be carried on to the tug, unless the latter increased its speed (as I find it did) and that if the tug was unable to escape the suction by her speed, it would go towards the passing vessel (as I find it did here) and that the only thing for the tug to do then was to run her engines to keep away from the barge and avoid being sucked under

(1) (1925) Ex. C.R. 183.

(2) (1926) Ex. C.R. 46.

(3) (1906) 10 Ex. C.R. 155.

(4) (1925) Ex. C.R. 147.

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the passing ship. He also says that attempting to pass would be quite unsafe.

*Mann*, who knows this particular part of the channel quite well, would not have attempted to pass at all under the circumstances here, and considers that to attempt it would be unsafe.

*Rinn*, called for the defence, would not have tried to pass unless he had got an answer consenting and if he could not see a boat's length ahead would have blown fog signals.

*Baxter*, also called for the defence, would reverse and put his vessel's nose into the bank rather than attempt to pass at 100 feet, and he admits that at "X" on the chart, even if the tug and tow pulled over to the other bank, an attempt to pass would be taking chances of an accident. There is evidence from Stinson and I think from the other experts, that the bank on the starboard side is soft mud, and Carr says that on the following day he was able to tow the barge away on attaching his tug to it. There was no evidence of rocks on that side of the canal or on the bottom injuring the barge or that would have injured the *Steel Chemist* if she had followed the view expressed by Baxter.

The duty of an overtaking ship has recently been considered in the case of the *SS. Hellen v. The Donovan* (1) which was carried to the Privy Council.

In the Supreme Court Mr. Justice Newcombe said:—

If the *Hellen* had the obligation of an overtaking ship, as both the learned judges find she had, she was under absolute obligation to keep out of the way of the *Donovan*.

He cites, as authority for this wide statement, the *Saragossa* (2), where Lord Esher M.R., said:—

If the ships were an overtaking vessel and a vessel being overtaken, then the first rule is this: "Every ship, whether a sailing ship or a steamship, overtaking another, shall keep out of the way of the overtaken ship." That is an absolute rule, equivalent to an Act of Parliament. If that rule stood alone, whatever the overtaken ship did, however much she might deviate from her course, the other is bound absolutely to keep out of her way, and nothing can excuse it except inevitable accident. There was a case in the House of Lords in which the nautical advisers found that a man was put into such a position with regard to the other ship by the fault of that ship that any sailor of ordinary care and skill would have

(1) (1925) Ex. C.R. 114; (1926) Ex. C.R. 59; (1926) S.C.R. 627; 28 Lloyds L.L.R. 165. (2) (1892) 7 Asp. 289.



done just what the man did. The House of Lords held, nevertheless, that he was within the rule, and was bound to keep out of the way. It was a severe finding, I think—it overruled the Court of Appeal—but it shows that the rule is absolute. What is the effect of it? Why say to a man, “You are to keep out of the way. We don’t tell you how to keep out of the way. It may be by starboarding or by stopping and reversing, or going at full speed. It may be in any way you please. You are to have the choice; you have the obligation of doing it which way you will, but do it you must.” It was thought right that if you put that tremendous obligation upon the overtaking ship you must give him all the means to carry it out, and therefore there is another rule: “Where by the above rule, one of two ships is to keep out of the way, the other shall keep her course.” That is, that the ship on whom the heavy obligation lies may not be hampered by anything the other does. He must have his full liberty to go ahead of you, astern of you within ten feet of you on one side or the other. If he is to have that obligation you must keep your course, so that he may not be hampered by you in any way as to his choice. Then it seems to me that that at once makes the rule correlative, and that the obligation on the one and the obligation on the other exist at the same time.

I cite these observations not only for the establishment of the rigid rule laid down, but to show that the course of the tug and tow being in the middle of the channel they were, in the absence of agreement, bound and entitled to pursue their way and their speed without alteration till consent was given or became unnecessary. See also *Macdonald v. The Atlantic Salvage Co. Ltd. et al* (1).

It was urged that in another important respect the *Steel Chemist* must be held to be blameworthy and sec. 920 of the Canada Shipping Act, R.S.C., 1906, c. 133, was referred to. That section requires that in case of collision the Master should render such assistance to the other ship as was practicable and necessary to save them from any danger caused by the collision with his ship, etc. It further provided that if he did not do so it would be presumed that the collision was due to his wrongful act.

This requirement was not complied with and the tug was left in a sinking condition with a crew on board without the slightest assistance being given or tendered. There was danger, how much or how little is not of vital consequence, and need of assistance, and I find there was a total disregard of the duty imposed by the events which happened by the Master of the *Steel Chemist*. This enactment is still in force in Lakes Ontario and Erie and their con-

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(1) (1925) Ex. C.R. 209.

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necting canals. See 4-5 Geo. V, c. 13, s. 5 (2) in force on 1st July, 1914, by proclamation. The section as to other waters is found in R.S.C., 1927, c. 186, s. 902.

The evidence of the Master of the *Steel Chemist* was to my mind extremely unsatisfactory. Apart from contradictions of his former answers on discovery, he does not seem to have noticed, or if he did he did not betray it, much of what one would expect to have been seen by an experienced navigator in the circumstances in which he found himself. He was aware of contact with both tug and tow, though the officer on watch with him saw no contact with the barge and felt nothing. He did not move out of the pilot house, nor did his second officer or Chief Engineer, to see or hear what was going on, and he failed to realize that he might have caused serious damage to these two smaller craft. He heard no signals said to have numbered ten in all, although they were, as I find, blown, and that notwithstanding that the tug's alarm signals were heard at Port Colborne about a mile away. No one appears to have done anything except the lookout, Daniel, who followed the tug down the side of the vessel, and when it was clear so reported. He admits hearing the Master of the tug cursing and the noise of the exhaust. The Master of the *Steel Chemist* admits that the night was such that he could see the banks (which were further from his vessel on each side than the distance at which he saw the tow), and that if he could not see ahead owing to the rain and misty atmosphere he ought to have blown a fog signal (see Article 16), but he did not do so. These observations may also well be applied to Brown, the second officer then on watch, and those in the wheel house with them.

I am unable to see that the absence of the stern light, in view of the knowledge of the presence of the tug and tow immediately in front of him, on the 2 miles stretch, lured the *Steel Chemist* into danger, much less into a trap, because knowledge of all the actual conditions existed, and was not used as a prudent and careful navigator would have done, but was, in my judgment, recklessly disregarded by the Master of that vessel.

The cases of *Cayser, Irvine & Co. v. Carron Company* (1), and *Anglo-Newfoundland Co. v. Pacific Steam Navigation Co.* (2), have application here. In the first case Lord Blackburn described the cause of the accident as being "that the Margaret knowing where the *Clan Sinclair* was, attempted to pass between it and the *Zephyr* where there was not sufficient room." In the latter case Lord Shaw, in language quite appropriate here, says, at p. 420:

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I take the principle to be that, although there might be—which for the purpose of this point I am reckoning that there was—fault in being in a position which makes an accident possible yet, if the position is recognized by the other prior to operations which result in an accident occurring, then the author of that accident is the party who, recognizing the position of the other, fails negligently to avoid an accident which with reasonable conduct on his part could have been avoided. Unless that principle be applied it would be always open to a person negligently and recklessly approaching, and failing to avoid a known danger, to plead that the reckless encountering of danger was contributed to by the fact that there was a danger to be encountered. There is a period of time during which the casual function of the act or approach operates and it is not legitimate to extend that cause backwards to an anterior situation. The anterior situation may be brought about either innocently or by some mistake; but if it has nothing to do with the subsequent operations which contributed to produce an accident or collision, it is not legitimate to treat it as a contributory in liability for the result thus produced.

I find knowledge of the presence ahead of the tug and tow, neglect to take precautions not to get too close to them, and, failing such precautions, an attempt to force a passage at excessive speed where there was not sufficient room to accomplish it without danger.

I also find disregard of the requirements of Section 920 already quoted which entitles me to find that the collision was due to the wrongful act of the Master of the *Steel Chemist*.

The plaintiffs should have judgment condemning the defendant ship in damages and directing a reference to the Registrar at Toronto to assess the damages, all with costs.

*Judgment accordingly.*

(1) (1884) 9 A.C. 873.

(2) (1924) A.C. 406.

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GEORGE E. PRENTICE ..... PLAINTIFF;

AND

DOMINION RUBBER COMPANY, LTD.. DEFENDANT.

*Patents—Commercial success—Utility—Description—Specification—  
Anticipation.*

The patent in question is for an improvement in interlocking fastener construction, consisting essentially of two helically wound springs, whose convolutions constitute the fastening elements, together with an actuating slider, an important feature of the alleged invention consisting in the fact that instead of making the locking members in separate and individual units, each secured to the fabric independently, each series of fastener members is made up of a single integral piece of wire in the form of a helical spring. The patent is attacked for want of utility and as being anticipated.

*Held*, that a definite amount of utility is not required by law to sustain an invention; a slight amount of utility being sufficient. Commercial utility is the very essence of a patent, and a favourable reception by the purchasing public is strong evidence of that degree of utility required by law.

2. That the inventor must fully describe his invention and its operation or use as contemplated by him, and he must set forth clearly the various steps in the method of constructing, making or compounding the machine, manufacture, or composition of matter, as a consideration for receiving the grant of letters patent, and so that the public may have it at its expiration, and may know what they are prohibited from infringing in the meantime. The inventor, however, is not ordinarily required to state what particular tools or machines should be used in constructing the invention.

ACTION by plaintiff to have it declared that certain patent granted to him was infringed by the defendant.

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

*D. L. McCarthy, K.C.*, for plaintiff.

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

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (August 21, 1928), delivered judgment.

This is an action brought by the plaintiff alleging infringement of a Patent, no. 253,251, issued to him pursuant to the Patent Act and dated the 1st day of September, 1925, for new and useful improvements in Interlocking

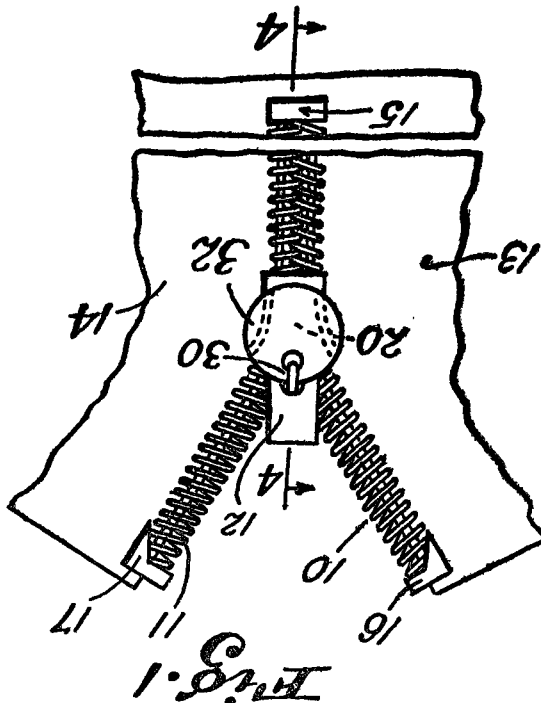
Fastener Construction. The improved fastener consists essentially, it is said, of two helically wound springs whose convolutions constitute the fastening elements, together with an actuating slider.

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The inventor describes his invention in a general way in his specification as follows:—

This invention relates to interlocking fasteners of the kind in which a series of complementary mating or interlocking members are arranged along the opposed edges of a gap or opening in a garment, shoe, receptacle, or other article made of such flexible material as textile fabric, leather or rubber. Fasteners of this kind are operated by a slider, the movement of which in one direction closes the gap and interlocks the complementary fastener members, and the movement of which in the opposite direction unlocks the fastener members and opens the gap.

Hitherto it has been the practice to make fasteners of this kind of a series of separate, individual locking members attached respectively to the opposite edges of the gap or opening. An important feature of the present invention consists in the fact that instead of making the locking members in separate and individual units, each secured to the fabric independently of the others, each series of fastener members is made up of a single integral piece of wire in the form of helical spring. The helical spring may be cylindrical in its general form, in which case each convolution is round, or it may be flattened, in which case each convolution has a substantially oval form, or it may be otherwise shaped in order best to meet the requirements of the use to which the fastener is to be put. In any case each convolution constitutes a fastener member for interlocking between a pair of the convolutions of the opposite helical spring.



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Fig. 1 of the drawings accompanying the specification, as below shows a front elevation, partly broken away, of the fastener made with round coil springs, and presents a general outline of the invention and its construction in its various forms.

The inventor states that the helical springs 10 and 11 in fig. 1 may be substantially alike except that one is coiled in a right hand direction and the other in a left hand direction; and that these springs may be conveniently made of wire of approximately .029 inch in diameter, wound upon a one-eighth mandrel to form open helices. He states that the wire employed should be stiff enough to prevent distortion in use and preferably resistant to corrosion, and that the physical characteristics of nickel-silver wire is well adapted for the purpose. He describes the manner of assembling the fastener and states that a convenient way to do this is to apply the respective springs to the opposed edges of two strips of stout fabric, such as braid or tape, which may be readily attached to the margin of the gap or opening in the garment, shoe, pouch or other articles with which the fastener is to be used. He describes a preferred method of uniting the springs 10 and 11 to the strips, by threading the springs spirally through the material of the strips which is provided with salvage edges having cord or heavy warp threads, or alternatively, he states that the springs may be united to the strips during the manufacture by a process of weaving. The slider 12 in the fig. above is described and also its operation, but this element is not in any way in controversy and besides is well known.

In reference to the arrangement in figs. 1, 2, and 3, inclusive, in the specification, the inventor states:—

In the arrangement shown in Fig. 1 to 3 inclusive the coil springs 10 and 11 are of circular transverse section and of like construction except that one is coiled with a right hand twist and the other with a left hand twist.

Variations in the form of the fastener, that is in the helical springs, is indicated by figs. 6 to 8, inclusive, and in this regard the inventor states:—

In some cases it is desirable to decrease the thickness of the fastener in a front and rear direction and this may be accomplished by flattening the spring coils after winding, thereby producing elongate convolutions such for example as those shown in Figs. 6 to 8 inclusive. The convolutions of one or both springs whether flattened or not may also be bent

or otherwise shaped to enable them more positively to interlock with one another, this feature also being shown in Figs. 6 to 8.

\* \* \* \* \*

In this embodiment of the invention the springs 10a and 11a are so flattened so that their individual convolutions are of generally oval or egg shape in contour with their longer axes lying substantially in the plane of the strip of material to which they are fastened.

Preferably the outwardly projecting smaller or more pointed ends 33 (Fig. 8) of the convolutions of one spring are opposed to the outwardly projecting larger ends 34 of the other. The projecting smaller end 33 of each convolution of the first spring is bent out of the general plane of the convolution as indicated at 33a in Fig. 7 so that when engaged between adjacent convolutions 34 of the opposite spring these bent ends tend to hook over the latter convolutions then enhancing the interlocking effect of the convolutions.

In the preferred arrangement the springs are so bent or swaged that the pitch or change in elevation from one convolution to the next of each spring is confined wholly or mainly to those parts 35 of the convolutions which engage the strips of webbing 13a and 14a so that the sides of each loop which projects out beyond the edge of the strip of webbing lie in a level plane substantially perpendicular to such edges.

The defendant contends that there is no invention in Prentice; that it was not new; that it was anticipated by others; and that it is not useful. The defendant also contends that the specification does not sufficiently describe the alleged invention or its construction.

It might be convenient first to deal with the question of utility. A definite amount of utility is not required by law to sustain an invention; a slight amount of utility is sufficient. Commercial utility is the very essence of a patent; a favourable reception by the purchasing public affords strong evidence of that degree of utility required by the law. Prentice, in the preferred form at least, has been applied to some millions of overshoes, and if the fastener sold by the company from whom the defendant purchased the alleged infringing fastener, is Prentice or its equivalent, then the commercial adoption of Prentice has been very substantial indeed, and its utility completely demonstrated. I do not think it is possible to hold otherwise than that Prentice does possess utility, at least that is my conclusion. It may be that the fastener constructed of the plain undeformed helical spring has not the same range of utility that the inventor's preferred form of spring has, but where the strain or flexion is negligible or slight, I know of no reason to doubt but that it possesses sufficient utility to sustain the claim of the patentee. To put it to any test

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not inherent in the purposes to which it was intended to be applied or used should not be the criterion of its utility.

The next point for decision is whether the patent in question represents invention, and this is purely a question of fact. I think it does in all its forms. To obtain the interlocking or fastening accomplished by Prentice from two integral pieces of wire in the form of a helical spring, operated by a slider, so that each convolution constitutes a fastener member for interlocking between a pair of the convolutions of the opposite spring, was I think something distinctly new and original. In the prior art locking members operated by a slider was known, but there, each locking member was a separate and individual unit, each secured to the fabric independently of the other, such as in the hook and eye and the lug and socket types of fastener. Prentice is I think an altogether different conception, and at least is a new way of accomplishing the same end, and I think required invention.

But Prentice, it is claimed, had been anticipated. Several prior patents were cited as being in anticipation of Prentice. I need only consider one of them, a German patent issued to one Chaim in 1908. I need only consider this one instance of the cited prior art, because if Chaim is not an anticipation, then I feel quite confident that none of the others are. Chaim describes his invention as a method of closing together the edges of openings in all kinds of articles of clothing, particularly of ladies garments, the closing being made by means of the known running slide and opening by pushing the slide back. Chaim had I think in mind the well known hook and eye principle. A spiral wound wire is used by Chaim, in which at definite intervals the wire is bent out to form hooks and eyes, and Chaim states that these are held in strict relation to each other so as to fit each other exactly. The coil is covered with the material of the garment and only the hooks and eyes protrude. There is no interlocking of the coils. The fastening is effected by the hooks and eyes only. The specification and drawings present variations in the construction of this invention, but I need not I think discuss them as the same principle of construction is to be found in each of them, that is the wire coils are bent out at definite points to form hooks and eyes, or as described in



the claim, the wire coils are sewn into the closing strips and are bent out at several places to form hooks and eyes. That was not new although forming the hooks and eyes by deforming the coils may have been new. The novelty, if any, lay in a new way of making the hooks and eyes, and that was the basic thing in the inventor's mind. As Mr. McCarthy put it the coils act as an anchor for the hooks and eyes. There is no complimentary mating or interlocking of the coils, which was what Prentice sought to do and did do, which I think is a different thing altogether from Chaim. I think it is probable that as claimed, Prentice has many advantages over Chaim, and particularly has it a wider range of application.

I cannot agree with the plaintiff's contention that Chaim is an anticipation of Prentice. It accomplishes the same end it is true, but the means are altogether different, and the whole principle or conception of the means of accomplishing that end are altogether different. To the eye it is most manifest, and I should say, to use a well known expression, that altogether Prentice lies so much out of the track of Chaim as not naturally to suggest itself to a person turning his mind to the subject, but would require some application of thought and study. Prentice showed a new way of accomplishing a known result, and I think his particular means may very safely be said to be different in principle and construction to that of Chaim, or any other.

As already stated the defendant contends that the Prentice specification is insufficient, because generally it does not disclose sufficient information to enable those, to whom it is addressed, to produce it. It is contended that the specification does not precisely state what the interval between the convolutions of the spring coils should be; that the specification is silent upon the mode of manufacture particularly of the elongated and hooked form of coil; and that the inventor Prentice having the knowledge how the fastener could be constructed by mechanical aids, consciously withheld the same, so that no skilled mechanic could construct this device without lengthy experiment. In other words it is urged that the inventor left the public with a mechanical problem which should vitiate the patent. It is quite correct to say that the inventor must fully de-

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scribe his invention and its operation or use as contemplated by the inventor. He must set forth clearly the various steps in the method of constructing, making or compounding a machine, manufacture, or composition of matter. The obligation rests upon the inventor to give this information to the public as the consideration for receiving the grant of letters patent, and also so that the public may know what they are prohibited from doing without the license of the patentee, during the currency of the patent. The patentee must complete his specification with the utmost of good faith, in such clear and concise language as is possible, so that it may be intelligible to those skilled in that branch of the art to which the invention relates. Has Prentice failed to comply with these requirements? I do not think there is any indication of bad faith, misrepresentation, misdescription, misdirection or ambiguity in the specification of Prentice. In his specification he first describes generally his alleged invention. He says the helical springs may be cylindrical in form in which case each convolution is round, but coiled in different directions, or it may be otherwise shaped in order to best meet the requirements to which the fastener is to be put. In some cases he says it may be desirable to flatten the spring coils after winding, thus decreasing the thickness of the fastener in a front and rear direction, and producing elongated convolutions as shown in figs. 6 to 8 inclusive. He also says that the convolutions of one or both springs whether flattened or not, may be bent or otherwise shaped, so as to enable them the more positively to interlock with one another. In the embodiment of the invention as shown in figs. 6 to 8, he sets forth that the springs are flattened so that their individual convolutions are of generally oval or egg shape in contour with their longer axes, lying substantially in the plane of the strip of material to which they are fastened. He goes on to say that preferably the outwardly projecting smaller or more pointed ends (33 fig. 8) of the convolution of one spring, are opposed to the outwardly projecting larger ends (34) of the other; that the projecting smaller end, of each convolution of the first spring, is bent out of the general plane of the convolution so that when engaged between adjacent convolutions of

the opposite spring, these bent ends tend to hook over the latter convolutions, thus enhancing the interlocking effect of the convolutions. In this preferred arrangement he explains that the springs are so bent or swayed that the pitch or change in elevation from one convolution to the next of each spring is confined mainly to those parts of the convolutions which engage the strips of webbing, so that the sides of each loop which projects out beyond the edge of the strip of webbing, lie in a level plane substantially perpendicular to such edges. The springs he says, may be made of wire approximately .029 inch in diameter and wound upon a one-eighth inch mandrel to form the open helics, and he further states the wire should be stiff enough effectually to prevent distortion in use, and should be resistant to erosion, and he indicates that a nickel-silver wire is well adapted for the purpose. He suggests the most convenient means of applying the fasteners or springs to the opposed edges of the two strips of fabric, such as braid or tape, which may be attached to the opening of the garment, shoe, etc. He explains the operation of the slider but this need not be mentioned as this element of the improvement was not attacked for insufficiency of description in the specification. All this appears to me as a fairly clear and complete description of the invention itself, and should I think, afford a fairly clear picture of the invention, its method of operation, and the manner in which it is to be applied.

But it is claimed, Prentice did not tell us how to make his invention, he did not tell us what tools to employ in elongating or flattening the spring coils, how to give the hook or bent turn to the edges of one of the coils, or what space should intervene between the convolutions of the coils. All this constitutes the alleged insufficiency of description or information in the specification, and the defendant in support of this alleges that it required about two months for skilled workmen of the Mishawaka Rubber and Woollen Co., of the State of Indiana, U.S.A., to make Prentice. It was this company which made and sold the infringing fastener to the defendant.

The plaintiff's position on this aspect of the case is, that his description of the invention is so complete and clear,

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that any person skilled in the art to which this invention relates, should be able to make the invention in all its forms without any serious difficulty. The means of constructing the invention as embodied in figs. 1, 2, and 3, that is the plain helical spring, is I think made sufficiently clear in the specification. I do not think it was necessary to state the space intervening between the convolutions, because obviously it had to be not less than the diameter of the wire. That I think is to be inferred. With many variations in the intervening space between the convolutions, the device might successfully operate. The inventor says that even now, with his experience in manufacturing it since the date of his invention, he could not fix any precise space, that should in practise be followed between the convolutions, and that with slight variations in the spacing the device will work satisfactorily. There must of course be the same number of convolutions in each spring. I do not see that more could be said in the specification. The size and character of the wire is suggested and also the form of winding; that is all I think the inventor could say at the time of his application. But the defendant says, that in deforming one of the coils as already mentioned, so as to more effectually ensure the interlocking of the complementary members, the specification is silent as to how this is to be best done, or how the inventor would do it when he patented his invention, and it is said that Prentice does not state what tools should be used in flattening a coil or in bending the end of the coil. This silence it is claimed voids the patent. But has not Prentice complied with the statute in setting forth clearly the method of constructing his manufacture? I think this has been done quite fully and clearly. He has stated the method of constructing his invention by describing it and from his description its essential qualities are discernable and a complete knowledge of the manufacture is afforded. He has not stated what tools or machines should be used in constructing his fastener, particularly in connection with the flattening and bending of the coil. He says any one skilled in the art to which this device appertains would know that a die should be used to perform this particular work. No independent evidence was given on behalf of the plaintiff that his device

could be made from his specification in a workable form by any one skilled in this particular art, and perhaps this should have been done. But the plaintiff's contention that any skilled person could produce the invention from the specification and drawings, is I think, sustained by the fact that Mr. DeGroot with little help, made what I think is Prentice within two months, and that with only intermittent work upon it. DeGroot was not particularly experienced in this kind of work, but still he succeeded in making Prentice. I do not think that an inventor of a manufacture is required to state what particular tools or machines should be used in constructing the invention. He must describe it and also its form of construction but it is a mechanic's job to do the rest if it can be done, and if it cannot be done there is no invention. A person might I think make a real invention and still be unable to state by what mechanical means the invention itself should or could be constructed. The same would be true of any process patent. In the case of a manufacture, when it can be fully described and explained so as to distinguish it from all other inventions, nothing more is necessary. Where this is impossible, the process by which the manufacture is produced may be particularly delineated and the manufacture described as the result of that peculiar process. If an inventor specified certain tools or machines wherewith to make an invention, and they proved impracticable, his invention might possibly be held void on that ground. Conceivably there may be some classes of invention where the inventor might be required to go quite a distance in this direction, but in a case of this kind, I have not been satisfied that Prentice should lose his invention because he did not state with what tools or machines his coiled springs should be deformed or manipulated so as to enhance the interlocking effect. I know of no authority supporting such a proposition. In actual practice it is not customary for inventors to enter into such details in their specifications. In these days, skilled engineers and mechanics are usually available to construct anything a designer or inventor can outline or describe. In any event the employees of the company manufacturing the infringing fastener made Prentice, and I think remarkably well, and without

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any unreasonable amount of experimental work. I am inclined to the belief that no serious difficulty would be encountered in constructing Prentice by any person skilled in the art to which that invention relates, and I am confirmed in this belief by the success attending the efforts of DeGroote and his assistants.

It is to be inferred from what I have already said that there has been infringement of Prentice by the defendant. There is not I think any real distinction between Prentice and the defendant's fastener and the latter is in substance identical with Prentice. The elements in the defendant's fastener are the same as in Prentice. One of the coils in the defendant's fastener is what is called a corrugated coiled spring, the corrugations functioning in the same way as the bent end of the coil in Prentice to enhance the interlocking. All the corrugations appearing on the defendant's coil do not I think function to enhance the interlocking effect, only a portion of them do so. I am of the opinion that there is no such degree of novelty in the corrugated coiled spring as used by the defendant, as to warrant the conclusion that the device used by the defendant is a new means of producing the results obtainable from Prentice.

I therefore find that there has been infringement, and that the plaintiff is entitled to the relief claimed together with his costs of action.

*Judgment accordingly.*

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THE PROCTOR &amp; GAMBLE COMPANY,

PLAINTIFF AND PETITIONER;

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AND

PUGSLEY, DINGMAN AND COMPANY, LIMITED,

DEFENDANT AND OBJECTING PARTY.

*Trade-Mark—Use—Registration—Rights conferred by registration—  
Rectification of register.*

Plaintiff was the owner of a trade-mark *Camay* registered in the United States, for use in connection with the sale of toilet and bath soaps. Upon their applying for registration of the said mark in Canada the same was refused because of defendant's registration of the word *Cameo*. Though this mark was registered for use in connection with the sale of soap generally, it, in fact, was only applied to and used in connection with the sale of laundry soap. The application for registration stated that such mark was to be applied to "a certain soap." The present proceedings were to expunge defendant's mark or vary it by limiting it to laundry soap only, and for permission to register the word *Camay*.

*Held* that, on the facts, the defendant's registration and use of the mark *Cameo* should be limited to the sale of laundry soap alone; that said registration be varied accordingly; and that the plaintiff be permitted to register the mark *Camay* to be used in connection with the sale of toilet and bath soaps.

2. The Trade-Mark and Design Act was not intended to give new rights, but to place restrictions on the bringing of actions for infringement of trade-marks, and to facilitate evidence of title to the same by means of registration. The proprietor of a mark is not bound to register and does not lose his mark by failure to do so.

ACTIONS to expunge or vary the trade-mark *Cameo* of the defendant and to have the trade-mark *Camay* of the petitioner registered.

The actions were heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

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

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

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (August 21, 1928), delivered judgment.

These two proceedings were, by agreement, heard together. The former is an action to expunge the registration of the trade-mark "Cameo Soap" registered in the

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name of the defendant company, or in the alternative, to vary it; the latter is a Petition of The Proctor & Gamble Company, the plaintiff in the first proceeding, for an order for the registration of the word "Camay" as a specific trade-mark, the application of the petitioner to register the same having been refused by the Commissioner of Patents.

I shall first consider the action to expunge the registered trade-mark of the defendant. On December 7, 1900, the Imperial Soap Company Limited, a corporation then carrying on business in the city of Toronto, registered in Canada a specific trade-mark, consisting of a square panel on which was engraved the words "Cameo Soap;" the mark had been previously acquired from the Grocers Good Manufacturing Company. In the application for registration it was stated that the mark was to be applied to the sale of a "certain soap," but there was no further description of that "certain soap." The certificate of registration stated that the registered mark was to be applied to the sale of "soap." The Imperial Soap Company commenced to apply this mark to a yellow laundry soap, which it manufactured and sold in Canada. In 1902 this company having ceased to do business assigned the mark to the defendant company, and the defendant company continued to use the mark exclusively in connection with the sale of the same brand of soap as did its predecessor. The registered specific trade-mark "CAMEO SOAP" expired on December 7, 1925, but on December 21 of the same year, the defendant company applied for the registration of the same words, as a specific trade-mark, to be used in connection with the sale of soap. The application stated that the defendant company believed the mark to be theirs on account of their having been the first to make use of the same. A certificate of registration issued on January 10, 1926. During the currency of the mark registered by the Imperial Soap Company Limited and until its expiration on December 7, 1925, the defendant company not only manufactured and sold a yellow bar laundry soap to which on one side of the bar they applied the word mark "CAMEO", but during the same period the defendant also continued to apply on the reverse side of the bar of soap the words "Imperial Soap Company Ltd," these latter



words the defendant continued to use on this particular brand of soap even after the registration applied for by it on December 21, 1925.

In August, 1926, the plaintiff company registered in the United States the word "CAMAY" as a trade-mark to be used in connection with the sale of toilet and bath soap. It immediately embarked upon an extensive advertising campaign in the United States, and it is claimed, that some advertising appearing there in printed publications also circulated in Canada. In May, 1927, the plaintiff made application in Canada to register the word "Camay" as a specific trade-mark to be used in connection with the sale of toilet and bath soaps. The application was to register the word "Camay" only, and nothing else. The application of the plaintiff company was refused by the Commissioner of Patents, on the ground that the word "Cameo" had been registered for soap since December 7, 1900, and was at present standing in the name of the defendant company, it having been renewed, it was said, in a communication to the solicitors of the applicant. The Commissioner apparently regarded the mark applied for by the defendant on December 21, 1925, as a renewal of the mark that expired on December 7, 1925. The Commissioner evidently considered the mark "Camay" to be the same as Camée, or at least sufficiently alike as to cause confusion. The French word Camée is the equivalent of the English word Cameo, and it is claimed that the word Camay is but the phonetic spelling of the French word.

In September or October, 1927, the defendant company commenced to manufacture a white toilet soap, of the same colour and shape as the plaintiff's "Camay" soap manufactured in the United States. It was in February, 1927, that the defendant company first considered the matter of manufacturing a toilet soap and using the word mark "Cameo" thereon. It is not clear when a definite decision was made to do this, but that is not important I think, as the vital point would be, when did it commence to use the mark in connection with the sale of toilet soap, and that was in September or October, 1927. It is quite clear that the defendant company knew of the plaintiff's Camay soap being placed on the United States market, and that an extensive advertising campaign was being carried on by

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the plaintiff to establish this particular soap in that market.

Another phase of the case as developed should be stated, though I do not think it is of importance. In 1921 The T. Eaton Drug Company of Toronto, began the sale of a toilet soap and in connection with which they used the word Cameo as a trade-mark, but this mark was not registered. The box and wrapper in which this soap was sold bore the words "Cameo Toilet Soap." In 1927, this company abandoned the use of this mark as applied to toilet soap, but later registered the word Cameo as a trade-mark to be applied to toilet articles "other than soap." It was not contested that this abandonment was made by the T. Eaton Drug Company, and this is to be inferred from the registration made by it, and just mentioned. The defendant company states that it was unaware of the use of the mark Cameo Toilet Soap, by the T. Eaton Drug Company. This mark is not now in use by this company in connection with the sale of soap, in fact as I say it has been definitely abandoned, so therefore I cannot regard this incident as of present importance or relevance.

It was contended by Mr. Biggar, K.C., for the plaintiff that the defendant's registration should be expunged, or at least varied, so as to make its use applicable only to laundry soap; alternatively he claimed that the word mark Camay as applied for registration by the plaintiff would not be in conflict with the defendant's mark if it remained on the registry, and that both marks might properly be registered. He also urged that the continued use of the words "Imperial Soap Co., Ltd." by the defendant upon the laundry soap manufactured by it for twenty years and more, destroyed the registered mark. This last point may be considered first.

The essential feature of a trade-mark is that the mark should guarantee a particular manufacture, and the question here arises, whose manufacture was guaranteed by the mark? The original purchaser doubtless would know from whom he was buying and whose manufacture he was purchasing, but the user possibly would think he was using the manufacture of the Imperial Soap Company. This point arose quite casually upon the trial, and was not a point made by Mr. Biggar, K.C., in opening his case. I have no doubt the use of the words in question was an oversight and

will now be discontinued, but in any event I do not think it is a ground for removing entirely the mark from the registry. It is conceivable that under a certain state of facts, the point taken might prove quite formidable, but not here. A person in some way aggrieved might well complain of this irregularity, but the plaintiff is not I think such a person. I know of no authority upon which to sustain the point, and none was pointed out to me.

Now as to Mr. Biggar's first point, that the defendant's registration should be varied so as to make it apply only to laundry soap. We have the fact that the Imperial Soap Company applied the mark only to a laundry soap, and no doubt its predecessor did although there is no evidence on the point. I have no doubt when the Imperial Soap Company applied for the registration of its mark to be applied to "a certain soap" they meant soap of a particular brand or grade, and that was a common laundry soap. Something was intended by way of limitation in using the words "a certain soap." With the clear indication that the applicant did not intend to use the mark in connection with the sale of soap generally, an amended application should have been demanded at the time by the Commissioner of Patents. However, while this company continued in business it applied the mark only to laundry soap. The defendant did the same during the currency of the Imperial Soap Company registration. But that registration expired on December 7, 1925, and was never renewed. It could not be renewed because no renewal application was made within the period required by the Trade-Mark and Design Act. The defendant however secured a fresh registration of the mark in January, 1926, and there was no reason why it should not register a mark of which it could be said, that the defendant was the owner. It is clear that the defendant applied for this registration practically as a renewal of the one that had expired, and it at that time had in mind its use only in connection with the sale of laundry soap. The fact that it continued the use of the words "Imperial Soap Company Limited," is a pretty clear indication that it intended the use of the mark for the same soap that its assignor did, and that was laundry soap. In February, 1927, for the first time the defendant company, by its officers, discussed the propriety of using the mark in connec-

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tion with a toilet soap. No effect can however be given to an indefinite intention to use a mark in the future, because it means nothing. The defendant only commenced to manufacture and sell toilet soap in September or October, 1927, and in this connection no previous date is of importance. When the plaintiff applied to register "Camay" for toilet and bath soap, on May 16, 1927, the defendant had not up to that date used its mark "Cameo Soap" on any soap excepting laundry soap. When it applied for registration of the same word mark on December 21, 1926, it was laundry soap it had in mind. It had no intention then to apply that mark to toilet soap though it was in fact selling toilet soaps under other names. The defendant therefore on May 16, 1927, had not the trade-mark Cameo in use for toilet or bath soaps. There can be no mark to register unless there has been one in use, or possibly, one that at the time of registration the applicant intended to use. So, on December 21, 1926, the defendant was not using the mark Cameo on anything but laundry soap, and it then had no intention of using it on any other kind of soap. Neither was the mark Cameo in use by the defendant on the date of the plaintiff's application on any soap, other than laundry soap. In this situation should the plaintiff have been refused registration of the mark Camay for toilet and bath soaps?

The Trade-Mark and Design Act was not intended to give new rights, but to place restrictions on the bringing of actions for infringement of trade-marks, and to facilitate evidence of title to trade-marks by means of registration. Essentially, the purpose of the Act was to provide a system of registration of trade-marks, but there must be a trade-mark before there can be a registration. The proprietor of a trade-mark is not bound to register and does not lose his mark by failure to register. I am not attempting in this case to go so far as to say that user is a prerequisite to registration, it is not necessary that I should. The Act contemplates a user of the trade-mark contemporaneously with, if not before registration. The defendant's mark is I think, what it would be had there been no registration at all. The means of enforcing its rights in the mark would be different. The Act could not have been intended to mean that one might register a specific trade-mark for

soap generally, and thus prevent another from registering the same mark for an absolutely different kind of soap, which the other did not at the time of registration sell nor intend to sell. It would seem strange that a registered specific trade-mark, covering a general and not a particular description of a class of merchandise, could be protected as to all articles within that class, no matter how diversified, and regardless of whether they were sold or not by the registrant. If so, then mere registration would seem to create a trade-mark, something I feel confident was never intended by the Act. That would seem to be contrary to the whole spirit of the Act. Clear of the question of the registration of a mark, in this case the defendant has only what he received from the Imperial Soap Company. The good will in a mark was assigned to the defendant and it can claim only what the assignor could claim. I am satisfied that all the Imperial Soap Company could claim or intended to claim was what I have already stated. Although the defendant made a fresh registration it is not on that account in a stronger position. It is in the same position exactly as if it had renewed the registration of the Imperial Soap Company before its expiration, or if there had never been a registration at all, which perhaps is the safest way of determining what is the scope of any trade-mark.

The defendant and its predecessors in title, the Imperial Soap Company and the Grocers Good Manufacturing Company so far as I know never used the mark for anything else than laundry soap. The defendant for many years, in its printed advertising matter, continuously used the mark to indicate to the trade as its manufacture a certain laundry soap. It produced, sold and advertised other laundry soaps, but to which it applied other word marks or trade names. It used other names for other soaps such as toilet soaps, whether they were registered trade-marks I know not and it is not of importance. When the defendant and its immediate predecessor, registered the mark "Cameo Soap" it was not believed contemplated to use the same in connection with the sale of any soap other than laundry soap. This I think can hardly be open to doubt and one must go back to the time of the registration to determine whether a trade-mark is properly on the register. The fact that both the Imperial Soap Company and the

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defendant company registered the words "Cameo Soap" and not merely "Cameo" rather indicates that each intended one particular manufacture of soap to be known as "Cameo Soap." The defendant had therefore a specific trade-mark in "Cameo Soap" when used in connection with the sale of a laundry soap. If the registration included more, it did so improperly, and it should have been limited to what the defendant and its predecessors had used it for, namely as a mark to indicate a particular manufacture of soap. It was urged that laundry soap may be used as a toilet soap, but that is true of many other articles of commerce, and it does not follow that such soap is not primarily a laundry soap. I am of the opinion that the plaintiff's contention should prevail and that the register should be rectified so that the defendant's registration of January, 1927, should be made applicable only to laundry soap. I would refer to the following authorities which are in some degree applicable here though they are of course decisions made under a different statute. *Edward v. Dennis* (1); *Hargreaves v. Freeman* (2); *In re Hart* (3); and *Anglo-Swiss Condensed Milk Co. v. Pearks Gunston & Tee Ltd.* (4); and *Re Batt & Co.* (5).

That point being disposed of, and the rectification of the register becoming effective as of January 10, 1926, is there any objection to the registration of the word "Camay," which the plaintiff applied to register on May 16, 1927. I think not. I cannot see that there can arise any confusion over the use of the words "Cameo Soap" as a trade-mark in connection with the sale of a laundry soap by one person, and the use of the word "Camay" as a trade-mark for toilet and bath soaps. It may well be, as contended by Mr. Biggar, K.C., that the two marks are in no sense calculated to deceive or mislead the public if each were put into use by rival traders as in this case, in connection with the sale of the same kind of soap. It is not now necessary for me to make any decision upon this point. However, if applied to different grades of soaps, intended for different purposes or uses, I do not think it can fairly be contended that the use

(1) (1885) 30 Ch. Div. 454.

(2) (1891) 8 R.P.C. 237.

(3) (1902) 19 R.P.C. 569.

(4) (1903) 20 R.P.C. 509; (1904)  
 21 R.P.C. 261.

(5) (1898) 2 Ch. Div. 432.

of both marks is calculated to mislead the public. I think therefore the petitioner in the second proceeding should be granted registration and I so order.

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The plaintiff and the petitioner will have in each case its costs to be taxed.

*Judgment accordingly.*

THE FRASER VALLEY MILK PRODUCERS ASSOCIATION .....

} APPELLANT;

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AND

THE MINISTER OF NATIONAL REVENUE .....

} RESPONDENT.

*Revenue—Income War Tax Act, 1917—Co-operative societies—English Act—1 Geo. V, c. 2 (B.C.).*

*Held* that the appellant, a co-operative society incorporated under the provisions of 1 Geo. V, c. 2 (B.C.) must be considered as a commercial company, and that the dividends paid by it to its shareholders, as interest on capital, are profits and gains, liable to assessment as income, under the Income War Tax Act, 1917.

- 2. The contention that such a company acts as a factor, and that the dividends paid by it to its shareholders are disbursements on capital in the hands of the company as trust moneys, cannot be sustained.
- 3. The specific legislation existing in England in respect to co-operative societies referred to and commented upon.

APPEAL by the appellant from the decision of the Minister, assessing them for tax on income under the Income War Tax Act, 1917.

This appeal was heard before the Honourable Mr. Justice Audette, at Ottawa, on June 28, 1928.

*Lewis Duncan* for appellant.

*C. F. Elliott* and *W. S. Fisher* for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now, this 6th October, 1928, delivered judgment.

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This is an appeal under the provisions of secs. 15 *et seq* of *The Income War Tax Act, 1917*, and amendments thereto, from the assessment for the appellant company's fiscal year ending 31st December, 1923.

The appellant company (hereinafter named the company) was incorporated on the 18th June, 1913, under the provisions of (1911) 1 Geo. V, ch. 2, B.C.) the "Agricultural Association Act, 1911," and more especially under Part II of that Act which deals with "*Association with share capital.*"

The company has a duly paid up capital (sec. 39) for which it issues shares (secs. 39 and 40) in the form of exhibit No. 1, the shareholder's liability being limited to the amount of his shares. Provision is made, by sec. 43, securing to all producers, who are members of the company, *a share in the profits* in proportion to the value of the product supplied by them, after *payment of a dividend upon the capital stock* now not exceeding 8 per cent per annum.

The company, after being duly constituted, is supposed to deal exclusively with producers who are shareholders (with a few exceptions mentioned at trial) and enters into a contract with them in the form of Exhibit No. 2, whereby it is, among other things, provided, viz:—

(c) For the purpose of paying a cash dividend on the paid-up shares in the capital stock of the Association at such rate as may be fixed by the said Association in annual general meeting, such dividend not to exceed 8% per annum.

Moreover, the contract (exhibit No. 2) further provides that:—

(e) Any balance remaining over shall be disposed of in such manner as shall be decided by the members of the Association in Annual General Meeting, and the Producer hereby agrees to be bound by the decision of such meeting, whether he be present or not.

The dividend in question was part of the auditor's report which was approved of at a general meeting, as testified to by witness Hillar.

In other words the profits earned and on hand at the end of the year are distributed to the shareholders, members and shippers, both in the form of a dividend of 8 per cent and the balance on a percentage basis; that is the shareholder-shipper receives his portion in proportion to the



quantity of milk supplied, and not controlled by the shares, —according to his contract with the company—Exhibit No. 2.

The By-laws (Exhibit No. 3), speak of that dividend in Article IV as interest, but Article 34 as dividend. The statute, which is paramount, calls it dividend.

The company has a capital, like other companies; it owns real estate and pays an annual dividend on the capital, which however, the appellant calls a disbursement on the capital in the hands of the company as trust moneys,—the company acting as a factor. With this contention I am unable to agree.

The company is but a combination of a number of persons organized for the purpose of carrying on a business with a view to the economic distribution of milk, and with the object of saving for the benefit of shareholders, the whole body of producers, that which otherwise would become the profits of the individual. The object of the company is to realize profits and to distribute them to its shareholders in the same manner as any other company. It is a very commendable action for the producers of milk to combine and form an association, a company, with the object of reducing the cost of collection and distribution, thereby realizing better and larger profits or dividends; but that does not entitle such company or association to discriminate as against the public, the taxpayers, and place it in a position whereby it would become exempt from paying the income tax. The company has been able by combination to secure an advantage measured in money which it could not have enjoyed but for such combination.

The company is, under the Act, a person liable to pay income (secs. 1 and 3) and it does not come within any of the exemptions mentioned in sec. 5 of the said Act.

The dividend paid, notwithstanding any ingenious or plausible argument to the contrary, is a dividend upon the capital of the company, and the appellant cannot and should not be treated in any other manner than any other company doing a similar business and yet paying the income tax as required by law.

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In the case of *The Commissioners of Inland Revenue v. The Sparkford Vale Co-operative Society Limited* (1), a case dealing with a co-operative society dealing in milk, it was clearly held that the company's profits arose from selling to the public and not from buying from its members, and that it was accordingly not entitled to the exemption from the tax.

In the case of *Liverpool Corn Trade Association Limited v. Monks* (2) it was held that any profits arising from the association's transactions with members were assessable to Income Tax as part of the profits of its business. See also *The Commissioners of Inland Revenue v. The Cornish Mutual Assurance Co.* (3); See *Mersey Docks and Harbour Board v. Lucas* (4); *Nizam's Guaranteed State Ry. Co. v. Wyatt* (5); *Last v. London Assurance Corporation* (6); *Equitable Life Assurance Society of U.S. v. Bishop* (7).

There is specific legislation in England with respect to co-operative societies,—or a society registered under the Industrial and Provident Societies Act, 1893; but the Canadian Income Tax Act is silent in that respect and a co-operative company is not distinguished from any other company and is therefore liable to taxation. Dowell's Income Tax Laws—9th ed., 90; 15-16 Vict., ch. 31 Imp. (1852) sec. 8; 56 and 57 Vict., ch. 39 (1893) Imp., sec. 24, etc. . . . This Imperial legislation by way of exemption, as is well known, has roused quite an amount of feeling in England on the part of the ordinary traders whose idea is that such companies enjoy an unfair advantage over them.

The company must be considered as a commercial company, notwithstanding contention to the contrary, and its dividends must be treated as profits and gains which become liable to assessment as income. The goods handled by the company are sold to the public and paid for by the public. It is true that most of the goods were obtained by the company from its shareholders, but that does not alter matters. *Liverpool Corn Trader Association v. Monk* (*ubi supra*).

(1) (1925) 12 Tax Cases 891.

(2) (1926) 10 Tax Cases 442.

(3) (1926) 12 Tax Cases 841.

(4) (1883) 2 Tax Cases 25, at p. 29.

(5) (1890) 2 Tax Cases 584.

(6) (1884) 2 Tax Cases 100.

(7) 4 (1889) Tax Cases 147; (1900) 1 Q.B. 177.

The dividends were paid by the company from the profits or gain resulting from their business as representing a percentage on the capital invested by the shareholders. The sums acquired by the company and distributed as dividend, or otherwise dealt with, are in their nature indistinguishable from the profits and gains of ordinary traders and are therefore a fit subject for taxation. The company is an independent entity in itself and has realized excess profits over expenditures which are identical with all other traders' profits. The profit distributed is the difference between the cost of production and the price realized.

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Therefore, in view of the considerations to which I have just adverted, I find that, in Canada, under the Income War Tax Act, 1917, the appellant, a co-operative company, is not exempt from the liability of paying income tax.

The appeal is dismissed with costs.

*Judgment accordingly.*

HIS MAJESTY THE KING.....PLAINTIFF;  
 AND  
 SARNIA BREWING COMPANY, LTD.....DEFENDANT.

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 June 27.  
 Oct. 8.

*Revenue—Special War Revenue Act, 1915—Excise Tax—Exportation—Proviso—Sec. 19B—Onus of Proof.*

*Held*, that he who claims the benefit of an exemption in a taxing statute, must plead the exemption and must establish the facts which take his case out of the operation of a general rule, and where, as in this case, a person claims to be exempt from the excise tax, under the proviso to 19B, of the Special War Revenue Act, 1915, "that such excise tax shall not be payable when such goods are manufactured for export, under regulations prescribed by the Minister of Customs and Excise" the *onus* is upon him to prove that the goods in question were actually exported. (*The King v. Gooderham & Worts Ltd.* (1928) 3 D.L.R. 109 referred to.)

INFORMATION by the Crown to recover certain Excise Taxes from the defendant.

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

*Hon. N. W. Rowell, K.C.*, and *Gordon Lindsay* for plaintiff.

*A. G. Slaght, K.C.*, and *H. E. Fuller* for defendant.

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The facts of the case are stated in the reasons for judgment.

THE PRESIDENT, now, this 8th October, 1928, delivered judgment.

At all times material here the defendant was licensed to carry on the trade or business of a brewer in Canada, and as such manufactured and sold beer.

Under section 19B subsection (b), of the Special War Revenue Act, 1915, and amendments thereto, there is leviable an excise tax of twelve and a half cents per gallon, in respect of beer manufactured and sold in Canada, the tax being payable at the end of the month next succeeding the month in which the sale took place. There is a proviso to section 19B, near the end of the section and following two subsections, to the effect that no gallonage tax is payable when such goods are manufactured for export, under regulations prescribed by the Minister of Customs and Excise.

Under section 19BBB of the Special War Revenue Act, 1915, and amendments thereto, there is imposed in addition to any other tax, a consumption or sales tax of five per cent on the sale price of all beer manufactured in Canada; this tax is payable by the producer or manufacturer at the time of the sale. There is also a proviso to this section to the effect that

the consumption or sales tax specified in this section shall not be payable on goods exported.

The statute provides for the keeping of records and books by all licensed manufacturers, which are to be open for inspection by persons authorized by the Minister. The regulations under the Act, require that each licensee keep adequate books and accounts "for the purposes of this Act" and that such books and accounts shall show the details of every transaction of the licensee, and shall be preserved by him and available for inspection for a period of two years. An inspection of the defendant's books was made by a firm of accountants, Messrs. Clarkson, Gordon & Co., which inspection was authorized by the Minister for the purpose of ascertaining the amount of excise tax and sales tax, if any, payable by the defendant. At the trial, a written statement prepared by this firm of accountants from the books and records of the defendant, was put in evidence showing the number of gallons of beer manu-

factured and sold each month within a stated period by the defendant, together with the amount of excise and sales tax payable thereon under the provisions of the statute already mentioned. It is agreed by counsel that the evidence given by Mr. Troop of the firm of accountants mentioned, on behalf of the plaintiff, in proof of and in connection with the written statement prepared from the books of the defendant, shall have the same force and effect as if the books and documents from which Mr. Troop had compiled the same, had been produced and proven in Court and had Mr. Troop given his evidence directly therefrom. This evidence establishes that there was manufactured and sold by the defendant beer in quantities and at the sale prices claimed by the plaintiff, and within the period pleaded.

As to the taxing and exempting provisions of the Special War Revenue Act here applicable, the intention of the legislature is clearly expressed, and with one exception such provisions are not subject to doubt. It cannot be contended that beer manufactured and sold within the country is not taxable. The proviso to 19B however presents some difficulties as to construction.

The exact words are:—

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

Mr. Rowell for the plaintiff urged that unless the beer was manufactured for export, and within prescribed regulations, no exemption could be claimed, and as no regulations had in fact been enacted within the meaning of the section, there was no exemption from the tax provided by the tax enacting clause. In my view of the case, there being no export proven, it is not necessary to pronounce upon this point. I should doubt very much Mr. Rowell's construction of this clause, and without passing definitely upon it, it appears to me that this proviso can only be made operative and practical by reading the words "manufactured for export" as "manufactured and exported." It seems to me, that must have been the intention of the legislature otherwise in actual application it would be difficult to read sense into the proviso. Then again, no regulations in reference to the "manufacture" or "export" of beer at least, was necessary. The Excise Act, and the Customs

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Act, make ample provision for this by their enactments, and the regulations made thereunder, and I doubt very much if any construction could be placed upon the latter part of this proviso in respect of regulations, which would at all affect this case.

The real question for determination here is, upon whom lies the onus of establishing what, if any, of the goods in question, were sold for export and in fact exported, and therefore coming within the exemptions from taxation. The defendant has not pleaded the provisos, and has produced no evidence of any kind whatever in support of the fact that the goods in question were exported. The defendant in fact contends that it is not obliged, as a rule of law or evidence, to offer any evidence as to export, and that this burden rests entirely upon the plaintiff. I think it clear under the authorities that the defendant must bring itself within the language of the provisos. He who claims the benefit of an exemption in a taxing statute, must plead the exemption and establish the state of facts which take his case out of the operation of a general rule. Whether or not there was in this case any export of the goods upon which taxes are claimed, is evidence peculiarly within the knowledge of the defendant, and it should adduce the evidence necessary to bring itself within the exemption. That burden, in a case of this kind should not in justice be placed elsewhere, and I think that was within the contemplation of the statute itself. The intendment of the taxing clauses of the statute, seems clear, and the provisions of these clauses are complete in themselves; they are distinct and substantive.

Where the burden of proof rests in a case of this kind, was recently the subject of a very careful consideration by Grant J. in *The King v. Gooderham and Worts Ltd.* (1), wherein that learned judge reviews at length the principal authorities upon the point, and I need not I think engage in any discussion of the same authorities, or the principles there discussed. I agree with the conclusions of Grant J. upon the point. I might however cite the following authorities, which are not referred to I think in the judgment of that learned judge, but which are much to the same effect.

They are, *Steel v. Smith* (1); *Vavasour v. Omrod* (2); *Apothecaries Company v. Bentley* (3); *Rex v. Jarvis* (4); *Chitty Pleading* 7th Ed., p. 246-7 and *Dominion Press Ltd. v. The Minister of Customs* (5).

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I am of the opinion therefore that there must be judgment for the plaintiff for the several amounts claimed, with interest at the rate of five per cent per annum from the time when the taxes became due and payable to June 1, 1927, and thereafter at the rate of two-thirds of one per cent per month as provided by the Special War Revenue Act. The plaintiff will have his costs of action.

*Judgment accordingly.*

EXCHEQUER COURT OF CANADA

BETWEEN:—

THE MINISTER OF RAILWAYS AND  
CANALS FOR THE DOMINION OF  
CANADA ..... } PLAINTIFF;

v.

THE HEREFORD RAILWAY COMPANY. DEFENDANT.

IN RE

STEPHEN N. BOND AND JAMES  
MACKINNON, IN THEIR QUALITY OF  
TRUSTEES FOR THE BONDHOLDERS OF THE  
DEFENDANT COMPANY (CLAIMANT)... } RESPONDENT.

AND

THE MINISTER OF RAILWAYS AND  
CANALS (CONTESTING CLAIM)..... } APPELLANT.

*Railways—Incorporation under Special Act—Bondholders—Subsidies—  
Priority—Vested Rights—Railway Act, 1919—Retrospective  
Effect*

The railway company had been incorporated under the provisions of ch. 93 of the Dominion Acts of 1887. Under certain provisions of that Act the company was empowered to issue bonds secured by a mortgage deed upon the property, assets, rents and revenues of the com-

- (1) (1817) 1 B. & Ald. 94.
  - (2) (1827) 6 B. & C. 430.
  - (3) (1824) 1 Car. & P. 538.
  - (4) (1800) 1 East 643 (Note).
- (5) 1928 A.C. 340; 1927 S.C.R. 583.

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pany. These bonds were to be a "first preferential claim" upon the property of the company. Bonds were issued in the year 1890 and a mortgage deed was duly executed between the company and the trustees of the bondholders. Subsequently, subsidies were granted from time to time by the Dominion Government to the company. On the company failing to operate its road the Minister of Railways took the necessary steps under section 160 of the Railway Act of 1919 to create a first lien or mortgage upon the railway and its equipment in favour of the Crown for the amount of such subsidies, and for an order authorizing the sale of the railway. The railway was sold under order of Court, and the Minister of Railways claimed to be entitled to receive the purchase money paid for the railway on account of the subsidies that had been granted to the company. By section 3 of the Railway Act of 1919 it was provided that where any railway was incorporated under a special Act, and where the provisions of the Act of 1919 and of any such special Act related to the same subject matter, the provisions of the special Act should be taken to override the provisions of the Railway Act.

*Held*, that the lien conferred in favour of the Crown by section 160 of the Railway Act of 1919 could not be given priority over the claim of the bondholders, the same having become a vested right prior to the statute of 1919.

2. The general rule as to the retroactive effect of statutes affecting prior vested rights discussed.

An appeal from the report of the Registrar Acting as Referee.

The facts leading up to the reference are as follows: The defendant company was sold under a judgment of this court, rendered in an action brought by the Minister of Railways and Canals, under the provisions of sections 26 et seq. of the Exchequer Court Act. The proceeds of such sale were deposited in court, and creditors of the railway and claimants to such money or any part thereof, were notified through the newspapers to file their claims. In answer to said notice, a number of municipal and school corporations filed claims for taxes due, but the only two claims which were contested, and which it is necessary to refer to here are the claims of the Trustees of the bondholders under the Deed of Trust, and that of the Minister of Railways and Canals, to the whole amount paid into court. The nature and amount of these claims are fully explained in the Report of the Referee, the material parts of which are given below:—

THE REGISTRAR, under the order of reference, reported [February 28, 1928] as follows:—



“ PART III

“ DISPOSITION OF CONFLICTING CLAIMS OF THE MINISTER OF RAILWAYS AND CANALS, AND TRUSTEES FOR THE BONDHOLDERS TO THE MONEYS DEPOSITED IN COURT AS REPRESENTING THE PURCHASE MONEYS ON THE SALE OF THE RAILWAY.

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In this connection the Undersigned had to consider the following:—

CLAIMS

- A. The claim of the Trustees of the Bondholders of the Hereford Railway under the Trust Deed of October 24, A.D. 1890. The amount so claimed is the amount of the proceeds of sale, namely, \$46,378. (Reference Exhibit No. 14.)
- B. The claim of the Minister of Railways and Canals to the payment of the proceeds of sale of the Hereford Railway to the Canadian Pacific Railway Company, namely, the same amount as that claimed by the Trustees of the Bondholders in the above item \$46,378. (Reference Exhibit No. 15.)

CONTESTANTS

- C. A contestation of the claim of the Minister of Railways and Canals by the Trustees of the Bondholders. (Reference Exhibit No. 16.)
- D. A contestation by the Minister of Railways and Canals of the claim of the Trustees of the Bondholders. (Reference Exhibit No. 17.)

Substantially the only contention between the parties on the whole Reference was as to whether the proceeds of the sale of the railway to the Canadian Pacific Railway Company, amounting to the sum of Forty-six Thousand Three Hundred and Seventy-eight Dollars (\$46,378), should be directed to be paid to the Trustees of the Bondholders or should go to the Minister of Railways and Canals as representing the Crown in the right of the Dominion of Canada, after satisfying the claims for Working Expenditure.

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In order to have a clear understanding of the position of the parties on the Reference it is necessary to summarize the history of the Hereford Railway Company and its dealings with the Dominion Government, its bondholders, and the Maine Central Railroad Company.

The Hereford Branch Railway Company was incorporated under the provisions of Chapter 93 of the Dominion Acts of 1887. By an amending Dominion Act (being Chapter 81 of the Dominion Acts of 1888), the name of the Company was changed to "The Hereford Railway Company" (section 1). The road was constructed with the aid of Dominion and Provincial subsidies. Under the provisions of sections 11, 12, and 13 of The Incorporating Act of 1887 the Company was empowered to issue bonds secured by a mortgage deed upon the "property, assets, rent and revenues of the Company, present or future or both, as shall be described in the said deed." By the amending Act of 1888 above referred to, the amount of the bond issue was limited to Fifteen Thousand Dollars (\$15,000) per mile (section 8 of Chapter 81 of the Dominion Acts of 1888.)

Bonds to the amount of eight hundred thousand dollars (\$800,000) were issued by the Company bearing date the 1st day of October, A.D. 1889. These bonds were exchanged under the authority of the Dominion Acts, 53 Vict., Chapter 72, for an issue of bonds for the same amount bearing date the 1st day of May, A.D. 1890. The bonds issued on the 1st October, A.D. 1889, were duly cancelled, and the new issue delivered to the holders of the prior issue of bonds. These bonds by their express terms constituted a mortgage and privilege upon the property of the railway and its assets, rents and revenues; and contained a reference to the Dominion Acts, 50-51 Vict., Chapter 93 (1888) which ranked them as a first preferential claim upon the Company and its property, save as to the working expenses of the railway.

By the Dominion Act, 53 Vict., Chapter 73, the Company was empowered to lease its railway, franchises, etc., to the Maine Central Railroad Company, and a lease was passed between the parties on the 28th day of August, A.D. 1890, for the term of 999 years. (Exhibit A on the Reference.) By this lease the Maine Central Railroad Com-

pany undertook, *inter alia*, to guarantee and endorse the bonds issued by the Hereford Railway Company, and also to become bound by the provisions of a mortgage deed subsequently to be executed by the Hereford Railway Company and the Trustees of the Bondholders. Under this lease the Maine Central Railroad Company operated the railway until the 1st day of November, A.D. 1925.

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On the 24th day of October, A.D. 1890, the mortgage deed referred to was duly executed between the Hereford Railway Company and the Trustees of the Bondholders in notarial form (Exhibit A at the trial). By the terms of the Trust Deed the Maine Central Railroad Company was obliged to become the guarantor of the principal and interest of the bonds issued by the Hereford Railway Company and to endorse the said bonds. The Trust Deed recites on page 3 that the Maine Central Railroad Company "has been made subject to this mortgage deed and to the conditions thereof." The Trust Deed purports to 'mortgage and hypothecate' the railway, with its building plant and appurtenances and assets, to secure the payment of the said bonds, and the mortgage is made subject only in priority to the working expenses of the railway.

The lease of the railway to the Maine Central Railroad was cancelled by the parties thereto by indenture dated the 11th day of September, A.D. 1925. (Exhibit B on the Reference). No legislative authority was obtained by the parties to the lease for its cancellation, although as has been seen the Dominion Parliament authorized the lease to be made in the first instance. By the instrument cancelling the lease it is provided that such cancellation is subject "to whatever rights the bondholders of the Hereford Railway Company may have in virtue of said lease." It is also provided that "this indenture shall not be construed to enlarge, abridge, or affect the obligation of the said Maine Central Railroad Company as guarantor of the mortgage bonds of the said the Hereford Railway Company now outstanding." So that as a matter of fact the bondholders are in no way prejudiced by the cancellation of the lease. Their rights against the Maine Central Railroad Company as guarantor of the bonds, are not impaired. By the said indenture it was also provided that the Maine Central Railroad Company would "assume and pay the interest

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on the first mortgage bonds of the Hereford Railway Company at present outstanding as the same may become due." Such interest to be paid from the 1st day of November, A.D. 1925, until the maturity of the said bonds. By the cancellation of the lease also the Maine Central Railway Company undertook to buy all the shares of the capital stock of the Hereford Railway Company at Sixty Dollars (\$60) a share. Mr. Rugg stated, and his statement was not disputed by Mr. Lazure on behalf of the Crown, that the bonds are being retired by the Maine Central Railroad Company from time to time as they are presented through the banks. Mr. Rugg also stated that of the eight hundred thousand Dollars (\$800,000) of bonds issued there was only Twenty-five Thousand Dollars (\$25,000) represented originally in the books of the Company, and the whereabouts of the other Seven Hundred and Seventy-five Thousand Dollars (\$775,000) of bonds are not known. (See pp. 19 and 20 of the proceedings on the Reference.)

Some time after the cancellation of the lease, namely, on the 1st day of November, A.D. 1925, as mentioned above, the Maine Central Railroad Company abandoned the operation of the railway. In order that the operation of the railway should be continued, the Minister of Railways and Canals petitioned the Board of Railway Commissioners for an order directing the Hereford Railway Company to operate the railway with the necessary equipment. On the 1st day of April, A.D. 1926, an order of the Board of Railway Commissioners was issued and served upon the Hereford Railway Company. The railway company having failed to comply with the said order the Minister took the necessary steps under paragraph 2 of section 160 of the Railway Act to create a first lien or mortgage upon the railway and its equipment in favour of His Majesty for the amount of the subsidies granted from time to time by the Dominion Government to the Hereford Railway Company, and for an order authorizing the sale of the said railway. The amount of the Dominion subsidies totals One Hundred and Seventy Thousand Five Hundred and Sixty Dollars (\$170,560) according to the claim of the Minister of Railways and Canals filed before the Undersigned on the Reference as Exhibit 15. Thereafter proceedings were taken by the Minister of Railways

and Canals on behalf of His Majesty under the provisions of subsection 2 of section 160 of the Railways Act, 1919, to enforce the lien for the subsidies paid, in the Exchequer Court of Canada.

In his argument before the Undersigned in support of the claim of the Crown to receive the amount of the purchase money of the railway, paid into court by the Canadian Pacific Railway Company, Mr. Lazure contended that section 160 of the Railway Act, 1919, should be read as having a retrospective operation, so that it would give a remedy to the Crown in the case of these subsidies paid to the Hereford Railway Company although such subsidies were granted and paid to the Company before the Railway Act of 1919 came into operation. As a matter of fact the provisions of section 160 of the Railway Act of 1919 were first enacted in the year 1911. (See 1-2 Geo. V, Chapter 22, section 13.) But of course on that date also the Crown could not maintain its claim unless a retroactive effect was given to the statute of 1911.

Accepting it as an axiom of construction that statutes are not to be taken as having a retroactive operation unless express words are used for the purpose or unless there is an implication of retroactivity necessarily arising from the language used (Craies Statute Law, 3rd Ed., p. 329), and finding, as I do, that there are no such express words in the enactment, I am of the opinion that in such a case as the present there is no implication of retroactivity inhering in the language of section 160 of the Railway Act of 1919 (R.S.C., 1927, c. 170). By the provisions of that section where a railway company has been subsidized by the Dominion Government, and can be shown not to operate the railway safely or efficiently, the Minister of Railways and Canals may apply to the Board of Railway Commissioners for an order to put the railway or its equipment, or both, in a safe and efficient condition. If the Company fails to comply with an order of the Board obtained in pursuance of this section the Minister of Railways and Canals may, after certain formalities required by the Act have been satisfied, obtain 'a first lien or mortgage' upon the railway and its equipment for the amount of the subsidy granted by the Dominion Government, and such lien may be 'enforced by His Majesty in the same manner and by

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the like proceedings as any other lien upon property may be enforced by His Majesty in the Exchequer Court of Canada.'

Now the effect of the retrospective operation of this section, which counsel for the Minister asks the court to recognize, would be to displace a prior 'first preferential claim' upon the property of the railway which had been granted to the bondholders of the Company by the provisions of the 13th section of Chapter 93 of the Dominion Acts of 1887, that is to say, the Act incorporating the defendant railway company.

To give effect to the contention of the counsel for the Crown would simply amount to removing or taking away a vested right, and there is always a presumption against such being done where there are no express words to be found in the statute for the purpose. (See Craies 3rd Ed., pp. 109 and 112.)

It appears to the Undersigned that there is nothing in the language of section 160 of the Act of 1919 to justify the presumption that the Parliament of Canada intended to give the language used a retroactive effect. Whatever may be thought of the spirit of equity that infuses this legislation considered in relation to those who might have become the holders of the bonds of the Hereford Railway Company at a period subsequent to the year 1911, it is reasonably clear that no retroactive effect should be given to the legislation so as to deprive purchasers of bonds prior to 1911 of their vested right to preference under the Special Act of 1887 incorporating the Hereford Railway Company.

The rule against retroactivity by forced construction can hardly be better put than it was by Lord Selborne in the case of *Main v. Stark* (1).

Their Lordships of course do not say that there might not be something in the context of an Act of Parliament, or to be collected from its language which might give to words *prima facie* prospective a larger operation; but they ought not to receive a larger operation unless you find some reason for giving it. . . . That operation, would in the first place be contrary to general principles. Even if there were not on the face of the Act something affirming those principles, words not requiring a retrospective operation, so as to effect an existing status prejudicially, ought not to be so construed.

I repeat that I can find nothing in the language of section 160 upon which to successfully found the contention

(1) (1890) 15 A.C. 384, at p. 387 and 388.

that it should be given a retrospective operation so as to cut out the vested rights of the bondholders and previous legislation of the Dominion Parliament.

A construction of section 160 that would confine it in its operation to matters arising subsequent to it becoming law, receives much support from the further principle of statutory construction that all the parts or sections of a statute should be read together so that no part should be segregated from its context or any pertinent section of the statute be disregarded, in order to place a forced meaning on any particular provisions of the statute. This is the principle known as construction *ex visceribus actus*. In the *Lincoln College* case (1), Sir Edward Coke says:

The office of a good expositor of an Act of Parliament is to make construction on all the parts together, and not of one part only by itself. And in his Institutes, 1 Inst. 381 b. Coke says:

It is the most natural and genuine exposition of a statute to construe one part of a statute by another part of the same statute, for that best expresseth the meaning of the makers . . . and this exposition is *ex visceribus actus*.

Following the principle in the rule last mentioned and turning to section 3 of the Act of 1919 we find cogent reason for excluding any implication of retrospective operation of the provisions of section 160. Section 3 reads as follows:

3. Except as in this Act otherwise provided (a) this Act shall be construed as incorporate with the Special Act; and (b) where the provisions of this Act and of any Special Act passed by the Parliament of Canada relate to the same subject-matter the provisions of the Special Act, shall, in so far as is necessary to give effect to such special Act, be taken to override the provisions of this Act. R.S., c. 37, s. 3.

What could be more explicit of the intention of the Legislature to keep alive vested rights, such as those of the bondholders of the Hereford Railway Company, under section 12 of the Special Act of 1887, than the language used in section 3? In the first place Parliament declares that the General Act of 1919 shall be construed as "incorporate with the Special Act" and secondly, where the provisions of the General Act and of any Special Act "relate to the same subject-matter" the provisions of the Special Act in order to make it effective shall be taken to "over-ride the provisions" of the General Act. The subject-matter dealt with by the pertinent sections of the Special Act and the Railway Act of 1919 is undoubtedly one and the same, namely, priority of rank as a creditor or claimant.

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(1) (1595) 3 Co. Rep. at 59 b.

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Clearly there is no advantage to be gained by discussing further the doctrine of implied retroactivity or retrospective operation of section 160 as regards the year 1911 or the year 1919. Confining himself now to a consideration of the effect of the provisions of section 160 of the Railway Act of 1919 as to disposing of the amount of the purchase money paid into Court by the Canadian Pacific Railway Company, the Undersigned feels it desirable to quote the concluding portion of subsection 2 as follows:

The said court may order such railway and its equipment to be sold to satisfy such lien, and pending such lien may appoint a receiver to manage and operate such railway. Any moneys realized from such sale may, with the consent of the purchaser, be applied by the Minister under the direction of the Chief Engineer of Government Railways towards the repair and improvement of such railway and equipment so far as the same may be deemed necessary by the Minister, and any moneys so realized, and not in the opinion of the Minister required for such repairs and improvements, may be paid to the Company owning the railway at the time of the sale, or to the Trustee for the holders of any outstanding bonds or other securities secured by mortgage or otherwise upon such railway. 1911, c. 22, s. 13 Am.

It is not necessary to say anything about the appointment of a Receiver, because that was rendered unnecessary by the manner in which the proceedings have been conducted before the court, the parties having entirely concurred in the view that it was not necessary to appoint a Receiver.

Then there was no suggestion and no evidence offered to show that the Minister intended, with the consent of the purchaser, to apply the proceeds of the sale towards the repair and equipment of the railway; indeed by reason of the understanding between the Minister of Railways and Canals and the Canadian Pacific Railway Company, the purchaser of the railway in question, it has become unnecessary for the Minister to so apply the moneys realized from the sale. This is established by the terms of the tender for the purchase of the railway submitted by the Canadian Pacific Railway Company on the 2nd day of May, A.D. 1927, and appearing of record herein. By the terms of the tender the Canadian Pacific Railway Company stipulated that it should not be required to operate at any time those portions of the railway between Cookshire and Lime Ridge and between Malvina and the international boundary, but should be at liberty to take up the rails and fastenings of the said portions of the railway and dispose of the same, or any part thereof, as to it may seem



fit. Then it was further stipulated in the Tender that the Canadian Pacific Railway Company would, within three months from the completion of the purchase, commence the operation of the portion of the railway between Cook-shire Malvina with at least three mixed trains a week each way, subject to the law governing railways and subject to the jurisdiction of the Parliament of Canada. Furthermore the said terms of the Tender are embodied in the Deed of Sale to the Canadian Pacific Railway Company executed by the Registrar of this Honourable Court on the 6th day of August, A.D. 1927. A duly authenticated copy of such Deed now remains on the files of this court.

By the arrangement so appearing in the Tender of the Canadian Pacific Railway Company and embodied in the Deed of Sale, the Minister is relieved of the necessity of applying the purchase moneys towards the repair and improvement of the railway and its equipment as mentioned in subsection 2 of section 160 of the Railway Act of 1919. That being so, the Minister is also relieved of paying the money "to the Company owning the railway at the time of the sale, as provided in the said subsection 2." So that in the last analysis it must be found that the duty cast upon the Minister in the circumstances of this case by the provisions of the said subsection is to pay the said purchase moneys "to the Trustee for the holders of any outstanding bonds or other securities secured by mortgage or otherwise upon such railway."

THEREFORE the Undersigned, for the reasons above stated, is of opinion that the claimant, the Minister of Railways and Canals has failed to establish his claim to the proceeds of the sale of the Hereford Railway, and that such claim should stand dismissed, and the claim of the Trustees of the Bondholders to such proceeds allowed, and the balance thereof remaining after the payment of the other claims set out in Part IV of this Report be paid over to the said Trustees upon the production by them of bonds in equal amount to the balance of the moneys so remaining in court."

A consent was filed to the payment out of those claims which were not contested, and the Minister of Railways and Canals appealed from this report by way of motion to vary the same in conformity with his claim as filed, and the Trustees moved to affirm the Report, and for a judg-

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ment that the balance of the money in Court be paid them, for the bondholders. These two motions were heard before the Honourable Mr. Justice Audette at Ottawa, on the 20th April, 1923.

*Mr. Wilfrid Lazure, K.C.*, for plaintiff.

*Mr. Rugg, K.C.*, for Trustees for the bondholders.

AUDETTE J., now (October 18, 1928), delivered judgment.

This matter comes now before this court, upon a motion on behalf of the trustees for the bondholders to confirm the Referee's Report, and upon a motion by way of appeal by the plaintiff from the said Report in respect of the collocation of the moneys to the bondholders.

By an Order of this court of the 30th December, 1927, the matter of the disposition of the proceeds realized from the sale by the defendant's railway was referred to the Registrar of this Court for inquiry and report, and more especially, 1. to investigate, inquire and report upon all claims herein to the proceeds of the sale of the railway; to hear evidence in respect thereof and any contestation of such claim.

2. And to determine the respective ranks and privileges of the creditors. The Referee filed his report on the 28th February, 1928.

There seemed to be no reason in this case that the moneys should go back to the Crown to be paid to the purchasers of the railway for the repairs and improvement of the same. There is no occasion to pay back to the purchasers, the Canadian Pacific Railway Company, any part of their purchase money, as so prosperous and efficient a corporation is obviously in a position to satisfactorily operate the railway and to improve it when occasion arises, as undertaken by them by the conditions and terms of sale. The moneys should go to the bondholders.

I have heard both parties on the issue in question upon their argument submitted in writing, and after due deliberation I have come to the conclusion to grant with costs the bondholders' motion for judgment pursuant to the Report, and to dismiss with costs the plaintiff's motion by way of appeal, and to order and adjudge that all moneys be paid to the claimants accordingly.

*Judgment accordingly.*

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**INCOME WAR TAX ACT, 1917**

See REVENUE NOS. 1, 3, 5 AND 9.

**INDUSTRIAL DESIGNS**

See TRADE MARKS.

**INFORMATION**

See PRACTICE No. 1.

**IN REM**

Actions. See SHIPPING AND SEAMEN No. 3

**INSURANCE ACT** — *Superintendent of Insurance — Jurisdiction.* The Policyholders of the appellant are divided into two classes, participating and non-participating, the former constituting about 90 per cent of the whole. This class is represented on the Board of Directors by four of the policy-holders, who meet with the shareholders' directors and have a vote on all business matters. At a meeting of the Board of Directors so constituted a sum of \$25,000 was recommended and voted to the Banting Research Foundation, which action of the Directors was approved of at an annual meeting of the company. In the annual statement of the company to the Minister of Finance this amount was charged as a matter of general expenditure under the head of public health and welfare. Under section 73, ss. 2, of the Insurance Act, the Superintendent of Insurance, of his own motion, amended this statement, making this amount a charge against the shareholders' surplus account alone. It was contended that he had no power to act as he did; that the contribution was not in conflict with the objects and powers of the company and was advantageous to the company's business.—*Held*, that the act of the superintendent aforesaid was *ultra vires* of the powers conferred upon him by the Insurance Act. **SUN LIFE ASSURANCE COMPANY OF CANADA v. SUPERINTENDENT OF INSURANCE**..... 1

**INSURANCE**

See INSURANCE ACT No. 1.

**INTERPRETATION OF STATUTES**

See REVENUE No. 1, 10.

See SHIPPING AND SEAMEN No. 3.

**INVENTION**

See PATENTS FOR INVENTION NOS. 1, 2, 3 AND 5.

**JURISDICTION**

of *Superintendent of Insurance.* See INSURANCE ACT.

See also PRACTICE No. 1.

See SHIPPING AND SEAMEN No. 5.

**LIEN**

For *Subsidies.* See RAILWAYS.  
Priority. See RAILWAYS.

**LIMITATION OF ACTIONS**

See SHIPPING AND SEAMEN No. 3.

**LIQUIDATION**

See REVENUE No. 4.

**MARITIME CONVENTIONS ACT, 1914**

See SHIPPING AND SEAMEN NOS. 3 AND 5.

**MARITIME LIEN**

See SHIPPING AND SEAMEN No. 7.

**NAVIGATING WITH CAUTION**

See SHIPPING AND SEAMEN No. 8.

**NAVIGATION**

See SHIPPING AND SEAMEN.

**NEGLIGENCE**

See SHIPPING AND SEAMEN NOS. 1 AND 2.

**NOVELTY**

See PATENTS FOR INVENTION No. 2.

**PATENTS FOR INVENTION**

Anticipation. No. 4.

Commercial Success. Nos. 1, 5.

Description. No. 4.

Impeachment. No. 5.

Importation. No. 5.

Improvement. Nos. 1 and 2.

Invention. Nos. 1, 2, 3 and 5.

Novelty. No. 2.

Practical and Beneficial Results. No. 5.

Prior Art. Nos. 1 and 3.

Specification. No. 4.

Utility. No. 4.

—*Invention — Prior art — Commercial success—Improvement.*] The patent in suit, dated the 16th December, 1924, was for golfing tees. One of these tees comprised a shank having a pointed end, and a disked or concaved ball-supporting member connected with and carried by the shank, and the other consisted of a cone shaped shank with a disk shaped member at the top to support the ball. The structure and function of the golfing tee was well defined and known in the prior art.—*Held*, that, where the patented device embodies most of the features, functions and contrivances of the prior art, the mere difference in some small structural details, does not constitute invention.—2. The fact that a device was somewhat of an improvement on the prior art and had resulted in commercial success, only afforded a presumption of its usefulness, and was not conclusive that such improvement constituted invention. **NIEBLO MANUFACTURING Co. INC. v. DAVID J. REID et al.**..... 13

2 — *Novelty — Invention — Improvement.*] The patent in suit relates to a barking drum used in the making of pulp, and for improvements thereto. The drum is a rotatable, cylindrical drum, the interior wall of which is formed by bars extending longitudinally, the central portion of such bar being rounded or made substantially into a U-shape,

## PATENTS FOR INVENTION

—Continued

projecting inwardly, the marginal edges of the bars on either side constituting a base or flange through which the bars are fastened to the hoops around the exterior of the drum. Between the bars are spaces through which the bark falls. The general construction of the barking drums known to the prior art was of the same general character as that of the plaintiffs. Plaintiffs claimed that their improvements consisted in rounding the angle bars into U-shape, forming pockets between them, which improved and assisted in the tumbling of the wood in the drum and was more expeditious in action. The only difference between the prior art and the patent consisted in this U-shaped alleged improvement, the drums previous to the plaintiffs having a flat smooth surfaced bar.—*Held*, that to produce a rounded surface on the bars forming the interior walls of the drum did not denote invention; that such an alleged improvement is a matter for a mechanic or engineer to work out, and did not require inventive genius.—2. That merely to carry forward an idea disclosed in the prior art, by making a change in form, but doing the same thing in the same way, by substantially the same means, even if with better results, does not constitute invention. [*Railroad Supply Company v. The Elyria Iron and Steel Company*, (1917) Patent Off. Gaz. (U.S.) vol. 239, p. 656, referred to and followed.]

GORGICA GUETTLER *et al.* v. CANADIAN INTERNATIONAL PAPER Co. *et al.* . . . . . 21

3 — *Invention — Prior Art.*] The patent in suit was for a channel rubber runway for slidable windows in automobiles. In respect to sliding windows, the channel, either of metal or rubber, with a fabric lining the groove and upper edges, which contact with the glass was known in the prior art. The "only idea claimed (as invention) was the extension of the fabric down the sides" to the bottom. A patent had previously been granted to one Matthews, for a channel, in which the fabric was carried completely around, but which was intended to be used for stationary windows.—*Held*, that the idea of extending the fabric around the channel, was one which might well have occurred to an ordinary intelligent person, or any person skilled in the art, without any exercise of that inventive faculty which was essential to a valid patent, and that the present patent did not denote invention. DETROIT RUBBER PRODUCTS, INC., v. REPUBLIC RUBBER COMPANY 29

4 — *Commercial success — Utility — Description — Specification — Anticipation.*] The patent in question is for an improvement in interlocking fastener construction, consisting essentially of

## PATENTS FOR INVENTION

—Continued

two helically wound springs, whose convolutions constitute the fastening elements, together with an actuating slider, an important feature of the alleged invention consisting in the fact that instead of making the locking members in separate and individual units, each secured to the fabric independently, each series of fastener members is made up of a single integral piece of wire in the form of a helical spring. The patent is attacked for want of utility and as being anticipated.—*Held*, that a definite amount of utility is not required by law to sustain an invention; a slight amount of utility being sufficient. Commercial utility is the very essence of a patent, and a favourable reception by the purchasing public is strong evidence of that degree of utility required by law.—2. That the inventor must fully describe his invention and its operation or use as contemplated by him, and he must set forth clearly the various steps in the method of constructing, making or compounding the machine, manufacture, or composition of matter, as a consideration for receiving the grant of letters patent, and so that the public may have it at its expiration, and may know what they are prohibited from infringing in the meantime. The inventor, however, is not ordinarily required to state what particular tools or machines should be used in constructing the invention. PRENTICE v. DOMINION RUBBER CO. LTD. . . . . . 196

5 — *Invention — Impeachment — Practical and beneficial results.*] The plaintiff's patent was for certain new and useful improvements in trainmen's lanterns, to permit of the use of kerosene oil instead of signal oil. The object of the invention was to provide, under all conditions, an adequate supply of air from the upper part of the lantern, to maintain combustion, when the currents through the body were reversed from their normal upward direction. It consisted broadly in a lantern body having air conductive ports above the upper end of the globe and a perforated shield located within the body and facing such ports. A trainman's lantern in which kerosene could be used, being cheaper and giving a brighter light, had long been desired, but, until the advent of the present lantern, none had been made giving satisfactory results. When the present lantern came on the market it was readily adopted by practically all Canadian railways and by 75 per cent of the railways of the United States, and proved satisfactory. The invention effects a saving of 80 per cent in operating cost.—*Held*, on the facts, that the lantern in question was new and useful, and that the changes made in the ventilation

**PATENTS FOR INVENTION**—*Concluded*

in the lantern to control the quantity and direction of the air currents was not the result of mere mechanical skill, but required, thought, study and an inventive mind, and constituted invention.—2. That in order to avoid a patent for illegal importation, the thing imported must be the patented article itself, and not merely consist of material, which, while requiring but a trifling amount of labour or expense to transform them into the patented invention, yet do not in their separate state embody the principle of the invention. *THE ADAMS & WESTLAKE COMPANY et al v. E. T. WRIGHT LIMITED* . . . 112

**PENSIONS***See* CROWN No. 1.**PETITION OF RIGHT***See* EXPROPRIATION No. 1.**PRESCRIPTION***See* SHIPPING AND SEAMEN No. 3.

**PRACTICE** — *Crown — Information — Set-off—Fiat—Jurisdiction.*] The Crown by its information claimed that the defendants were indebted to it for certain duties and asked for judgment accordingly. By its answer to said information the defendant set-off a claim to recover certain other duties that had been paid to the Crown, and which were absolutely distinct from what was claimed by the information.—*Held*, that the set-off and counter-claim confer definite and independent remedies upon a defendant against the plaintiff, and are two separate claims or causes of action, and as one cannot sue the Crown without a fiat, such set-off or counter-claim could not be pleaded by way of answer to the information. (*The Queen v. Whitehead* (1884) 1 Ex. C.R. 134 distinguished.)—2. That to allow a counter-claim or set-off the court must as a condition precedent be vested with the jurisdiction of hearing both the action and the counter-claim or set-off, and that this court has no jurisdiction to hear the counter-claim until a fiat has been given to hear the same. *THE KING v. THE COSGRAVE EXPORT BREWING CO. LTD. AND THE KING v. LABATT, LTD.* . . . . . 103

2—*As to right of Co-owner to sue alone.**See* REQUISITION.*See also* SHIPPING AND SEAMEN No. 4.**PRIOR ART***See* PATENTS FOR INVENTION Nos. 1 AND 3.**RAILWAY ACT***See* RAILWAYS.

**RAILWAYS** — *Incorporation under special Act—Bondholders — Subsidies — Priority—Vested Rights—Railway Act, 1919—Retrospective Effect.*] The railway company had been incorporated under the provisions of ch. 93 of the Dominion Acts of 1887. Under certain provisions of that Act the company was empowered to issue bonds secured by a mortgage deed upon the property, assets, rents and revenues of the company. These bonds were to be a “first preferential claim” upon the property of the company. Bonds were issued in the year 1890 and a mortgage deed was duly executed between the company and the trustees of the bondholders. Subsequently, subsidies were granted from time to time by the Dominion Government to the company. On the company failing to operate its road the Minister of Railways took the necessary steps under section 160 of the Railway Act of 1919 to create a first lien or mortgage upon the railway and its equipment in favour of the Crown for the amount of such subsidies, and for an order authorizing the sale of the railway. The railway was sold under order of Court, and the Minister of Railways claimed to be entitled to receive the purchase money paid for the railway on account of the subsidies that had been granted to the company. By section 3 of the Railway Act of 1919 it was provided that where any railway was incorporated under a special Act, and where the provisions of the Act of 1919 and of any such special Act related to the same subject matter, the provisions of the special Act should be taken to override the provisions of the Railway Act.—*Held*, that the lien conferred in favour of the Crown by section 160 of the Railway Act of 1919 could not be given priority over the claim of the bondholders, the same having become a vested right prior to the statute of 1919.—2. The general rule as to the retroactive effect of statutes affecting prior vested rights discussed. *MINISTER OF RAILWAYS AND CANALS v. THE HEREFORD RY. CO. AND BOND et al., TRUSTEES OF BONDHOLDERS, ETC.* . . . . . 223

**REQUISITION OF SHIPS** — *Requisition — Crown — Value of ship — Loss during requisition—Hire—Right to sue alone without co-owners—Rule 9, Order 16 (Eng.).*] The *S.* was requisitioned by the Canadian Government in 1918. In 1924 the claimant was notified of the release of the vessel. At that time she was lying partly submerged, at Kingston, a derelict hulk of no value, and claimant refused to take delivery thereof.—*Held*, on the facts, that the question of hire disappeared, and that the controversy resumed itself into a question of compensation for the value of the vessel so appropriated, as at the date of the requisition thereof, and not for the profits

**REQUISITION OF SHIPS—Concluded**

that could have been made out of the vessel during the period of requisition.—2. That there being no special rule in this Court dealing with the joinder of parties, the practice and procedure of the High Court of Justice, in England, obtains, and the claimant herein was entitled to bring the present action in his own name alone, without joining his co-owners or their assignees. That misjoinder or nonjoinder cannot now defeat a claim.—[As to the right to recover, the Court referred to and followed the judgment in *Gaston-Williams and Wigmore Ltd., et al v. The King* (1922) 21 Ex. C.R. 370.] *MACKAY v. THE KING*. . . . . 149

**RIVER NAVIGATION**

See SHIPPING AND SEAMEN No. 2.

**RETROACTIVITY OF STATUTES**

See RAILWAYS.

**REVENUE**

"Annual." No. 5.  
Burden of Proof. Nos. 6 and 10.  
Co-operative Societies. No. 9.  
Customs Act. Nos. 1, 2 and 6.  
Deferred Payments. No. 4.  
Donations. No. 3.  
Excise Tax. Nos. 8 and 10.  
False Answers. No. 1.  
Forfeiture. No. 2.  
Income Tax. Nos. 3 and 5.  
Income War Tax Act, 1917. Nos. 3, 5, 9.  
Interpretation. Nos. 1 and 10.  
Liquidation. No. 4.  
Sales Tax. Nos. 7 and 8.  
Seizure. Nos. 1 and 6.  
Smuggled Goods. No. 6.  
Special War Revenue Act, 1917. Nos. 7 and 10.  
Trade and Business. No. 5.  
Winding-Up Act. No. 4.

1—*Customs Act, sec. 96 (1)—False answers to questions—Seizure—Interpretation.*] Section 246 of the Customs Act provides *inter alia* that where any vessel departs from any port or place in Canada without a clearance, . . . or the Master thereof "does not truly answer the questions demanded of him" said Master shall incur a penalty of \$400 and the vessel shall be detained until said penalty is paid. The only report made was that required of the Master under section 96 (1) of the Customs Act.—*Held*, that the delivery of the report required by section 96 (1) to the Customs officer by the Master was not the "answer of questions demanded of him" referred to in section 246 of the Customs Act.—2. That in the interpretation of any enactment which entails penal consequences, the Court should not do violence to the language in order to bring people within it, but ought rather to take care that no one is brought

**REVENUE—Continued**

within it who is not brought within it by express language. *PARKER v. THE KING* . . . . . 36

2 — *Customs Act — Forfeiture — Sections 101, 237, 238, 186 and 196 of Customs Act.*] *Held*, that the purpose of sections 101, 237 and 238 of the Customs Act, is to prevent fraudulent export entries from customs warehouses, and to ensure the performance of the obligation to export the goods to another country. That the forfeiture penalties attached only when there had been actual and fraudulent relanding of the goods into Canada in violation of the Customs Law.—2. That where goods are transferred within the territorial waters of Canada, without the intention of fraudulently relanding or bringing the same back into Canada, no offence is committed under the Act.—3. That if Parliament intended to make such an act an offence, then it is not sufficiently or clearly stated to warrant the imposition of the penalty of forfeiture.—4. That sections 186 and 196 deal with two entirely different offences, and cannot be read together so as to make a ship liable to forfeiture, for entering any place in Canada other than a port of entry. *COOK v. THE KING*. . . . . 49

3 — *Donations — Income — Deductions — Sec. 3, subsection 8 of Income War Tax Act, 1917.*]—*Held*, that donations made to public, social, charitable and ecclesiastical institutions, at the request of the friends of such institutions as well as amounts paid in the office to casual visitors for tickets to performances, lotteries, etc., under an alleged commercial practice, with the object of benefiting appellant's business, and not for charitable purposes, are not disbursements or expenses "wholly, exclusively and necessarily laid out or expended for the purposes of earning the income," and cannot be deducted from the profits and gains of the company in arriving at its taxable income, under the provisions of subsection 8, section 3 of The Income War Tax Act, 1917, and amendments. *O'REILLY & BELANGER, LIMITED v. MINISTER OF NATIONAL REVENUE*. . . 61

4 — *Company in liquidation — Interest on deferred payments — Income — Liquidator — Winding-Up Act.*] The appellant is a company which was carrying on large lumbering operations and the manufacturing of lumber. In 1914, business being bad owing to the war, the company ceased operating, closed down a large mill, and in 1916 resolved to wind up the company. They sold a number of their assets, partly for cash and partly under deferred payments extending up to 1931. Upon the interest on such deferred payments the appellant paid income tax

## REVENUE—Continued

until 1926 when it was authorized, under the Winding-up Act, to be wound up, and a liquidator was appointed thereunder. The company then refused to pay any further tax on said interest, contending that upon the winding-up taking place under the Winding-up Act, there was a notional change in the character of the company, whereby the distinction formerly existing between capital, profits and interest was lost as to which was left, and all became merely assets.—*Held*, that the Crown is not bound by a statute unless therein mentioned, and not being mentioned in the Winding-up Act, that Act did not bind it. (*The Queen v. Nova Scotia Bank*, 11 S.C.R. 1 followed).—2. That a liquidator under the Winding-up Act is the agent of the company, and that it is the company which is taxed and not the liquidator; that interest on deferred payments of capital is income, subject to taxation.—3. That the nature and character of the debt did not change by the fact that the affairs of the company had passed under the control and custody of a liquidator.—4. That a company, though not actively engaged in the business mentioned in its charter, is not by reason of that fact necessarily exempt from taxation, and, if it has income, such income is liable to taxation. *NORTH PACIFIC LUMBER CO. LTD. v. MINISTER OF NATIONAL REVENUE*..... 68

5 — *Income — Trade or Business — Irregularities in Determination*—“*Annual*”—*Section 3 of Income War Tax Act, 1917—ejusdem generis.*] M. was carrying on the business of grain commission merchant in partnership with one K., and his assessment as such is not in question here. He was also personally buying and selling grain through his firm and paying it the necessary margins and commissions. He was assessed for the net profit from these transactions, but refused to pay, contending that this was not carrying on a trade or business. Hence the appeal. During the period of taxation in question M. had had 260 such transactions. It was also contended that the assessment was illegal, as the commissioner who made the assessment in the first place was also the judge on appeal from his own pronouncement.—*Held*, that in the present Act there is the imperative enactment to tax, being the main purpose of the Act, and there is the directory enactment, providing the machinery to do so, and whilst the former must be fulfilled absolutely, it is sufficient if the latter is substantially fulfilled. That assuming the act of the commissioner to be irregular, as no one was thereby prejudiced, his ruling should not be invalidated.—2. That the personal transactions of M. amounted to the carrying on of a trade or

## REVENUE—Continued

business, and that the net profit of such trading was liable to taxation under the Income War Tax, 1917.—3. That when an interpretation clause in any Act, extends the meaning of a word it does not take away its ordinary meaning. 4. That the word “annual” in sec. 3 of the Act is used to mean all profits during the year.—5. That the seven different classes of subjects mentioned in sec. 3 of the Act, following the definition of income, as “the annual net profit or gain or gratuity,” are not exhaustive, but are only there by way of illustration and not as limiting the foregoing language of the Act, as these provisions are further supplemented by the words “and also the annual profit or gain from any other sources.”—6. That the words “and also” and “other sources” in the Act make the said illustration absolutely inconsistent with the application of the doctrine of *ejusdem generis*. *MORRISON v. MINISTER OF NATIONAL REVENUE*..... 75

6 — *Smuggled goods — Seizure — Onus of proof—Sec. 264 of Customs Act.*—*Held*, That where goods alleged to have been smuggled, are found and seized in the possession of any person, the *onus*, under the provisions of sec. 264 of the Customs Act, is upon such person to explain how the goods had come into his possession or how they had been imported into Canada, and if so, to prove that the duty upon them was paid. *WEISS v. THE KING*..... 106

7 — *Sales tax—Section 19BBB. of the Special War Revenue Act, 1915—Sale by licensed manufacturer to licensed manufacturer.*] By a contract between it and its managing president (U.), the D.P. Co. was to obtain orders and sublet them to him to carry out, and U. was to give his entire time to the D.P. Co. and to pay D.P. Co. \$6,000 per annum for the use of its premises and plant for said purposes, the said \$6,000 to be paid by credit note upon the work done for the company, but said credit never to be in excess of \$500 for any one month. The D.P. Co. was to continue to purchase the paper and other supplies, to pay U. each week a sum sufficient to cover the wages of the workmen, for which U. was to give credit, to receive the completed goods in the shop, and pack and deliver same at its expense, and to pay U. at the end of each month, for work done by him, 60 per cent of the contract price thereof. U. remained, during all the period covered by the contract, president and manager of the D.P. Co., and also a large shareholder. Being sued for sales tax on the contract price to the consumer, the D.P. Co. refused to pay, claiming it should only pay 60 per cent of the tax as wholesaler's price, making allowance for retail-



## REVENUE—Continued

er's profit, and the balance paid by the retailer, and also that, by reason of the contract, its transactions with U. were analogous to those between two corporations, and came under the exemption in the proviso to section 19BBB.—*Held*, on the facts, that the contract in question was but an attempt to avoid paying the tax and did not change the situation of the company under the law. That there was no sale from the company to the contractor, or by the company to a licensed manufacturer or producer; the only sale being that between the company and the outsider or consumer, and that the company could not claim the exemptions contained in the proviso in section 19BBB, of the Special War Revenue Act, 1915, and was liable for the full tax on the price to its customer.—2. That that section of the statute deals only with producers and manufacturers and that the tax is due by the producer and manufacturer upon his price and not upon the wholesaler's and the retailer's price. **THE KING v. DOMINION PRESS CO.** 122

8—*Sales Tax—Excise Duty—Specially denatured alcohol—Excise Act, Sections 154, 155 and 369.* The defendant Corporations imported liquor in bulk in Canada and later diluted and bottled the same in a bonded warehouse, and then in this form sold the same to the consumer. They also manufactured denatured spirits of grade known as "specially denatured" alcohol, (grade 1-F) and procured release thereof from bond without the payment of excise duty, which duty is claimed by this action.—*Held*, that where goods imported are so changed before taking them out of the bonded warehouse for consumption that they take on a form altogether different from that in which they were imported, the sales tax, under the Special War Revenue Act, 1915, should be calculated on the sale price of the goods after such change, and not upon the duty paid value thereof as imported in bulk.—2. That specially denatured alcohol is not "distilled spirits", within the meaning of Sections 154 and 155 of the Excise Act, and is not subject to the payment of the excise duty provided for in said sections. **THE KING v. THE DOMINION DISTILLERY PRODUCTS CO. LTD.**..... 170

9—*Income War Tax Act, 1917—Co-operative societies—English Act—1 Geo. V, c. 2 (B.C.).—Held* that the appellant, a co-operative society incorporated under the provisions of 1 Geo. V, c. 2 (B.C.) must be considered as a commercial company, and that the dividends paid by it to its shareholders, as interest on capital, are profits and gains, liable to assessment as income, under the Income War Tax Act, 1917.—2. The contention

## REVENUE—Concluded

that such a company acts as a factor, and that the dividends paid by it to its shareholders are disbursements on capital in the hands of the company as trust moneys, cannot be sustained.—3. The specific legislation existing in England in respect to co-operative societies referred to and commented upon. **THE FRASER VALLEY MILK PRODUCER'S ASSOCIATION v. MINISTER OF NATIONAL REVENUE.** 215

10—*Special War Revenue Act, 1915—Excise Tax—Exportation—Proviso—Sec. 19B—Onus of Proof.*—*Held*, that he who claims the benefit of an exemption in a taxing statute, must plead the exemption and must establish the facts which take his case out of the operation of a general rule, and where, as in this case, a person claims to be exempt from the excise tax, under the proviso to 19B, of the Special War Revenue Act, 1915, "that such excise tax shall not be payable when such goods are manufactured for export, under regulations prescribed by the Minister of Customs and Excise" the onus is upon him to prove that the goods in question were actually exported. (*The King v. Goodherham & Worts Ltd.* (1928) 3 D.L.R. 109 referred to.) **THE KING v. THE SARNIA BREWING COMPANY LTD.** 219

## RIGHT OF ACTION

See SHIPPING AND SEAMEN No. 9.

## RULES OF COURT

See SHIPPING AND SEAMEN, NOS 1 AND 2.

## SALES TAX

See REVENUE NOS. 7 AND 8.

## SEIZURE

See REVENUE NOS. 1 AND 6.

## SET-OFF AGAINST CROWN

See PRACTICE No. 1.

## SHIPPING AND SEAMEN

1. Action *in Rem.* No. 3.
2. Admiralty Rules. No. 4.
3. Appeal. Nos. 6 and 10.
4. Canal Navigation. Nos. 9 and 10.
5. Change of Course. No. 6.
6. "Check" Signal. No. 10.
7. Collision Nos. 1, 2, 4, 5, 6, 7, 8, 9 and 10.
8. Contributory Negligence. No. 2.
9. Evidence. No. 6.
10. Exchequer Court. No. 5.
11. Fog. No. 6.
12. Harbour. No. 8.
13. Interpretation. No. 3.
14. Jurisdiction. No. 5.
15. Look-Out. Nos. 6 and 9.
16. Maritime Conventions Act, (1914), Nos. 3 and 5.
17. Maritime Lien. No. 7.
18. Navigating with Caution. No. 6.
19. Negligence. No. 1.
20. Overtaking Vessel. Nos. 8 and 10.

## SHIPPING AND SEAMEN—Continued

21. Passing Signal. No. 1.
22. Practice. No. 4.
23. Prescription. No. 3.
24. Right of Action. No. 5.
25. Right-of-way. No. 9.
26. River Navigation. No. 2.
27. Rules of Court. Nos. 1 and 2.
28. Sale of ship, effect of on lien. No. 7.
29. Signals. No. 1.
30. Speed. No. 6.
31. Standing by. No. 10.
32. Workmen's Compensation Act (B.C.) No. 5.

## SHIPPING AND SEAMEN—Shipping—

1—*Collision — Signals — Rules — Negligence.*—*Held*, that where vessels are meeting in narrow channels or areas and improper signals by whistle are exchanged, Rules 22 and 23 being violated by both vessels, liability for negligence which causes a collision must be determined by the weight of evidence after consideration of the action of each vessel, having regard to Rule 37. *SS. MANLEY v. THE HECTOR AND THE NORTHERN CONSTRUCTION Co.*..... 42

2 — *Collision — Rule 25 — Contributory negligence—Passing signal—Breach of Rules—River navigation.* [On June 15, 1926, at 11.30 p.m., the weather being fine and clear, with little or no wind, the tug *E.L.* was proceeding down the St. Lawrence River channel, on Lake St. Louis, and the *B.*, a steel vessel of the lake type, was going up. When the ships were about 2½ miles apart, *B.*'s pilot observed a white light ahead, which he took to be that of a yacht coming down on the north side of the channel. The channel at this point is between 2,000 and 4,000 feet wide and bounded by shoals. The *E.L.* was on the north side of the channel and the *B.* was at all material times on the north of midchannel, which was her proper side. The only lights seen by the *B.*, on the *E.L.*, were then the two white lights which were broadening on the starboard bow of the *B.* indicating she was passing clear, starboard to starboard. When 70 feet away the *E.L.* suddenly changed her course, to cross the *B.*'s bows, when her red light was disclosed. The *E.L.* failed to give any signal to indicate which side she elected to take (Rule 25) nor did the *B.* give any signal. When the *E.L.* changed her course the *B.* put her helm hard starboard, and her engines full speed astern, and collision occurred, the stem of the *B.* colliding with the port side of the *E.L.*, near the pilot house.—*Held*: On the facts, that the *E.L.* was solely to blame for the collision.—2. That the fact of the *E.L.* attempting to cross the bow of the *B.* was the direct and immediate cause of the accident, and that the fact of the *B.* earlier transgressing

## SHIPPING AND SEAMEN—Continued

one or more of the Rules of the Great Lakes, or the rules of good seamanship did not contribute to the accident, and did not constitute contributory negligence. [*Anglo- Newfoundland Development Co. v. Pacific Steam Navigation Co.* (1924) A.C. 406, followed.] *SINCENNES-McNAUGHTON LINE LTD. v. THE STEAMSHIP BRULIN*..... 45

3 — *Prescription — Action in rem — Maritime Conventions Act, 1914—Interpretation.* [The present action is one *in rem* against the tug *S.* for damages to plaintiff's canal boat, when in tow of the *S.*, as a result of a collision between the said canal boat, a dumb tow, and the wall of the inner basin of the Harbour of Quebec; which collision was alleged to be due to the negligent navigating of the *S.* The action was commenced more than two years after the date when the damage or loss or injury complained of was caused, and the defence claimed that the action was barred under sec. 9 of the Maritime Conventions Act, 1914. In the trial court defendant's contention was dismissed on the ground that "from the wording of Section 9 and from the object of the Act as read in the preamble and in Section 2, Section 9 only applied to "collision between vessels."—*Held*:—(Reversing the judgment appealed from; That Section 9 of the Maritime Conventions Act, 1914, was not limited in its application solely to actions for damages due to collision between vessels, and that the present action not having been commenced within two years from the date when the damages or loss or injury was caused cannot be maintained by the Court and should be dismissed. *The Cairnbahn* (1914) P. 25 followed).—2. That where the text of an enactment of a Statute is clear and unambiguous, no reference to the preamble of the Act is necessary to a proper interpretation of such enactment. *THE TUG Spray v. HERMAN ST. CLAIR*..... 56

4 — *Practice — Admiralty — Appeals—Collision—Both vessels to blame—Separate appeal by both—Rules 164, 168 and 169—Directions as to evidence at trial.*—*Held*, that where a judgment holds both vessels to blame for a collision and where each party is actively claiming against the other for damages, it is open to each to appeal from such judgment by a separate and distinct appeal. In such a case each must serve notice of appeal and give security to the other for costs of his appeal.—2. That rule 164 should be confined to cases where the respondent desires some modification in or enlargement of the judgment against the appellant or some relief against him but is not himself or his ship held to be liable in

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damages to the appellant.—3. When both claims have been tried together directions as to the evidence taken at trial and as to the costs of typewriting or printing it for the appeal, should be obtained under rules 168 and 169. CANADA ATLANTIC TRANSIT CO. v. EASTERN STEAMSHIP CO. LTD. . . . . . 60

5 — *Exchequer Court — Jurisdiction — Workmen's Compensation Act, B.C.—Maritime Conventions Act, 1914—Right of Action—Election of tribunal.*] Plaintiff's husband was killed in a collision between the C. and a boat in which he, with another man, was engaged in fishing. Following his death plaintiff applied to the Board, under the Workmen's Compensation Act (B.C.) for compensation under the Act. Payments were made to her, from the date of her husband's death until about the time of the trial of this action, which she accepted. After judgment the Board ceased making payments pending the final result of this action.—Upon application of the owners of the C. under sec. 12 (3), the Board "adjudicated and determined" that the owners were employers within the scope of part 1 of the Act; that the deceased was a workman in an industry covered by and within the scope thereof; that the accident arose out of and in the course of the employment; that plaintiff was one entitled to compensation under the Act, and that the action was one concerning which the right to bring was taken away by part 1 of the Act. After the application aforesaid, plaintiff took action *in rem* in the Exchequer Court in Admiralty to recover damages arising out of the death of her husband as above mentioned.—*Held*, (reversing the judgment appealed from) that the Exchequer Court had no jurisdiction to hear and determine the present action. (*The Camosun*, (1909) A.C. 598 and *The Vera Cruz* (1884-5) A.C. 59 referred to.)—2. That the Maritime Conventions Act, 1914, did not so enlarge the jurisdiction of the Exchequer Court in Admiralty, as existing under the Admiralty Court Act, 1861, as to give jurisdiction in actions like the present.—3. That even if this court had jurisdiction, the plaintiff, having elected to claim compensation under the Workmen's Compensation Act (B.C.), and having accepted it, could not thereafter renounce it and resort to an alternative remedy once open to her. *THE SHIP Catala v. MARTHA DAGSLAND*—83

6—*Collision—Navigating with caution—Fog—Speed—Lookout—Change of course—Appeal—evidence.*]—*Held* (by the Trial Judge), that the absence of the master from the bridge in a dense fog, when fog signals are heard around, and the lack of a properly stationed lookout

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when the vessel is under way in a fog is *prima facie* negligent navigation.—2. That the rule relating to travelling in a fog overrides and controls rule 21, when a case arises in which these two rules come into conflict.—3. That the Maritime Conventions Act, 1911, not being in force in the Great Lakes, or above Lachine Canal, the Court is not called upon to minutely analyze every circumstance relating to the proportion of fault in the case, if in broad outline both ships are found to be to blame, as each must bear half the damage.—4. That the general rule is, apart from statutory provisions, that a statement previously made by a witness, whether on oath or not, has no evidential value in the case, unless it is acknowledged at the trial by the witness as being a true statement, whereas if he repudiates it, it can form no part of the testimony in the case; but that rule of evidence does not prevent the judge or jury from drawing, from other facts of the case, including the circumstances in relation to the origin and making of the statement, as well as the mode and reason for its denial, an inference consonant therewith.—*Held* (by the Trial Judge and on Appeal) that in a fog when one vessel cannot see another which is approaching from a point apparently not more than four points from right ahead, and is unaware of the actual course of that other, changing direction is not "navigating with caution."—2. That speed in a fog which disables a vessel from avoiding another after it is seen should be deemed to be an excessive speed.—*Held*, *On appeal* (affirming the judgment appealed from) that where an appeal is taken from a local Judge in Admiralty to the Exchequer Court, presided over by a single judge, the latter should not interfere with the holding of the trial Judge on questions purely of fact, unless he comes to the conclusion that such findings are clearly erroneous. It is generally the duty of an appellate Judge to leave undisturbed a decision of which he does not clearly disapprove.—2. When vessels are travelling in dense fog and especially when hearing their respective fog signals not more than four points from right ahead, a speed of more than "bare steerageway" is excessive.—3. Where, from the fog signals, a vessel places an approaching vessel not more than four points from right ahead, on her starboard and where said vessel has given the one blast signal (I am directing my course to starboard) twice, if she is keeping her course and speed, and deems the signal injudicious, it is her duty to give the danger signal and to reduce her speed to bare steerageway, and if necessary even to stop and reverse. EASTERN STEAMSHIP COY. LIMITED, AND CANADA ATLANTIC TRANSIT COY. . . . 129

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7 — *Collision—Damage—Sale of ship after collision—Maritime Lien.*—*Held:* That in an action for damages by collision, the sale of one of the ships by the owner does not disentitle him from enforcing a Maritime Lien on the other ship. Such a lien is in general, and in such a case as this, is unassignable. *DUFF v. THE SHIP Progress*..... 157

8 — *Collision — Harbour — Boat leaving dock—Overtaking vessel.*] The *G.C.* was a ferry boat plying between Montreal and St. Helen Island. She was scheduled to leave Victoria Pier at 1 p.m. every day for the Island. This pier forms the south side of Market Basin in Montreal Harbour and is parallel to section 22 on the north side of the Basin at which the *R. P.* was docked. Every day one of the defendant boats was scheduled to leave their dock at 1 p.m. for the Lachine Canal, as was well known of the captain of the *G. C.* The space between the piers is about 325 feet, and at the end of the piers there is a seven mile current down the St. Lawrence River. On the day in question the *R. P.* gave one long blast and cast off her lines. She went 100 feet ahead and then 300 feet astern and as the current caught her she went full speed ahead upstream intending to pass a short distance from the southeast end of Victoria pier. When abreast of the *G. C.* the latter cast off; the *R. P.* then gave a danger signal and immediately after the two-blast, indicating she was going to port. As the *G. C.* began to move out, the *R. P.* ordered her engines full speed astern. The *G. C.* paid no attention to signals, started for the Island, and as the current struck her she was borne down into the *R. P.* which was then going astern, and was struck by the stem of the *R. P.* on her port side. One man only acted as captain, wheelsman and lookout on the *G. C.*—*Held,* on the facts, that the *G. C.* should not have left her dock without ascertaining exactly the position of the *R. P.* and she was wholly responsible for the collision.—2. That the present case is not one in which the Court should look into the Regulations for preventing collision, but one in which it should simply consider if there was neglect of any precaution under the special circumstances.—3. *Held,* further, that the *R. P.* could not be considered as an overtaking vessel. *RINFRET v. CANADA STEAMSHIP LINES LTD.*..... 165

9 — *Collision — Canal navigation — Right of way—Lookout.*] The *W.* was proceeding down the Lachine Canal, with the current, and before reaching Wellington Bridge and the railway bridge, she blew the usual whistle signals, which were heard by the first officer of the

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*B.* The *W.* then went through the north draw of the railway bridge. At that time the *B.* was backing out of Wellington basin, where she had been moored, on the east side, heading in. At this time the *B.*'s stern had reached a certain distance out of the dock, and there was still one line out. Instead of going ahead the *B.* continued to go astern, and answered with a danger signal, followed by two short blasts. The *W.* gave a second danger signal and reversed her engines, but the *B.* came across the *W.*'s course and the collision occurred, about 350 feet from point where *W.*'s first danger signal was given. The *B.*'s captain was in the wheelhouse and no lookout was on the *B.*, and the *W.*'s bridge signals though heard on the *B.* were not reported to her Captain. The *W.* could not pass astern of the *B.* because of the *B.*'s continued backing.—*Held,* that the *B.* was negligent in leaving her dock before making sure that there were no ships within reasonable distance; in backing out and across the *W.*'s course; in failing to respect the *W.*'s right of way; in not having a proper lookout, and in her lack of reasonable care and prudence, which was the sole cause of the collision, and that she was alone to blame therefor. *THE SS. WENCHITA v. THE BEECHBAY AND THE BEECHBAY SS. CO. LTD. v. THE WENCHITA*..... 178

10 — *Collision — Canal Navigation — "Check" signals—Overtaking vessel—Standing by.*—*Held,* that where a vessel is overtaking another in a narrow channel such as the Welland Canal and signifies her desire to pass by blowing one blast, but receives no reply, she is bound to wait and not attempt to go forward so as to affect the overtaken vessel until permission is obtained. Rule 29 of the Rules of the Road for the Great Lakes is imperative and overrides the General Rules which deal with conditions not covered expressly by said Rule. (*THE SS. Helen v. The Donovan*, 1925 Ex. C.R. 114; 1926 Ex. C.R. 59; 1926 S.C.R. 627; 28 Lloyd's List L.R. 165 referred to.)—2. The "check" signal is not recognized by the Great Lakes Rules and its meaning and effect can only be determined by the circumstances under which it is given and received. Rules 28, 29 and 36 are definite in their terms, and where the "check" signal is received by a vessel desiring to pass the onus is upon the overtaking vessel to demonstrate that said signal constituted a permission to pass slowly.—3. The enactment in section 920 of the Canada Shipping Act, R.S.C. (1906), c. 113 requiring the rendering of assistance in case of collision, by the Master of one ship to the other, and providing that in case of default, it is presumed that the collision was due to that wrongful act,

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is still in force in Lakes Ontario and Erie and their connecting canals. *SINGENNES McNAUGHTON LINES & HARRIGAN v. THE SS. Steel Chemist*..... 182

**SIGNALS**

See SHIPPING AND SEAMEN No. 1.

**SMUGGLING**

See REVENUE No. 6.

**SPECIAL WAR REVENUE 1915**

See REVENUE Nos. 3, 7, 10.

**STATUTES**

*Interpretation of:*—See REVENUE No. 1.

See SHIPPING AND SEAMEN No. 3.

*Retrospective effect of:* See RAILWAYS.

**SUBSIDIES**

*Lien for:*—See RAILWAYS.

**SUPERINTENDENT OF INSURANCE**

*Powers of:* See INSURANCE ACT No. 1.

**TAXATION**

*Income.* See REVENUE.

**TRADE OR BUSINESS**

*Meaning of:*—See REVENUE No. 6.

**TRADE-MARKS** — *Registration — User in Canada.*—*Held*, that the applicant for the registration of a trade-mark in Canada must be the first user of the same in Canada. (*Impex Electrical Ltd. v. Weinbaum* (1927) 44 R.P.C. 410, referred to.) GOLD MEDAL FURNITURE MFG. CO. LTD. *v.* GOLD MEDAL CAMP FURNITURE MFG. CO..... 65

2 — *Trade-Mark and Design Act—Industrial Designs—Definition of design—Requirements of—Trade Variants.*—*Held*, that as the Trade-Mark and Design Act does not define what industrial designs are within the meaning of the Act, the word Design therein must be taken to be used in its ordinary, and not in an artificial, sense.—2. A design to be registrable must be original and not in use by anyone else at the time of its adoption. Invention or utility is not a requirement to valid registration. A Design cannot be rendered original merely by a change in the mode of the construction of an article. A design to be registrable must be distinguishable from what previously existed by something that is essentially original. The introduction of ordinary

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trade variants into an old Design cannot make it new or original. *CLATWORTHY & SON LIMITED v. DALE DISPLAY FIXTURES LIMITED*..... 159

3 — *Use — Registration — Rights conferred by registration—Rectification of register.*] Plaintiff was the owner of a trade-mark *Camay* registered in the United States, for use in connection with the sale of toilet and bath soaps. Upon their applying for registration of the said mark in Canada the same was refused because of defendant's registration of the word *Cameo*. Though this mark was registered for use in connection with the sale of soap generally, it, in fact, was only applied to and used in connection with the sale of laundry soap. The application for registration stated that such mark was to be applied to "a certain soap." The present proceedings were to expunge defendant's mark or vary it by limiting it to laundry soap only, and for permission to register the word *Camay*.—*Held* that, on the facts, the defendant's registration and use of the mark *Cameo* should be limited to the sale of laundry soap alone; that said registration be varied accordingly; and that the plaintiff be permitted to register the mark *Camay* to be used in connection with the sale of toilet and bath soaps.—2. The Trade-Mark and Design Act was not intended to give new rights, but to place restrictions on the bringing of actions for infringement of trade-marks, and to facilitate evidence of title to the same by means of registration. The proprietor of a mark is not bound to register and does not lose his mark by failure to do so. *THE PROCTOR GAMBLE CO. v. PUGSLEY, DINGMAN & COMPANY LTD*..... 207

**TRADE VARIANTS**

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*Priority:*—See RAILWAYS.

**WAR MEASURES ACT, 1914**

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**WINDING-UP ACT**

See REVENUE No. 4.

**WORKMEN'S COMPENSATION ACT**

See SHIPPING AND SEAMEN No. 5.

