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HER MAJESTY THE QUEEN *ex rel.* THE AMERICAN STOKER COMPANY ..... PLAINTIFF;

AND

THE GENERAL ENGINEERING COMPANY OF ONTARIO (LIMITED) ..... DEFENDANTS.

Practice—Scire facias to repeal patent—The Patent Act sec. 6, sec. 34, sub-sec. 2—Expiry of foreign patent—"Cause as aforesaid"—Jurisdiction.

Upon a proceeding by *scire facias* to set aside a patent for invention because of an alleged expiry of a foreign patent for the same invention under the provisions of sec. 8 of *The Patent Act.*

Held, that there was so much doubt as to that being one of the clauses included in the expression "for cause as aforesaid" in clause 2 of sec. 34 of the Act that the action should be dismissed.

SCIRE FACIAS to repeal a patent for invention.

The facts of the case are stated in the reasons for judgment.

The case was heard before THE JUDGE OF THE EXCHEQUER COURT, at Montreal, on the 8th November, 1899.

B. B. Osler, Q.C. for the defendants: The writ of *scire facias* does not lie to repeal a patent in this country simply because a foreign patent for the same invention has expired. That is not one of the causes within the meaning of sec. 34, sub-sec. 2 of *The Patent Act.* (Cites *Hindmarch on Patents* (1).

It would be manifestly inequitable for us to lose the protection of the grant from the Crown in Canada because a foreign patentee, over whom we have no control whatever, has not carried out the provisions of

(1) P. 384.

the foreign law respecting the continuity of the patent there. The result of a judgment for plaintiff in an action of *scire facias* is to declare the patent void from the beginning. That is a most radical penalty for a breach of foreign law by a party over whom we have no control. Parliament could not have intended such an injustice. (Cites 22 Vict. (Prov. Can.) c. 34 sec. 5; 32 & 33 Vict. c. 11 sec. 7; 35 Vict. c. 26 sec. 7; 55-56 Vict. c. 24 sec. 1; U. S. *Acts of Congress*, 1839, sec. 6; 1870, c. 230 sec. 25; 1884, sec. 4887; 15 & 16 Vic. (U. K.) c. 83 sec. 25; 46 & 47 Vict. (U. K.) c. 57. In re *Blake's Patent* (1); In re *Betts' Patent* (2); *French* v. *Rogers* (3); *O'Reilly* v. *Morse* (4); *Auer Light* v. *Dreschel* (5); *Hull* v. *Hull* (6).)

J. L. Ross followed for the defendants: With reference to the meaning of the word "expiry" in the Canadian Patent Act, sec. 8, I would cite *Burns* v. *Walford* (7). There it was held that the term "expiration" did not cover termination by forfeiture, but only termination by lapse of time. The meaning of the word "expiry" as applied to letters patent for inventions has also been considered by the United States Supreme Court. (Cites *Pohl* v. *Anchor Brewing Co.* (8); *Bate Refrigerating Co.* v. *Hammond* (9); *Consolidated Roller Mills* v. *Walker* (10); Re *Mann* (11); *Holmes Electric Protection Co.* v. *Metropolitan Alarm Co.* (12)).

As to the particular meaning of the words "foreign country" as applied to this case, I would cite *The Consolidated Statutes of Canada*, c. 34 sec. 1. It says that the expression "foreign county" includes any country

(1) L. R. 4 P. C. 535.
(2) 1 Moo. P. C. N. S. 59.
(3) 1 Fish. P. C. 136.
(4) 15 How. 127.
(5) 6 Ex. C. R. 68.
(6) 4 Ch. D. 97.
(7) W. N. (1884) 31.
(8) 20 Brodex 190.
(9) 19 Brodex 231.
(10) 43 Fed. R. 575.
(11) 17 Off. Gaz. 330.
(12) 22 Fed. R. 341.

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not under the British dominion or subject to the Crown of Great Britain.

[*By the Court.*—The interpretation would not apply to the Dominion statutes.]

Not expressly, but impliedly. The section of *The Patent Act* has not materially changed since then.

D. McMaster, Q.C. for the plaintiff: The chief question arising in this case is answered by the provisions of section 34 of *The Patent Act.* I take it that under that section you may attack a patent directly by the aid of the writ of *scire facias* for the same causes as you may plead against the validity of a patent in an action of infringement. The words "for cause as aforesaid" include the cause for which we claim the patent here in question is void. Then again, take the provisions of the 8th section of *The Patent Act:* "under any circumstances if a foreign patent exists the Canadian patent shall expire at the earliest date on which any foreign patent for the same invention expires." The meaning of the enactment is this, viz.: that if there has been a foreign patent at all for the same invention, the Canadian patent shall expire simultaneously with the expiry of the foreign patent.

F. S. Maclennan, Q.C. followed for the plaintiff: The writ of *scire facias* is a remedy provided by English law for the repealing of any Crown grant that has become void or was improvidently granted. (Cites *Comyn's Dig.*, 5, vo. "Patent" F. 3 and vo. "Officer" K[II]; *R.* v. *Tolly* (1); *R.* v. *Eston* (2); *Sir Robert Chester's Case* (3); *R.* v. *Eyre* (4); *Reg.* v. *Cutler* (5); *Stephen's Com.* (6); *Broom's Constitutional Law* (7); *The Queen* v. *Prosser* (8); *The Queen* v. *Hughes* (9);

(1) 2 Dyer 197*a*.
(2) 2 Dyer 197*b*.
(3) 2 Dyer 211.
(4) 1 Strange 43.
(5) 3 C. & K. 227.
(6) II p. 33; III p. 668.
(7) 2nd ed. 238.
(8) 13 Jur. 71.
(9) L. R. 1 P. C. 87.

Eastern Archipelago Co. v. *The Queen* (1); *Fonseca* v. *Attorney-General of Canada* (2); *Foster on Scire Facias* (3); *Hindmarch on Patents* (4); *Edmunds on Patents* (5); *Agnew on Patents* (6).)

The meaning for the purposes of this case of the term "obtaining" in the 8th section of *The Patent Act* is its plain and ordinary meaning. It means when a patent is *obtained*, not when it is *applied* for. If the Canadian patent is *obtained* after the foreign patent, then the expiry of the latter puts an end to the former, no matter if the Canadian patent was *applied* for before the foreign patent was obtained. (Cites *Gramme Electric Company* v. *Arnoux Electric Co.* (7); *Edison Electric Light Co.* v. *United States Electric Light Co.* (8).

The Italian patent is identical with the Canadian patent. The differences between the two specifications are immaterial and merely verbal. (Cites *Siemens* v. *Sellars* (9); *Ridout on Patents* (10); *Commercial Mfg. Co.* v. *Fairbanks Canning Co.* (11))

The failure to pay the fees due upon the Italian patent operated an absolute forfeiture under the Italian patent laws. (Cites *Abbott's Patent Laws* (12)). It is only upon paying the fees from year to year that an Italian patent can be kept in existence for fifteen years. (Cites *Bonesack Machine Co.* v. *Smith* (13)).

The provisions of Art. 4887 of the United States Patent Act are instructive to show what our legislature probably intended to enact on the same subject. The French law is to the same effect. The French courts have unanimously held that the

(1) 2 El. & B. 856.
(2) 17 Can. S. C. R. 612.
(3) P. 246.
(4) P. 385.
(5) P. 356.
(6) P. 340.
(7) 25 Of. Gaz. 193.
(8) 43 Of. Gaz. 1456.
(9) 123 U. S. 276.
(10) P. 83.
(11) 135 U. S. 176.
(12) P. 283.
(13) 73 Of. Gaz. 963.

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termination by forfeiture of a foreign patent also operated a forfeiture of a French patent for the same invention. (Cites *Jour. du Pal.* (1); *Dalloz, Jur. Gen.* 1864 (2); *Dalloz, Jur. Gen.* 1882 (3); *Rendu: Code de la Propriété Industrielle* (4); *Goujet & Merger: Dictionnaire du Droit Commercial* (5); *Blanc: Traité de la contrefaçon en tous genres* (6); *Nouguier: Traité des actes de commerce* (7); *Dalloz, Rep.* vol. 6 (8); *Bédarride: Commentaire des lois sur les Brevêts d' Invention* (9); *Daw* v. *Ely* (10).)

Mr. Osler replied: I would refer to *Abbott's Patent Laws*, Art. 59 p. 294, to show that by the non-payment of fees the Italian patent was voidable only and not void.

THE JUDGE OF THE EXCHEQUER COURT now (January 10th, 1900,) delivered judgment:

This is a proceeding by *scire facias* to repeal letters patent, numbered 40700, granted to Evan William Jones, on the 15th day of October, 1892, for alleged new and useful improvements in boiler and other furnaces. The grounds on which it is sought to impeach the patent are that the Italian and British letters patent for the same invention have expired within the meaning of the 8th section of *The Patent Act.*

The questions raised and debated are:

1. Whether the Italian and English patents, one or both, are for the "same invention" as the Canadian patent referred to?

2. Whether the expression "if a foreign patent exists", in the last clause of the 8th section of *The Patent Act*, has reference to a foreign patent existing

(1) [1894] p. 727.
(2) Pt. 1, p. 146.
(3) Pt. 1, p. 253.
(4) Vol. 1 sec. 62
(5) Vol 3, p. 551.
(6) P. 313.
(7) P. 137.
(8) P. 10.
(9) Vol. 1, pars. 348 and 360.
(10) L. R. 3 Eq. 496.

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when the Canadian patent is granted, or to one existing when the Canadian patent is applied for?

3. Whether the expression, in the said section, "at the earliest date on which any foreign patent for the same invention expires" is to be limited to the expiration by lapse of time of the potential term of the foreign patent, or whether it includes any determination of such term?

4. Whether a British patent is a "foreign patent" within the meaning of the said section? and—

5. Whether a writ of *scire facias* will lie in this court to repeal Canadian letters patent which have, by reason of the expiry of a foreign patent, expired before the end of the term for which they were granted?

In an action for infringement brought by the defendant company on the letters patent referred to against the company at whose relation this proceeding is instituted, there was judgment for the former company. It was not made a matter of defence in that action that such letters patent had expired. The defendants therein say that at the time of the trial they had no knowledge that such was the fact. On learning of it they applied for a new trial of that action and obtained an order *nisi* which is now pending. In the meantime this proceeding has been taken to determine the question whether the Canadian patent referred to has expired or not. That is the substantial controversy between the parties and in it are involved four of the five questions stated. The fifth question is raised by the defendant company. While contending that their Canadian patent has not expired, they say that assuming it has transpired, a writ of *scire facias* will not, for that reason, lie for its repeal. If that contention is maintained it is obvious that no opinion ought to be expressed in reference to the other questions, although both parties profess to desire it.

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That the court has power for sufficient cause to revoke letters patent for an invention is not in doubt. The question in issue is one of procedure, not of jurisdiction. By the 17th section of *The Exchequer Court Act*, (1) the court is given jurisdiction, among other things, in all cases in which it is sought, at the instance of the Attorney-General of Canada, to impeach or annul any patent of invention. By the 21st section of the same Act it is provided that the practice and procedure in suits, actions and matters in the Exchequer Court shall, so far as they are applicable and unless it is otherwise provided by the said Act, or by rules made in pursuance thereof, be regulated by the practice and procedure in similar suits, actions and matters in Her Majesty's High Court of Justice in England at the time of the coming into force of the Act (October 1st, 1887). Prior to that date the proceding by *scire facias* to repeal a patent had in England been abolished, and the procedure then in force there for the revocation of a patent was by a petition to Her Majesty's High Court of Justice (2) By the 11th section of *The Patent Act* (3), the applicant for a patent has, for the purposes of the Act, to elect his domicile at some known and specified place in Canada,—and to mention the same in his petition for the patent; and by the 34th section of the Act, as enacted in *The Revised Statutes* (1887), it was provided that any person who so desired to impeach any patent issued thereunder might obtain a sealed and certified copy of the patent, and of the petition, affidavit, specification and drawings thereunto relating, and might have the same filed in the office of the clerk of certain Superior Courts therein named, according to the domicile elected by the patentee, which

(1) 50-51 Vict. c. 16, s. 17 (*b*).

(2) *The Patents, Designs and Trade-Marks Act* 1883, 46 & 47 Vict. c. 57, ss. 26 and 117.

(3) R. S. C. c. 61.

courts respectively should adjudicate on the matter and decide as to costs. It was further provided (s. 34, ss. 2) that the patent and documents mentioned should then be held as of record in such courts respectively, so that a writ of *scire facias*, under the seal of the court, grounded upon such record, might issue for the repeal of the patent, for cause as aforesaid, if after proceedings had upon the writ in accordance with the meaning of the Act the patent should be adjudged void. In 1890, by an amendment of *The Patent Act* (1), the Exchequer Court was added to the courts by which this jurisdiction could in a proceeding by *scire facias* be exercised. By the second section of the Act of 1890 the Exchequer Court was also given jurisdiction upon information in the name of the Attorney-General, and at the relation of any person interested, to decide whether or not the patent had become void for failure to manufacture the invention as provided in the Act, or for importation thereof contrary to the Act; and in 1891 the provision was further amended by striking out the words "at the relation of any person interested" and substituting therefor the words "or at the suit of any person interested" (2). In the same year by an amendment of *The Exchequer Court Act* (3) the court was, among other things, given jurisdiction as well between subject and subject, as otherwise, in all cases in which it is sought to impeach or annul any patent of invention. By the general order of court of the 13th day of November, 1891, it was provided that the rules of the court, then in force in the court in other matters, should apply to any proceeding under *The Exchequer Court Amendment Act*, 1891 (4), and that otherwise such proceeding should follow the practice of the

(1) 53 Vict. c. 13, s. 1.
(2) R. S. C. 61, s. 37; 53 Vict. c. 13, s. 2; 54-55 Vict. c. 33; and 55-56 Vict. c. 24, s. 6.
(3) 54-55 Vict. c. 26, s. 4.
(4) 54-55 Vict. c. 26.

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High Court of Justice in England. The effect of that was to provide that any proceeding between subject and subject to impeach or annul any patent of invention should be instituted by filing a statement of claim according to the ordinary practice of the court (1).

By another general order made on the 5th of December, 1892, it was provided that in any proceeding to impeach any patent under the 34th section of *The Patent Act*, the practice and procedure which in like proceedings were in force in Her Majesty's High Court of Justice in England immediately prior to the passing of *The Patents, Designs and Trade-Marks Act*, 1883, should be followed as near as might be, and that in any such proceeding the person seeking to impeach the patent might in addition to the grounds mentioned in the 34th section of *The Patent Act* set up and rely upon any breach of the conditions to manufacture, and not to import, mentioned in the 37th section of the Act. It was further provided (2) that where it was sought to impeach a patent on the grounds mentioned in section 37, and for no other cause, proceedings to have the same declared null and void might be taken by information in the name of the Attorney-General of Canada, or by a statement of claim at the suit of any person interested, in accordance with the ordinary practice of the court.

The result of all this appears to be that at present and until it is otherwise provided:

1. A petition, according to the practice now in force in England, will lie at the instance of the Attorney-General to revoke a patent upon any sufficient ground, excepting perhaps those mentioned in the 37th section of *The Patent Act*;

(1) Rule 7 of the Exchequer Court Rules.

(2) Rule 3.

2. An information in the name of the Attorney-General will lie to revoke a patent for non-manufacture, as provided in the 37th section of *The Patent Act*, or for importation of the invention in contravention thereof;

3. That a statement of claim in accordance with the ordinary practice of the court will lie at the suit of any person interested to impeach or annul a patent, or to have the same declared null and void on any good ground, and

4. That a writ of *scire facias* will lie to impeach a patent "for cause as aforesaid" (whatever that may include) mentioned in the 34th section of *The Patent Act*, and that where it will so lie the grounds stated in the 37th section of the Act may also be relied upon.*

It is, however, with the proceeding by writ of *scire facias* that one is concerned in this case. The other proceedings are mentioned because they help us to a better understanding of the matter, and show, I think, that a writ of *scire facias* will not lie to impeach a patent, except for the cause mentioned in the 34th section of *The Patent Act*. What is the cause therein referred to? Does it include as one of such causes the expiration of a Canadian patent under the provisions of the 8th section of *The Patent Act*?

To answer either of these questions it is necessary, I think, to have in mind the history of the provision in which the words "for cause as aforesaid" occur. In 1824, by the 8th section of an Act passed by the Legislature of Lower Canada to promote the progress of useful arts in the province, (1) it was provided that by a proceeding by motion made before a judge of the

* REPORTER'S NOTE:—These rules were rescinded on the 25th day of January, 1900, and a new practice established by the rules published in this volume.

(1) 4 Geo. IV. ch. 25.

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Court of King's Bench, within three years after the issuing of a patent, but not afterwards, a rule might be obtained calling upon the patentee to show cause why process should not issue for the repeal of the patent. The grounds upon which such a rule could be granted were that the patent had been obtained surreptitiously or upon false suggestion; and if no sufficient grounds were shown to the contrary, or if it appeared that the patentee was not the true inventor or discoverer, judgment was to be rendered for the repeal of the patent. The 6th section of the Act dealt with defences to an action for infringement. These provisions were adapted from the Patent Act of the United States of 1793. The provision in respect to the revocation of the patent, which in that country first occurred in the Act of 1790, remained in force there until 1836, when it was repealed. The corresponding provision was continued in Lower Canada by 6 Wm. IV. c. 34, s. 9 (1836), until 1849, when by an Act of the Province of Canada (1) a proceeding by *scire facias* to repeal a patent was substituted for that by motion to a judge of the court. The Act last referred to followed in this respect the Act of the Province of Upper Canada, 7 Geo. IV. chapter 5 (1826); by the 8th section of which it was in substance provided that at any time within three years after the issuing of any patent any person desiring to impeach the same because it had been fraudently or surreptitiously obtained, or had issued improvidently or upon false suggestion, might obtain an exemplification of such patent under the great seal of the province, and have the same filed with the Clerk of the Crown and Pleas, and thereupon such letters should be considered as remaining of record in the Court of King's Bench, so that a writ of *scire facias*,

(1) 12 Vict. c. 24, s. 17.

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under the seal of the court, might issue grounded upon the said record for the purpose of repealing the same for legal cause as aforesaid, if upon the proceedings which should be had upon the writ of *scire facias*, according to the law and practice of the Court of King's Bench in England, the same should be declared void. The 6th section of 7 Geo. IV, chapter 5, dealt with certain defences that might be pleaded in an action of infringement, but it is clear that in this statute in which we find in its earliest form in Canada the provisions corresponding to the 34th section of *The Patent Act* now in force, the "legal cause as aforesaid," referred to the grounds enumerated in the 8th section of the Act. The same is true of the same words where they occur in the 17th section of the Act of the Province of Canada, 12 Vict. chapter 24, before referred to, and in the 20th section of *The Consolidated Statutes of Canada*, chapter 34. There can be no question that the "legal clause aforesaid" for which a patent might be repealed in proceedings by *scire facias* according to these statutes was limited to the grounds mentioned, namely: where the patent had been fraudulently or surreptitiously obtained, or where it had issued improvidently or upon false suggestion.

When we come to the Act of 1869 (1) which applied to the Dominion of Canada, we find considerable change and the matter is not so clear. By the 26th section of that Act it is provided that a defendant in an action of infringement might specially plead, as matter of defence, any fact or default which by the Act or by law would render the patent void. By the 27th section it was enacted that a patent should be void, if any material allegation in the petition or declaration of the applicant were untrue, or if the

(1) 32-33 Vict. c. 11.

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specifications contained more or less than was necessary for obtaining the end for which they purported to be made, such omission or addition being wilfully made for the purpose of misleading. By the 28th section it was provided that every patent granted under the Act should be subject to the conditions therein expressed as to manufacture and importation of the invention, and should be void for breach of such conditions. And then comes section 29 by which a proceeding by writ of *scire facias* is given to repeal a patent "for legal cause as aforesaid," no cause being stated in the section itself, differing in that respect from the earlier provisions that have been referred to. If the question was to be determined by the Act of 1869 alone, there would, I think, be very good reason to think that the writ would lie to repeal the patent for any fact or default that renders it void. The only argument to be raised against that view arises from the fact that in the divisions of the Act, the 26th section occurs with those that relate to the "assignment and infringement of patents," while the 27th, 28th and 29th sections are under the heading: "Nullity, Impeachment and Voidance of Patent." But that clearly is not conclusive.

In *The Patent Act of* 1872 (1) the arrangement and number of the corresponding sections are the same as in the Act of 1869. But there is added to section 28 a proviso that any disputes which might arise as to whether or not a patent had become void for non-manufacture or for importation contrary to the statute, should be settled by the Minister of Agriculture or his deputy, whose decision should be final. From which it would follow that the "cause aforesaid" for which, by the 29th section, *scire facias* would lie to repeal a patent, would not include the breach of the

(1) 35 Vict. c. 26.

conditions prescribed by the 28th section; and it would not be true that it would lie for any fact or default which by the Act or by law rendered the patent void. If the words cited from the 29th section had any reference to the 26th section, the terms of the latter must, at least to the extent mentioned, be qualified. Before leaving this statute it will be convenient to notice that in it first occurs the provision that: "under any circumstances where a foreign patent "exists, the Canadian patent shall expire at the earliest "date at which any foreign patent for the same inven- "tion expires" (1). Here is a new ground for determining a patent. Clearly it might be pleaded as a defence to an action for infringement; but it is not at all clear that it could be invoked as a ground upon which a patent could be repealed by *scire facias*.

The Revised Statutes, chapter 61, (*An Act respecting Patents of Invention*), does not, I think, throw any new light on the question, or remove any of the difficulty. The division of the chapter, and the arrangement of the sections are altered. Section 27 of the Act of 1872 becomes section 28 of *The Revised Statutes*; section 26 becomes section 33; and section 29 becomes section 34, and all these occur under the heading of "Impeachment and other legal proceedings in respect to Patents." Section 28 as to non-manufacture and importation of an invention occurs as section 37 under the words "Forfeiture of Patents," and the jurisdiction of the Minister of Agriculture and of his deputy is continued. The result is that the section (2) enabling a defendant in an action of infringement to plead any fact or default that renders a patent void, immediately precedes that (3) which gives the writ of *scire facias* "for cause as aforesaid;" while several

(1) Sec. 7.
(2) Sec. 33.
(3) Sec. 34.

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sections intervene between the latter and section 28 which reproduces the provision of section 27 of the Act of 1872, that a patent should be void for certain stated reasons. Again under this statute it seems to me to be doubtful whether the words cited refer to the causes mentioned in the 33rd section, or to those mentioned in the 28th section, or to both. The same difficulty exists as that mentioned in connection with the Act of 1872. The 37th section of the Act shows clearly that there are facts and defaults that render a patent void which are not grounds for a writ of *scire facias*; and that the latter will not lie for all, but only for some of, the causes stated in the 33rd section of the Act. By several amendments of section 37 of *The Patent Act* (1) the Exchequer Court has, as we have seen, been given jurisdiction in the place of the Minister of Agriculture and his deputy to decide any question as to a patent being void for non-manufacture, or for importation contrary to the statute (2); but that does not remove the difficulty, as the jurisdiction is to be exercised by the court upon information in the name of the Attorney-General of Canada, or at the suit of any person interested, and not in a proceeding by *scire facias*.

In the earlier Acts that have been referred to, the words " for legal cause as aforesaid " had reference to certain specified causes, and not to the defences that might have been set up in an action for infringement. In the later statutes the corresponding expression " for cause as aforesaid " does not include all the defences that may be set up in an action for infringement, and it is doubtful whether or not it should be extended beyond the grounds upon which patents are in certain cases declared void by the 28th section of *The Patent*

(1) R. S. C. c. 61.
(2) 53 Vict. c. 13, s. 2; 54-55 Vict. c. 33; and 55-56 Vict. c. 24, s. 6.

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Act now in force. These grounds, as will be seen by reference also to sections 7, 8 and 10 of the Act, are, to state them briefly:—

(1.) That the grantee had not invented the art, machine, manufacture or composition of matter, or the improvement therein, for which the patent had been granted;

(2.) That the alleged invention was not the proper subject matter for an invention;

(3.) That it was not new; but had been known and used by other persons before his invention;

(4.) That it had been in public use or on sale with the consent or allowance of the inventor for more than one year previously to his application for a patent therefor in Canada;

(5.) That it was not useful; and

(6.) That the specifications were insufficient and misleading.

It certainly is not at all clear that the words mentioned include the defence created by the 8th section of the Act of 1872 on which the prosecutor relies, and that being the case it seems to me that there should be judgment for the defendant company. There will, under the circumstances, be no costs to either party. And the right of the Crown or prosecutor to set up in any other proceeding as a ground of defence or attack that the letters patent herein referred to have expired and become void is reserved.

Judgment accordingly.

Solicitors for the plaintiff: *Macmaster & Maclennan.*

Solicitors for the defendants: *Rowan & Ross.*