

BETWEEN:

ROBERT A. BRADLEY .....SUPPLIANT;

1940  
Feb. 1.

AND

Aug. 27.

HIS MAJESTY THE KING.....RESPONDENT.

*Patent—Petition of Right—Alleged user of invention by Government Department—Procedure—Action for declaration of validity of patent and for compensation for use of the patented invention by the Crown—Order setting down points of law to be disposed of before trial—Patent Act, 25-26 Geo. V, c. 32, s. 19—Exchequer Court Act, R.S.C., 1927, c. 34, s. 18—Jurisdiction of Court to make a declaratory order—Petition of Right Act, R.S.C., 1927, c. 142—Claim of patentee for user of patented invention by the Crown is not one in tort.*

An action was brought by B. against the Crown, claiming a declaration that a patent of 1936 granted to B. is valid and that the Crown has constructed and used his patented invention, and that the Commissioner of Patents be directed to ascertain and report under s. 19 of the Patent Act, 25-26 Geo. V, c. 32, what shall be a reasonable compensation to the suppliant by the Crown for the use of his invention, and that the Crown be condemned to pay to suppliant the amount of compensation so found by the Commissioner.

The respondent pleaded *inter alia* that the Petition of Right was bad in substance and in law and that any relief claimed therein was not relief for which under the law and practice a Petition of Right will lie or may be pleaded. The points of law raised were ordered to be set down for hearing and disposed of before the trial of the action. These questions were submitted to the Court:

1. Assuming the patent in suit to be valid and the invention covered thereby to have been used by the respondent, is the suppliant entitled in law to any of the remedies claimed against the respondent in respect of the use by the respondent of the patented invention, and
2. If so, does a Petition of Right lie to enforce such remedy or remedies?

For the purpose of a decision on the law points the Court assumed that the patent was valid and that the Crown had used the invention therein claimed, though such points were not conceded by the respondent in the statement of defence.

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*Held:* That the law points submitted for decision must be determined in the affirmative.

2. That a claim for compensation for the use of a patent is not a claim in tort because the Crown has the right to use the patent on the statutory terms set out in Section 19 of the Patent Act.
3. That where a statute authorizes the Crown to take away or use the property of a subject the Legislature cannot be considered as doing so without giving the subject a legal right to compensation unless such intention is expressed in unequivocal terms.
4. That there is no valid distinction between a sum due under a contract for the use of the property of a subject and a sum due for the lawful use of the property of a subject under a statutory authority.
5. That a Petition of Right lies when in consequence of anything legally done any resulting obligation emerges on behalf of the subject, and under the Petition of Right Act there is jurisdiction in this Court in respect of claims of the subject against the Crown to consider and determine what is right to be done, and to make a declaration as to the rights of the subject.

ARGUMENT on questions of law raised in the respondent's statement of defence ordered to be set down for hearing and disposed of before the trial of the action.

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

*Harold G. Fox, K.C.* and *M. B. Gordon* for suppliant.

*F. P. Varcoe, K.C.* and *W. R. Jackett* for respondent.

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

THE PRESIDENT, now (August 27, 1940) delivered the following judgment:

This proceeding, one of considerable importance, reaches the Court by way of Petition of Right, but the immediate matters for decision arise from an order to dispose of, in advance of the trial, certain law points emerging from the pleadings.

In October, 1936, there was granted the suppliant letters patent of invention relating to new and useful improvements in developments for the prevention of excessive wear in culverts. The suppliant alleges in his Petition that the Crown used his patented invention and that he thereupon requested the proper officer of the Crown, the Minister of Transport, to admit the use thereof and to pay any compensation therefor, but the Crown denied liability for such alleged use. Sec. 19 of the Patent Act

having provided that "the Government of Canada may, at any time, use any patented invention, paying to the patentee such sum as the Commissioner reports to be a reasonable compensation for the use thereof," the suppliant applied to the Commissioner of Patents under such provision of the Patent Act, to fix a reasonable compensation for the use of his said patented invention, but this application the Commissioner refused to entertain until use of the invention was first established either by admission of the Crown, or by judgment of the Court.

The suppliant then commenced this Petition of Right proceeding, claiming a declaration (1) that the Crown has constructed and used his patented invention, (2) that the said letters patent of invention are valid, (3) that the Commissioner be directed to ascertain and report, under s. 19 of the Patent Act, what shall be a reasonable compensation to the suppliant by the Crown for the use of his invention, and (4) that the Crown be condemned to pay to the suppliant the amount of compensation so found by the Commissioner.

The law points set down for hearing and disposition before the trial, are the following:—

1. Assuming the patent in suit to be valid and the invention covered thereby to have been used by the respondent, is the suppliant entitled in law to any of the remedies claimed against the respondent in respect of the use by the respondent of the patented invention, and

2. If so, does a Petition of Right lie to enforce such remedy or remedies?

For the purposes of a decision upon these points of law the allegations of fact in the suppliant's Petition must be taken as proved, and in a general way I have already stated them. However, I should perhaps recite paragraph 4 of the Petition because it alleges, in some detail, that the suppliant requested the Minister of Transport, the head of the Department of Government which the suppliant alleges used his patent, to admit the use of his patent, and also that the suppliant applied to the Commissioner of Patents to fix the compensation for the use of his patent, with the result therein appearing.

Paragraph 4 is as follows:—

4. The respondent has since the date on which the said Letters Patent were issued, constructed, and used in the Dominion of Canada, the said new and useful improvements in developments for the Prevention of Excessive Wear in Culverts, which embody the invention described in the above Letters Patent, without compensating the suppliant, therefor.

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4. (a) Your suppliant under date of March 23rd, 1938, Nov. 7th, 1938, December 5th, 1938, and December 21, 1938, requested the proper officer of the Crown, namely, the Honourable the Minister of Transport, to admit use of the said Letters Patent and to pay compensation therefor, but the Crown denied liability for use of the said Letters Patent under date of December 27th, 1938.

4. (b) Your suppliant applied to the Commissioner of Patents to fix compensation for the use of the said Letters Patent by the Crown in accordance with section 19 of the Patent Act, under date of October 11, 1938, and under date of October 14th, 1938, the Commissioner of Patents refused to fix compensation until use of the device was first established either by admission by the Crown or by judgment of the Court.

4. (c) Your suppliant again under date of June 12, 1939, requested the Commissioner of Patents to fix compensation for use of the said Letters Patent under section 19 of the Patent Act, but the Commissioner of Patents again refused to do so under date of June 15, 1939.

The statement of defence denies the validity and user of the patent, and there is no specific denial of the allegations of fact in paragraph 4 of the Petition. It will be seen therefore that the Crown by his denial of validity and user of the patent, and the Commissioner of Patents by his refusal to fix the compensation, prevented the suppliant from seeking any relief or remedy under s. 19 of the Patent Act, and apparently the only remedy available to him was to proceed by way of Petition of Right, at least it may be assumed that he was so advised.

Before approaching the principal question for decision here, whether a Petition of Right lies, I may first dispose of two or three other points raised by counsel in their arguments upon the law points. One contention put forward by Mr. Fox was that the suppliant's Petition was founded upon an implied contract, because s. 19 of the Patent Act authorizes the use of a patent by the Crown, and a use having been made by the Crown, there was therefore an implied contract to compensate the patentee. In any case of implied contract there must be an implied assent to a contract on both sides. Upon the facts appearing in this case I do not think this contention of Mr. Fox can be applied here, as there was no consensus on which to found an implied contract. The Crown, I think, must be assumed to have used the patent as a matter of right under the authority of s. 19 of the Patent Act. It may be contended that there was here a statutory contract, and in somewhat similar state of facts, in the case of *Rowland v. The Air Council* (1), Scrutton L.J., referring to s. 29 of the

English Patent Act of 1907, which corresponds with s. 19 of our own Patent Act, does refer to a "statutory contract," but he also uses the term "statutory liability" in the same connection. In the same case, Atkin L.J. refers to s. 29 of the English Patent Act as giving a "statutory right" of compensation to a patentee for the use of his invention by the Crown, and it seems to me that this more accurately describes the effect of s. 19 of the Canadian Patent Act. Then, Mr. Varcoe argued that the suppliant's Petition was essentially an action for infringement and therefore one sounding in tort, and being a wrong no claim founded on that wrong would lie against the Crown. The suppliant in this proceeding is, I think, saying that the Crown has used his invention lawfully and that he wants compensation for the use made of his invention, and which he claims he is entitled to under s. 19 of the Patent Act. That is not a claim in tort, because the Crown has a lawful right to use the patent on the condition set out in s. 19 of the Act. The suppliant's claim is, I think, one founded upon s. 19 of the Patent Act because the Crown had lawfully made use of his invention and because of that lawful use he claims the remedy or relief prayed for in his Petition. Further, for the purposes of a decision upon the law points mentioned, it is being assumed that the patent is valid and that the Crown has used the invention therein claimed. I do not think the question of infringement can be interjected into this matter because the validity and user of the patent is conceded for the purposes of the law points to be decided, and the Crown, it is conceded, had a legal right to use the invention. So therefore, I think, we may dismiss the idea that the suppliant's Petition cannot be heard because it is a claim in tort. Then, it was argued by Mr. Varcoe that the Court was without jurisdiction to make the declaratory order prayed for by the suppliant. As to the authority of the Court to make a declaratory order, to the effect here claimed, reference might be had to the following passages from the judgment of Lord Tomlin, in delivering the judgment of the Privy Council, in the case of *Dominion Building Corporation v. The King* (1):

It is no doubt true that an operative order for specific performance cannot be made against the Crown. In fact, no order can be made

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against the Crown in the sense in which it can be made against the subject, but under the Petition of Right Act (R.S. Can., 1906, c. 142), s. 8, there is jurisdiction in respect of claims of the subject against the Crown to consider and determine what is right to be done and, as their Lordships do not doubt, to make a declaration as to the right of the subject to specific performance if the circumstances justify it.

It is, in their Lordships' opinion, too narrow a view to treat the there is jurisdiction in respect of claims of the subject against the Crown In the present case their Lordships think that the circumstances are such as would have justified an order for specific performance by a Court of equity, had the contest been one between two subjects.

Reference might also be had to *Dyson v. Attorney-General* (1), and *Qu'Appelle Long Lake & Saskatchewan Railroad & Steamboat Co. v. The King* (2). It would seem to me quite clear that in so far as the suppliant seeks relief in the premises by a declaratory order of the Court, such relief may be granted in exercise of the jurisdiction conferred upon the Court by the Petition of Right Act, and by s. 18 of the Exchequer Court Act. And further, it is to be remembered, the practice of the High Court of Justice in England has been made part of the practice of the Exchequer Court of Canada by the provision of Rule 2 of that Court.

I shall have occasion presently to refer in some detail to the case of *Rowland v. The Air Council* (*supra*) and to which I was referred by counsel. As this case in the end involved a consideration of section 29 of the English Patent Act of 1907, since amended, and which corresponded closely to s. 19 of our own Patent Act, it may be desirable to refer briefly to the terms of that provision of the English Patent Act of 1907, and also to the new section 29 as enacted in 1919. Before the Patent Act of 1907 the Crown might use the subject-matter of a patent right independently of the consent of a patentee, or of any liability on the part of the Crown to make compensation to the patentee for such use. The case of *Feather v. The Queen* (3), decided that the Crown had the prerogative right to make such an independent use of a patent. The Act of 1907 provided that "a patent shall have to all intents the like effect as against His Majesty the King as it had against a subject," and also that any Government Department might use the invention for the services of the Crown "on such terms as may, either

(1) (1911) 1 K.B. 410 at 417.

(2) (1901) 7 Ex. C.R. 105 at 115.

(3) (1865) 6 B. &amp; S. 257.

before or after the use thereof, be agreed on, with the approval of the Treasury, between the department and the patentee, or, in default of agreement, as may be settled by the Treasury after hearing all parties interested." That turned out to be a difficult procedure because the Treasury refused to determine a dispute as to the validity of a patent. Sometimes, this difficulty was overcome by an arrangement between the parties to determine the matter of validity as a preliminary point, and Terrell on Patents, 7th Ed., page 429, states that prior to the coming into force of the Act of 1919 it had been the practice where there was a substantial question as to either infringement or validity for the Treasury to refuse to settle the matter under the old section 29, but instead for the department concerned to nominate some person who would act as a defendant in an action brought by the patentee in the High Court for a declaration upon the questions of validity and infringement, and thereafter if the patentee had been successful, to award terms. The new procedure is, where agreement cannot be reached otherwise, by way of originating notice of motion, and the matter is decided before any one of the Judges of the Chancery Division to whom it is allotted. The Act of 1919 also provided that a patent was to have to all intents the like effect as against the Crown as it has against a subject, and then there is a proviso to the effect that a Government Department may use the patent without licence "on such terms as may, either before or after the use thereof, be agreed on, with the approval of the Treasury, between the department and the patentee, or, in default of agreement, as may be settled in the manner hereinafter provided." The "manner hereinafter provided" was that in the case of any question as to the making, use or exercise of an invention the matter should be referred to the Court for decision, who should have power to refer the whole matter to a special or official referee, or an arbitrator, and further provided that "the Court, referee, or arbitrator, as the case may be, may, with the consent of the parties, take into consideration the validity of the patent for the purposes only of the reference." The Act of 1919 provided no procedure by which that question should be referred to the Court, and no procedure was in fact laid down until Rules of Court under the Patents Act were made in the year 1925, when,

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as I have already stated, it was provided that the reference should be by means of originating notice of motion addressed to the Department and, on such a notice of motion, apparently the Court may make such orders as are appropriate for determining the dispute. The action in *Rowland v. The Air Council (supra)*, was commenced in 1921, before there was any Rule of Court at all, and it was commenced in the ordinary way by a writ addressed to the Air Council claiming a declaration of validity and compensation.

The case of *Rowland v. The Air Council* (1), was an action commenced by a writ issued on behalf of the plaintiff Rowland, the Trustee in Bankruptcy of one, Kennedy, who was the owner of a patent which related to improvements in the construction of the body of an aeroplane. The Air Council, the defendant, was a body established for the administration of matters relating to the Air Force and to the defence of the Realm by air. The plaintiff alleged breach of a contract having reference to Kennedy's patented invention, and claimed, *inter alia*, a declaration of the validity of the said patent, and that certain user and exercise of the invention, which need not be specified, constituted infringement of the patent. The defendants alleged, *inter alia*, that they were a Public Department of His Majesty's Government and were servants and agents of His Majesty and were not liable to be sued in respect of any contract made on behalf of His Majesty, and in so far as the plaintiff's action was founded upon any alleged infringement of the patent the defendants relied on s. 29 of the Patent Act of 1907, as a defence to the action, and claimed they were entitled lawfully to use and exercise the invention, if any, and that in default of agreement between the parties the sum to be paid for the use of the invention, if any, by the defendants, should be settled by the Treasury, under the said section and not otherwise. After the pleadings were closed it was ordered that the points of law raised by the defence in the action be disposed of before the trial of the action. The law points were argued before Russell J., and he decided the law points in favour of the defendants, and dismissed the whole action, holding, *inter alia*, that any claim for relief for breach of contract, or for the alleged infringements, was not sustainable,



and further, that it was not open to the plaintiff to proceed by action against the Government Department, the Air Council, for a declaratory judgment that the patent was a valid one, the defendants refusing to consent to the validity of the patent. In a footnote appearing on page 1 of the report of this case it appears that, on appeal by the plaintiff, the Court of Appeal, without deciding whether the conclusions to which Russell J. came were right or not, reversed and discharged the Order of Russell J., dismissing the action, the action to come on for trial on the question of liability, and liberty was given to amend the pleadings. The action then came on for trial before Lawrence J., who held (1) that the plaintiffs failed not only on their claim for damages and a declaration of validity, but also on the preliminary point of law put forward by the defendants that in the circumstances they were not liable to be sued at all, following the judgment of Russell J. on that point. Accordingly, the action was dismissed, and an appeal followed therefrom.

The Court of Appeal, in 1927, dismissed the appeal (2), holding that no action for a declaration of the validity of a patent, or for compensation for user of the invention by the Crown, against the Government Department concerned, was open to the patentee under the new section 29 of the Patents Acts 1907 and 1919 (and that would apply as well to the old section 29), and they expressed the view that if the Crown would not consent to its being dealt with under the provisions of the Patents Acts, the remedy was by Petition of Right, or by originating notice of motion, addressed to the Department. The Court of Appeal, I might add, also held that a claim for a declaration of the validity of the patent was not a claim in tort because the Crown had a right to use the patent on the statutory terms set out in the Patents Acts. This decision is important here because of the views expressed by the members of the Court of Appeal, as to a remedy by Petition of Right being available to a patentee, such as Kennedy, or the suppliant in the case under discussion, who claims a declaration as to the validity of his invention, when the Crown refuses to consent to its validity. I may

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(1) *Rowland et al. v. The Air Council* (1925) 42 R.P.C. 433.

(2) (1927) 44 R.P.C. 453.

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therefore refer to certain passages to be found in the judgments of the members of the Court of Appeal. Bankes L.J. said in dismissing the appeal (p. 458):

For these reasons, I think that the Plaintiff's remedy, if any, in respect of this matter, is either by Petition of Right, when he can proceed against the Crown, or, if he chooses to proceed by the method now laid down in the Rules, it would be open to him to take that particular course,

and what that course is I have earlier explained. Atkin L.J. said (p. 461):

The result of this Section (s. 29 of the Patents Act) is to give a statutory right of compensation to the patentee for the use of his invention by a Government department for the service of the Crown. That seems to me to be precisely similar to the *DeKeyser* case and to give rise to a claim for compensation for use of the plaintiff's property and would be the proper subject of Petition of Right to the Crown.

Scrutton L.J. said (p. 459):

This patent claim is not a claim in tort, because the Crown has a right to use the Patent on the statutory terms set out in section 29 of the Patents Act. If, therefore, you are wanting to get a decision as to the Patent, you are dealing with a statutory right, a right not for damages for tort, but a claim for an amount depending upon a statutory contract. First of all, it seems to me, therefore, as Sargant L.J., then Sargant J., seems to have thought, sitting as the President of the Commission which has dealt with claims by inventors, that, if you want to get a decision as to the validity of the patent and the Crown will not consent to its being dealt with under the proceedings under section 29, you must try and do it by Petition of Right. I am not saying you can do it; but that is the way you may try and do it, if you want to do it. That was Sargant J.'s view and at present it is mine; . . .

It will be seen therefore that the Court of Appeal expressed rather strongly the view that a remedy by way of Petition of Right was open to a patentee in England, in the case where the Crown refuses to concede the validity and user of the patentee's invention, and that the Patents Acts gave a statutory right of compensation to a patentee for the use of his invention by a Department of Government for the service of the Crown. For the purposes of a decision in the matter of the law points under discussion here we start with the assumption that the patent of the suppliant is valid and that it has been used by the Crown, but that of course is not conceded in the statement of defence of the Crown, in the Petition of Right proceeding.

I come next to a reference to the decision of the House of Lords in the case of *Attorney-General v. DeKeyser's Royal*

*Hotel Limited* (1), a case of great and general importance, and which, it will be remembered, was referred to by Atkin L.J., in *Rowland v. The Air Council*. I shall not attempt to state at any length the particular facts appearing in that case, or the terms of the statutes or statutory regulations involved, because they are of considerable length and are to be found fully set forth in the report of the case. I might say however, that in 1916, the Crown, purporting to act under what was known as the Defence of the Realm Regulations, made under the Defence of the Realm Consolidation Act, 1914, took possession of an hotel, belonging to the DeKeyser Hotel Co. Ltd., for housing the headquarters personnel of the Royal Flying Corps. The representatives of the Crown insisted throughout that possession of the premises was taken under the Royal Prerogative, and that therefore the suppliants were not entitled as of right to any payment by way of compensation, but that their sole remedy was to apply to a certain Commission, named the Defence of the Realm Losses Commission, for an *ex gratia* allowance in respect of the losses that they would suffer by the occupation of their premises on behalf of the Crown. The Receiver in possession of the premises belonging to the DeKeyser Hotel Co. was furnished with forms of claims for submission to the Losses Commission, and he was at the same time advised that compensation "is made *ex gratia*, and is strictly limited to the actual money loss sustained." As no settlement as to compensation was arrived at, and the Receiver declined to go before the Losses Commission, there was presented a Petition of Right by the DeKeyser Company. The relief asked for was a declaration that the suppliants were entitled to an annual rent during the use and occupation of the premises, or, in the alternative, that they were entitled to compensation under the Defence Act, 1842, which Act provided that the amount of compensation to be paid by the Crown was to be settled by a jury. It was held by the Court of Appeal, and by the House of Lords, that the entry of the Crown upon the premises was under the Defence Act, 1842. As was stated by Lord Dunedin, the question in the case narrowed down to one point only: "The Crown having legally taken, is it bound to pay compensation *ex lege*, or is the offer to

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pay compensation *ex gratia*, as that compensation may be fixed by the Losses Commission, a sufficient offer and an answer to all demands?" The House of Lords affirmed the decision of the Court of Appeal, and the declaration there made was in the following language: "And this Court doth declare that the suppliants are entitled to a fair rent for use and occupation of DeKeyser's Royal Hotel on The Thames Embankment in the City of London by way of compensation under the Defence Act, 1842."

It is not possible to state in brief terms all that is comprehended in the decision of the House of Lords in this case. The extent and limitation of the Royal Prerogative and of the power of the executive officers of the Crown to take possession of land compulsorily during an emergency arising out of a state of war were exhaustively discussed, and the earlier records, statutes and decisions, with regard to acts of interference by the Crown with private property for the purpose of the defence of the realm, were considered and reviewed, as they were by the Court of Appeal, but into all that I need not enter, interesting though it be. For all necessary purposes here, I think, I may safely say that the Law Lords were of the opinion that the Crown had no power to take possession of the suppliants' premises in right of its prerogative simpliciter, and that the suppliants were legally entitled to compensation in the manner provided by the Act of 1842; that when an Act of Parliament deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being abridged; that when the Crown acts under the authority of a statute, it, like any other person, must take the powers that it thus uses *cum onere*, and it cannot take the powers without fulfilling the condition that the statute imposes on the use of such powers; and that when powers covered by the statute are exercised by the Crown it must be presumed that they were so exercised under the statute, and even if the commandeering of the DeKeyser Hotel had not been expressly done under statutory powers it was to be presumed that the Crown acted under those statutory powers, and therefore subject to the equitable provision for, or statutory right to, compensation. In respect of the remedy

available to the suppliants in that case, and of the question whether a Petition of Right would lie, I think I cannot do better than to quote one passage from the speech of Lord Dunedin, and another from that of Lord Atkinson. The former said: "The other point is as to the remedy. I am of opinion that a Petition of Right lies, for it will lie when in consequence of what has been legally done any resulting obligation emerges on behalf of the subject. The Petition of Right does no more and no less than to allow the subject in such cases to sue the Crown. It is otherwise when the obligation arises from tort, but, as already insisted on, what was done here, so far as the taking of the premises was concerned, was perfectly legal." Lord Atkinson in his speech said: "The only remaining point is whether a Petition of Right will lie in respect of the statutory liability for an unliquidated amount, not a fixed sum. In my opinion, based on the authority of *Reg. v. Doutré* (1), and *Windsor, &c. Ry. Co. v. Reg.* (2), there is no valid distinction between a sum due under a contract or grant made by or on behalf of the Crown as mentioned by Erle C.J. in *Tobin v. Reg.* (3), and such a liability, due for the lawful and authorized use and enjoyment by the officer of the Sovereign, on the Sovereign's behalf, of the lands or buildings of a subject. Both seem equally untainted by tort, both equally untouched by the principle that the King can do no wrong." The Attorney-General apparently raised no objection to the procedure by Petition of Right if the suppliants could establish a claim to compensation, or to the form of the declaration made by the Court of Appeal.

I have now to consider whether a Petition of Right will lie in respect of the liability herein alleged against the Crown by the suppliant for the use of his patented invention. This involves a consideration of s. 19 of the Patent Act. That this provision of the Act is inadequate, in regard to the procedure for the ascertainment of compensation, would seem obvious. The corresponding clause in the English Patent Act of 1907 must have been regarded in the same light or it would not have been subjected to the comment directed against it in the case of *Rowland v. The Air Council* (*supra*), by Scrutton and Atkin L.JJ.

(1) (1884) 9 A.C. 745.

(2) (1886) 11 A.C. 607.

(3) (1864) 16 C.B.(N.S.) 310.

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It would seem to me that while s. 19 of the Patent Act plainly permits the Crown to use a patented invention, and creates a statutory liability for such use, it fails to provide suitable machinery for determining what is the reasonable compensation to be paid a patentee, in all cases. The section seems to contemplate only the case where the validity and user of a patent is admitted by the Crown, and no provision is made for the case where both validity and user are put into question by the Crown, which is the case here. As was said by Atkin L.J. in *Rowland and Kennedy v. The Air Council (supra)*, it is difficult to ascertain how the Court, or the Commissioner, "can determine what is the use of a patented invention when there still remains the doubt whether it is the true subject-matter of a patent or not. I should have thought that was the essence of the question of the amount of the remuneration." In the same connection, Sargant J. in *the Matter of Carbonit Aktiengesellschaft* (1) said:

By Section 29 of the Patents and Designs Act, 1907, provision was made for the ascertainment by the Treasury, as therein mentioned, of the terms on which any Government Department or their contractors might use an invention protected by a patent. But the Section was only appropriate to cases where both the validity of the patent and the fact of the user of the patented invention were admitted; and in cases where either validity or user or both were disputed no machinery was provided for determining the dispute.

He then makes reference to this omission being supplied by s. 8 of the Patent Act of 1919, which repealed s. 29 of the Act of 1907, and substituted for it a new section which does contain machinery, for dealing with any such dispute. I think it is quite clear that s. 19 of our Patent Act, in the state of facts here, does not provide machinery for determining the amount of compensation which should be paid the suppliant here, the Crown not consenting, and I cannot but think that it was impossible for the Commissioner to have done otherwise than he did, in the circumstances, until there had been some determination of the dispute as to the validity and user of the patent, and until those points were determined, or agreed to, no purpose would be served by attempting to compel the Commissioner to determine the compensation, assuming some machinery existed requiring him so to do. The Commissioner is not, I think, given jurisdiction to determine such

(1) (1923) 40 R.P.C. 360 at 366.

questions as the validity or user of a patented invention. But does the omission mentioned leave the suppliant without a remedy, and can it be said that a Petition of Right does not lie in the state of facts disclosed here? It is difficult to conceive of such being the case. I do not think that the absence of such procedure connotes that the subject is left without any right of compensation, and I can find no authority which would support that proposition. If that were so it would mean that an intention to take away property, or property rights, without compensation was intended by the Legislature, and it has been held that such an intention is not to be imputed to the Legislature unless it is expressed in unequivocal terms: *Newcastle Breweries v. Rex* (1); *Central Control Board v. Cannon Brewery Co.* (2), and *Attorney-General v. DeKeyser's Royal Hotel Limited* (*supra*). In the second of the cases just mentioned Lord Atkinson stated that it was recognized as a canon of construction that a statute will not be read as authorizing the taking of a subject's goods without payment unless an intention to do so is clearly expressed. He said:

That canon is this: that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature, unless that intention is expressed in unequivocal terms. I used the words "legal right to compensation" advisedly, as I think these authorities establish that, in the absence of unequivocal language confining the compensation payable to the subject to a sum given *ex gratia*, it cannot be so confined. I do not think the Attorney-General really contested this, nor, as I understood him, did he contest the principle that where the statute authorizing the taking away of, or causing damage to, the subject's property, either does not provide a special tribunal to assess the amount of the compensation the subject is to receive, or only provides a tribunal which has become non-existent, the subject is entitled to have that amount assessed in the High Court of Justice.

If a statute creates an obligation or liability on the part of the Crown to pay to the subject compensation for the exercise of a statutory right, without providing a special tribunal for assessing the amount of compensation, it would seem clear that a Petition of Right will lie for the recovery of that compensation. If, on the other hand, a special tribunal, designated by the statute for that purpose, becomes non-existent, it would also seem clear that a Petition of Right will lie to have the amount of com-

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(1) (1920) 36 T.L.R. 276.

(2) (1919) A.C. 744 at 752.

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compensation assessed by a court of competent jurisdiction; as between subject and subject, in such a case, the one who had been damaged by the exercise of a statutory right would, I think, be entitled to have the amount of compensation for such damage assessed in an action. Now, I think, it would be equally true that if a tribunal named by the statute to assess the compensation for the legal use of a patent by the Crown, declines to hear a claim for compensation based upon that legal use of the patent, the Crown would not be relieved of its obligation or liability, and the claimant would have recourse, by way of Petition of Right, in the courts, for a declaration as to his rights in respect of compensation. Therefore, I cannot quite conceive of any sound reason why the suppliant here is not entitled to assert his alleged legal rights against the Crown in respect of compensation, by way of Petition of Right, where the Commissioner has refused to assess such compensation, and where apparently the statute has omitted to provide a tribunal for the assessment of compensation, in the particular facts here appearing. In such a case, I think, a Petition of Right will lie against the Crown to consider and determine what is right to be done. In this connection I might refer to a decision of the Court of Appeal in the case of *Robinson & Co. v. The King* (1). There the Food Controller requisitioned a quantity of bran and pollards, used as food for cattle, and manufactured by the suppliants. The goods in question were requisitioned under the Defence of the Realm Regulations but there was some doubt as to whether they were requisitioned under Regulation 2B, or Regulation 2F. If the goods were requisitioned under Regulation 2B, the price to be paid was to be determined by a tribunal, known as the Defence of the Realm Losses Commission, by which claims for compensation under the Defence of the Realm Regulations were determined, but the compensation was not to exceed a certain maximum price fixed by an Order in Council, and the maximum price had, in fact, been fixed by the Order in Council and had been paid to the suppliants. If the goods were requisitioned under Regulation 2F, then compensation for the goods was to be determined by an arbitrator, and the arbitrator in determining the amount of compensation was to have regard to the cost of

(1) (1921) 3 K.B. 183.



production of the article in question and to the allowance of a reasonable profit, without necessarily taking into consideration the market price of the article at the time. The Losses Commission refused to entertain a claim for compensation, on the ground they were "unable to entertain an application in respect of matters as regards which the applicant possesses, or claims to possess, any rights enforceable in a Court of law." The Minister and the suppliants were unable to agree as to the price which the suppliants were entitled to be paid, or as to the tribunal by which that price should be ascertained. The suppliants then presented a Petition of Right in which they prayed for a decision on those points. In the answer to the petition the Attorney-General set up that the requisitioning of the goods was made under Regulation 2B, and admitted the suppliants' legal right to be paid a price to be determined in accordance with that regulation by the Losses Commission, and that the Food Controller had always been ready to pay and had paid to the suppliants for their goods the maximum prices to which they could have been entitled under the said regulation. The trial judge held that the goods were requisitioned under Regulation 2B, and that the suppliants could recover no more than the maximum price fixed by the Order in Council. On appeal, it was held that the goods were taken under Regulation 2B, and that the suppliants were entitled to an order that the suppliants were entitled to be paid for the goods referred to in the Petition of Right, at prices to be determined in accordance with Regulation 2B, and to an account of what was due them on that basis. If I should quote a passage from the opinion of Bankes L.J. in this case, it will reveal the grounds upon which the Court of Appeal proceeded more clearly than I can state them. That passage is as follows (p. 197):

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A serious question was raised in this Court in reference to the tribunal mentioned in reg. 2B, which does not appear to have been brought to the attention of the learned judge. The regulation provides that the price to be paid for goods acquired under the regulation shall, in default of agreement, be determined by the tribunal by which "claims for compensation under these regulations are . . . determined." It was not disputed by counsel for the Crown that "are determined" means are in fact determined. It was contended for the suppliants that the only tribunal in existence to which the regulation could apply was the Commissioners appointed by the Royal Warrant of March 31, 1915, and that this body had from the first refused to entertain any claims in which any statutory or contractual right to payment or compensation existed

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or was alleged, and had in fact refused to entertain the suppliants' claim. This was not disputed by counsel for the Crown, but it was said that the Commissioners are the tribunal indicated by the regulation, because they do deal with numbers of claims arising under the regulation, and that if they refused to entertain claims which come within the terms of the reference to them they could by proper means have been compelled to entertain them. I cannot accept this argument. I do not give any decision upon the question whether any machinery exists by which the Commissioners could have been compelled to deal with cases like the present. It is sufficient for me that they never have done so, and refused to do so in the present case. That fact brings this case, in my opinion, within the rule referred to by Lord Atkinson in the *Cannon Brewery* case (1) and his comment on it: "That canon is this: that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms. I used the words "legal right to compensation" advisedly, as I think these authorities establish that, in the absence of unequivocal language confining the compensation payable to the subject to a sum given *ex gratia*, it cannot be so confined. I do not think that the Attorney-General really contested this, nor, as I understood him, did he contest the principle that where the statute authorizing the taking away of, or causing damage to, the subject's property, either does not provide a special tribunal to assess the amount of the compensation the subject is to receive, or only provides a tribunal which has become non-existent, the subject is entitled to have that amount assessed in the High Court of Justice." For all practical purposes the Commissioners were a non-existent tribunal so far as the claims of the suppliants are concerned. I come therefore to the conclusion that the suppliants have a legal claim to compensation, the amount of which claim must be ascertained in accordance with the directions laid down in reg. 2B for determining prices, and that inasmuch as the tribunal referred to in the regulation did not determine claims such as theirs the suppliants are not debarred from seeking to have the amount of their claim ascertained in the High Court, and that having established their legal right to be paid, and no agreement having been come to as to the amount to which they are entitled, they have established their right to an account at their own risk as to costs.

It would seem to me that the particular facts appearing in this case resemble closely those of the case before me, and that the decision of the Court of Appeal supports the contention that a Petition of Right will lie in the matter under discussion.

Now, by way of recapitulation. Sec. 19 of the Patent Act gives the Crown a right to use a patented invention and it creates a statutory liability to pay compensation to the patentee for such use. The user contemplated would appear to be in the nature of a special statutory licensing, running during the life of the patent. The suppliant could not therefore contest the right of the Crown to use his patent. From the authorities which I have mentioned and

discussed, I think I may say that the suppliant's claim is not one in tort, and that the user of the patent must be assumed to have been made under the statutory authority and not under the Royal Prerogative, as was suggested by Mr. Varcoe; that if a statute authorizes the Crown to take away or use the property of a subject no intention of doing so without giving to him a legal right to compensation for the loss of it is to be imputed to the Legislature unless that intention is expressed in unequivocal terms; that there is no valid distinction between a sum due under a contract for the use of the property of a subject and a sum due for the lawful use of the property of a subject under a statutory authority; that a Petition of Right lies when in consequence of anything legally done any resulting obligation emerges on behalf of the subject; and that under the Petition of Right Act there is jurisdiction in this Court in respect of claims of the subject against the Crown to consider and determine what is right to be done, and to make a declaration as to the rights of the subject. What is sought by the suppliant's Petition is a declaration as to his rights, and a determination of what is right to be done in the facts of his case. Substantially, the suppliant asks that it be declared that his patent is valid and has been used by the Crown, if he succeeds in establishing the facts alleged in his Petition. It is no answer, I think, to say that as the statute designates the Commissioner of Patents to determine the compensation payable to a patentee in the event of user of his patent by the Crown, that recourse can only be had to the Commissioner, if, in point of fact, the Commissioner has refused the patentee's application to determine the compensation. As was said by Bankes L.J. in the case of *Robinson & Co. v. The King (supra)*, it is sufficient that the Commissioner has not fixed the compensation, and has refused to do so; and the Crown here refused its consent to this being done. As I have already stated, s. 19 of the Patent Act seems to make provision only for the case where the user of a patent is not in controversy, but no provision is made for the case where both validity and user are put into question. I think the statute in question is to be construed as having made no provision for the assessment of compensation by the Commissioner, in the latter event, but the liability continues, and this Court is open to the suppliant by the appropriate

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procedure, that is, by Petition of Right. I have come to the conclusion that the suppliant has a legal claim to compensation if he succeeds in establishing the facts alleged in his Petition, but as validity and user of the patent by the Crown is to be assumed for our purposes here, the law points submitted for decision must be determined in the affirmative.

There is one other matter to which I have omitted to make reference. I was referred to the judgment of Burbridge J. in *McDonald v. The King* (1). This was a demurrer to a Petition of Right seeking compensation against the Crown for the alleged use of a patented invention; and it was held that a report by the Commissioner was a condition precedent to any right of action for such compensation. I wish to point out this distinction between that case and the matter I have to decide here, namely, that in the latter instance validity and user of the patent in question is assumed, and that an application to the Commissioner to assess the compensation claimed was refused, whereas in the case mentioned it is not clear that user by the Crown of the patent there in question was even alleged, but in any event no application was ever made to the Commissioner to assess the compensation claimed. The suppliant in his Petition alleged that the Government of Canada "adopted" his invention for use in Dominion elections, the invention claimed being a form of election ballot, and the "adoption" alleged appears to have consisted of the invention having been incorporated in section 48 of the Dominion Election Act, 63-64 Victoria, Chap. 12; and it is there also alleged that His Majesty, represented therein by the Minister of Justice, suggested for adoption by the Parliament of Canada a Bill providing for the use of the suppliant's invention, and that the Bill so submitted was adopted by the Parliament of Canada. But, assuming there was actual user of that suppliant's alleged invention, there is nothing in the record of the case, which I have examined, to indicate that any application was ever made to the Commissioner to assess the compensation for such user, or that the Crown ever refused its consent to such a procedure. The Petition did not seek a declaration of the suppliant's rights in the matter, and merely claimed that the suppliant be paid the sum of

(1) (1906) 10 Ex. C.R. 338.

\$10,000, less the sum of \$333.33 which the suppliant had been paid by the Crown, which payment the Crown pleaded was one in the nature of a gratuity. These facts distinguish that case from the matter before me, and that is all I think I need say concerning it.

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The matter of costs is reserved until the settlement of the minutes of judgment.

*Judgment accordingly.*