

1940

CANADA
LAW REPORTS

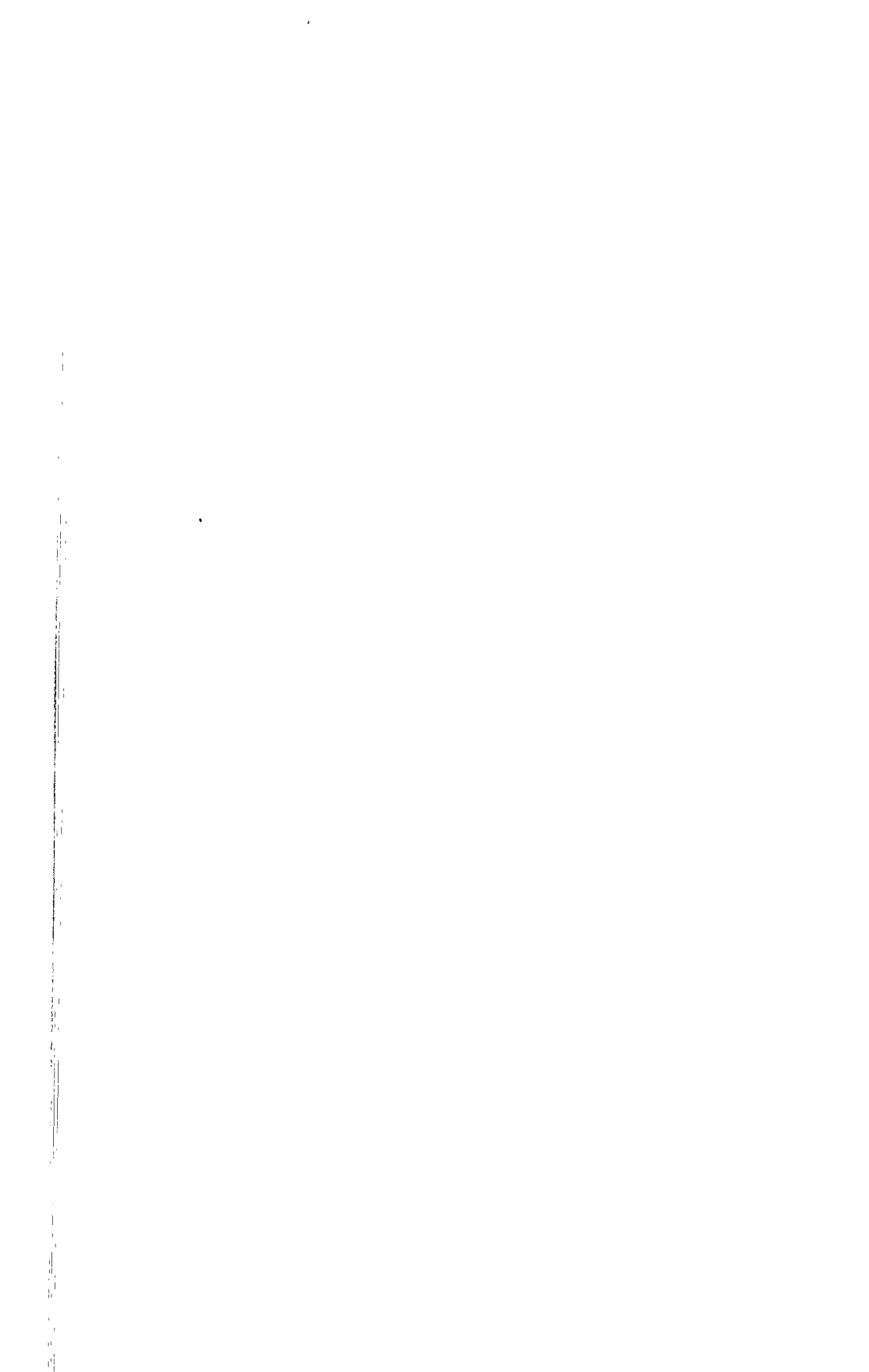
Exchequer Court of Canada

RALPH M. SPANKIE, K.C.
OFFICIAL LAW REPORTER

*Published under authority by Arnold W. Duclos, K.C.
Registrar of the Court*



OTTAWA
EDMOND CLOUTIER
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1941



JUDGES
OF THE
EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

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

PUISNE JUDGE:

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

DISTRICT JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT
OF CANADA

The Honourable CHARLES D. MACAULAY, Yukon Admiralty District—appointed 6th
January, 1916.

His Honour DONALD MCKINNON, Prince Edward Island Admiralty District—appointed
20th July, 1935.

do LEONARD PERCIVAL DEWOLFE TILLEY, New Brunswick Admiralty District—
appointed 14th August, 1935.

The Honourable WILLIAM F. CARROLL, Nova Scotia Admiralty District—appointed 23rd
April, 1937.

do LUCIEN CANNON, Quebec Admiralty District—appointed 18th October,
1938.

His Honour FRED. H. BARLOW, Ontario Admiralty District—appointed 18th October,
1938.

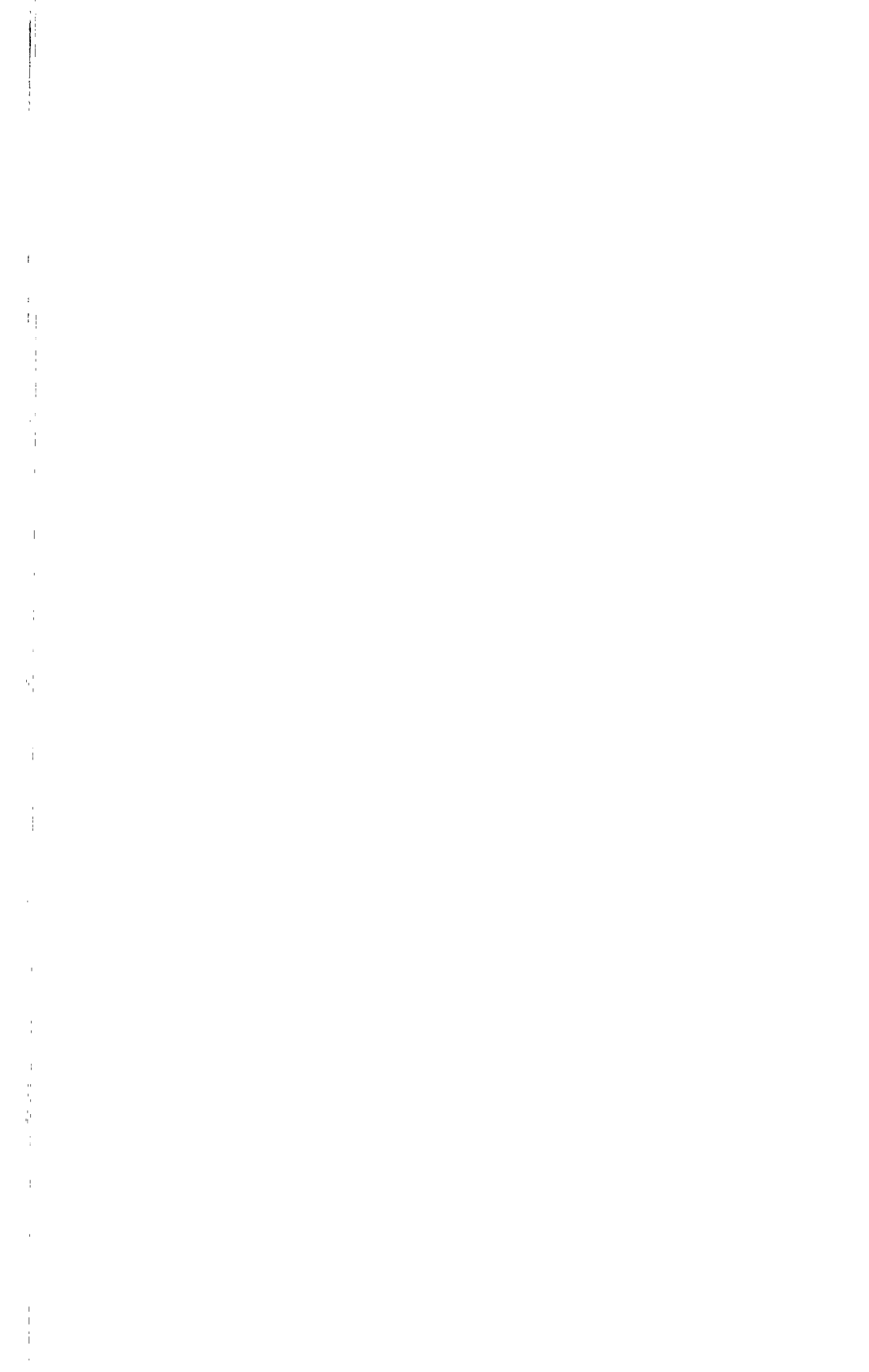
The Honourable MALCOLM A. MACDONALD, British Columbia Admiralty District—
appointed 16th May, 1940.

DEPUTY DISTRICT JUDGES:

The Honourable Sir JOSEPH A. CHISHOLM—Nova Scotia Admiralty District.
do J. B. M. BAXTER—New Brunswick Admiralty District.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Right Honourable ERNEST LAPOINTE, K.C.



The Honourable Archer Martin, District Judge in Admiralty for the British Columbia Admiralty District, retired from the Bench during the current year.

TABLE OF CONTENTS

Memoranda <i>re</i> Appeals.....	IX
Table of the Names of Cases Reported in this Volume.....	XI
Table of the Names of Cases Cited in this Volume.....	XIII
Report of the cases adjudged.....	I
Index	281

MEMORANDA RESPECTING APPEALS FROM JUDGMENTS OF
THE EXCHEQUER COURT OF CANADA

A. To the Judicial Committee of the Privy Council:

Coca-Cola Co. of Canada Ltd. v. Pepsi-Cola Co. of Canada Ltd. (1938)
Ex. C.R. 263. Appeal to the Supreme Court of Canada allowed.
Leave to appeal to the Privy Council granted. Appeal pending.

B. To the Supreme Court of Canada:

1. *Belding Corticelli Ltd. et al. v. Chas. A. Kaufman.* (1938) Ex. C.R. 152. Appeal dismissed.
2. *Dominion Bridge Co. Ltd. v. The King.* (1939) Ex. C.R. 235. Appeal dismissed.
3. *Dominion Natural Gas Co. Ltd. v. Minister of National Revenue.* (1940) Ex. C.R. 9. Appeal allowed.
4. *Dominion Tankers Ltd. v. Shell Petroleum Co. of Canada Ltd.* (1939) Ex. C.R. 192. Appeal dismissed.
5. *Dominion Textile Co. Ltd. v. Minister of National Revenue.* (1940) Ex. C.R. 130. Appeal pending.
6. *Dr. Brinkley II v. Shanalian et al.* (1939) Ex. C.R. 181. Appeal dismissed.
7. *Eastern Canada Steel & Iron Works Ltd. v. The King.* (1939) Ex. C.R. 244. Appeal dismissed.
8. *Elliott, Grace v. Minister of National Revenue.* (1940) Ex. C.R. 171. Appeal dismissed.
9. *Hochelaga Shipping & Towing Co. Ltd. v. The King.* (1940) Ex. C.R. 199. Appeal dismissed. Cross appeal allowed.
10. *James B. Eads v. Joseph P. Burke.* (1939) Ex. C.R. 289. Appeal dismissed.
11. *Lafayette et al. v. Maple Leaf Milling Co. et al.* (1939) Ex. C.R. 368. Appeal allowed.
12. *Lafayette et al. v. Port Colborne & St. Lawrence Navigation Co. Ltd.* (1939) Ex. C.R. 355. Appeal allowed.
13. *Magazine Repeating Razor Co. of Canada Ltd. et al. v. Schick Shaver Ltd.* (1939) Ex. C.R. 108. Appeal dismissed. Cross appeal allowed.
14. *Morrison, George Alexander v. The King.* (1938) Ex. C.R. 311. Appeal allowed.

15. *National Elec. Products Corpn. v. Industrial Elec. Products Ltd.* (1939) Ex. C.R. 282. Appeal dismissed.
16. *Newbrundoc, The Ship v. Rudolf, A. S.* (1940) Ex. C.R. 247. Appeal pending.
17. *Niagara Wire Weaving Co. Ltd. v. Johnson Wire Works Ltd.* (1939) Ex. C.R. 259. Appeal dismissed.
18. *Northern Elec. Co. Ltd. et al. v. Brown's Theatres Ltd.* (1940) Ex. C.R. 36. Appeal dismissed.
19. *Riddell, Mary M. v. Minister of National Revenue.* (1938) Ex. C.R. 135. Leave to appeal refused.
20. *Samson-United of Canada Ltd. et al. v. Canadian Tire Corpn. Ltd.* (1939) Ex. C.R. 277. Appeal dismissed.
21. *Stackhouse, Russell T. v. The King.* (1940) Ex. C.R. 235. Appeal pending.
22. *Wilson, W. R. v. Minister of National Revenue.* (1938) Ex. C.R. 246. Appeal abandoned.

A TABLE
OF THE
NAMES OF THE CASES REPORTED
IN THIS VOLUME

A		L	
NAME OF CASE	PAGE	NAME OF CASE	PAGE
Albany Packing Co. Inc. v. Registrar of Trade Marks.....	256	Leahy, Mary <i>et al.</i> , Federal District Commission, v.	115
B		Lemaire, Doria, Fiel, Marthe v.	21
B & B Royalties Ltd. v. Minister of National Revenue	90	M	
Brown's Theatres Ltd., Northern Elec. Co. Ltd. <i>et al.</i> v.	36	McCormick, Ruth v. The King.....	183
Burshtein, Israel <i>et al.</i> v. Henry Disston & Sons Ltd.	79	Minister of National Revenue, B. & B. Royalties Ltd. v.	90
C		_____ Do-	
Canada Steamship Lines Ltd. v. Montreal Trust Co.	220	minion Natural Gas Co. Ltd. v.	9
D		_____ Do-	
Disston & Sons Ltd., Henry, Bursh- tein, Israel <i>et al.</i> v.	79	minion Textile Co. Ltd. v.	130
Dominion Natural Gas Co. Ltd. v. Minister of National Revenue....	9	_____ Elhott,	
Dominion Textile Co. Ltd. v. Minister of National Revenue....	130	Grace <i>et al.</i> v.	171
Dower Bros. Ltd. v. Registrar of Trade Marks.....	73	_____ Julius	
E		Kayser & Co. Ltd. v.	66
Elhott, Grace <i>et al.</i> v. Minister of National Revenue....	171	Montreal Trust Co., Canada Steam- ship Lines Ltd. v.	220
F		Mysterious Chemical Co. Ltd. v. Pro- tex Corpn. of Canada Ltd.....	240
Federal District Commission v. Leahy, Mary <i>et al.</i> ..	115	N	
Fiel, Marthe v. Lemaire, Doria.....	21	<i>Newbrundoc</i> , <i>The Ship</i> v. Rudolf, A. S. ..	247
Fudge, John M v. The King.....	187	Northern Elec. Co. Ltd. <i>et al.</i> v. Brown's Theatres Ltd.	36
G		P	
H		Protex Corpn. of Canada Ltd., Mys- terious Chemical Co. Ltd. v.	240
Henry Disston & Sons Ltd., Bursh- tein, Israel <i>et al.</i> v.	79	R	
Hochelaga Shipping & Towing Co. Ltd. v. The King.	199	Rankin, James Sabiston v. The King.	105
Hull, Annie v. The King.....	1	Registrar of Trade Marks, Albany Packing Co. Inc. v.	256
J		_____ Dower	
Julius Kayser & Co. Ltd. v. Minister of National Revenue....	66	Bros. Ltd. v.	73
K		_____ Kellogg	
Kellogg Company of Canada Ltd. v. Registrar of Trade Marks.....	163	Co. of Canada Ltd. v.	163
King, The, Fudge, John M. v.	187	Rudolf, A. S., <i>The Ship Newbrundoc</i> , v.	247
_____ Hochelaga Shipping & Towing Co. Ltd. v.	199	St.	
_____ Hull, Annie v.	1	St Germain, Romeo, <i>et al.</i> , Tuckett Tobacco Co. Ltd v.	58
_____ McCormick, Ruth v.	183	S	
_____ Rankin, James Sabis- ton v.	105	Stackhouse, Russell T. v. The King..	235
_____ Stackhouse, Russell T. v.	235	T	
		Tuckett Tobacco Co. Ltd. v. St. Germain, Romeo <i>et al.</i>	58

**A TABLE
OF THE
NAMES OF THE CASES CITED
IN THIS VOLUME**

NAME OF CASE	A	WHERE REPORTED	PAGE
Anglo-Persian Oil Co. Ltd. v. Dale..	[1932]	1 K.B. 124.....	15
B			
Bacon v. The King	[1921]	21 Ex. C.R. 25.....	111
Bale & Church Ltd. v. Sutton, Parsons & Sutton <i>et al.</i>	[1934]	51 R.P.C. 129.....	166, 168
Bowker Fertilizer Co. & Gunns Ltd	[1916]	16 Ex. C.R. 520.....	169
Byrne v. Statist Co.	[1914]	1 K.B. 622 ..	32, 33
C			
Canada Crayon Co. Ltd. v. Peacock Products Ltd.	[1936]	Ex. C.R. 178.....	86
Canada Steamship Lines Ltd. <i>et al.</i> v. The King.	[1926]	Ex. C.R. 13; [1927] S.C.R. 68..	204
Capital Trust Corpn. Ltd. <i>et al.</i> and Minister of National Revenue	[1937]	S.C.R. 192..	183
Citron-Byer Co. v. Commissioner.....	21 B.T.A. 308..		19
Commissioner v. Continental Screen Co. ..	58 Fed. (2nd) 625.....		18
_____, v. Peoples-Pittsburgh Trust Co.	60 Fed. (2nd) 187.....		18
Continental Oil Co. v. Commissioner of Patents	[1934]	Ex. C.R. 244.....	89
Cooper v. Stubbs	[1925]	2 K.B. 753	133
Crombie v. The King.....	[1922]	52 O.L.R. 72.....	113
D			
Darcy v. Allin.....	1 W.P.C. 8..		57
Davis <i>et al.</i> v. Sussex Rubber Co. Ltd. ..	[1927]	44 R.P.C. 412....	166, 168
DeDohsé v. The Queen.....	[1886]	3 T.L.R. 114.....	111
Denning v. Secretary of State for India in Council	[1920]	37 T.L.R. 138..	111
Dunn v. The Queen ...	[1896]	1 Q.B. 116	111
E			
Eastman Photographic Materials Co. Ltd., Application for a Trade Mark, <i>In re</i> ..	[1898]	15 R.P.C. 476.....	170
G			
Grant v. Secretary of State for India in Council	[1876]	2 C.P.D. 445..	111
Gribble v. Manitoba Free Press Co. Ltd... [1931]	3 W.W.R. 570.....		32, 33
H			
Hales v. The King ..	[1918]	34 T.L.R. 341.....	111
Hamburg American Packet Co. v. The King	[1901]	7 Ex. C.R. 150; [1902] S.C.R. 252.....	33 204
Harris v. The King.....	[1904]	9 Ex. C.R. 206.....	204
Hotpoint Electric Heating Co., Application for a Trade Mark, <i>In re</i>	[1921]	38 R.P.C. 63.....	169
J			
J. C. & J. Field Ltd. v. Wagel Syndicate Ltd.	[1900]	17 R.P.C. 266	170
John Lane, The Bodley Head Ltd. v. Associated Newspapers Ltd.	[1936]	1 All E.R. 379.....	33
Jokela v. The King.....	[1937]	Ex. C.R. 132.....	216
Joubert v. The King	[1931]	Ex. C.R. 113.....	204
Julia, The	[1860]	14 Moore's P.C. 210.....	235

		K		
NAME OF CASE			WHERE REPORTED	PAGE
Kidd v. The King....	[1924]	Ex. C.R. 29..		111
King, The v <i>The Vessel Katty D.</i>	[1904]	34 S.C.R. 673; [1905] 22 T.L.R. 191		195
Kirstein Sons & Co. and Cohen Bros. Ltd..	[1907]	39 S.C.R. 286..		169
Kornhauser v. United States.....	276	U.S. 145....		18
L				
Leaman v. The King	[1920]	3 K.B. 663.....		111
Legault v. The King..	[1931]	Ex. C.R. 167.....		204
Leprohon v. The Queen	[1894]	4 Ex. C.R. 100		213
Linotype Co.'s Trade Mark	[1900]	2 Ch. 238.....		170
Mc.				
McHugh v. The Queen.....	[1900]	6 Ex. C.R. 374		204
M				
Mansell v. Star Printing & Publishing Co..	[1937]	4 D.L.R. 1; [1937] A.C. 872...		33
Martin and Lowry.....	[1927]	A.C. 312		183
Minnesota Mining & Mfg. Co., Application for a Trade Mark, <i>In re</i>	[1924]	41 R.P.C. 237.....		169
Mitchell v. The Queen.....	[1896]	1 Q.B. 121.....		111
Monrovia Oil Co. v The Commissioner ..	[1936]	83 Fed. R. (2d) 417..		103
Morgan v. Seaward.....	[1837]	1 W.P.C. 187..		57
Morrison v. Minister of Customs & Excise..	[1928]	Ex. C.R. 75.....		183
Mullard Radio Valve Co. Ltd. v. British Belmont Radio Ltd	[1939]	56 R.P.C. 1..		49
N				
National Outdoor Advertising Bureau v. Helvering		89 Fed. (2nd) 878.		19
North, The and The King... ..	[1906]	37 S.C.R. 385		198
Q				
Quebec, City of v. The Queen..	[1892]	3 Ex. C.R. 164; [1894] 24 S.C.R. 420.		213
Queen, The v. Authier.		R.J.Q. 6 B.R. 146....		245
— v. <i>The Ship Beatrice</i>	[1896]	5 Ex. C.R. 378		198
R				
Read v. <i>The Tug Lillie</i>	[1907]	11 Ex. C.R. 274		235
Rex v. Rhodes....	[1934]	O.R. 44.....		113
— v. <i>The Bellman</i>	[1938]	3 D.L.R. 548..		195
Ryall v. Hoare ..	[1923]	2 K.B. 447.....		183
S				
Sandness v. The King..	[1933]	Ex. C.R. 78.....		187
Shipway v. Skidmore..	[1932]	16 T.C. 748..		183
Spaight v. Tedcastle....	[1881]	6 A.C. 217		235
T				
Théberge v. Landry....	[1876]	2 A.C. 102.....		113
Tucker v. The King.....	[1902]	7 Ex. C.R. 351; [1902] 32 S.C.R. 722		114
U				
Usher's Wiltshire Brewery Ltd. v. Bruce...	[1915]	A.C. 433		17
V				
<i>Valesesia, The</i> ..	[1927]	P. 115 ..		235
W				
<i>W., Re</i> ..	[1925]	56 O.L.R. 611.....		113
Ward & Co Ltd. v. Commissioner of Taxes ..	[1923]	A.C. 145		17
Western Electric Co. Inc., <i>et al.</i> v. Baldwin International Ltd.	[1933]	Ex. C.R. 13		43

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

BETWEEN :

ANNIE HULLSUPPLIANT;

AND

HIS MAJESTY THE KINGRESPONDENT.

1939
 Sept. 11.
 —
 Nov. 17.
 —

Crown—Petition of Right—The Returned Soldiers' Insurance Act, 10-11 Geo. V, c. 54—Manitoba and Ontario Insurance Acts—Exchequer Court Act, R.S.C., 1927 c. 34, s. 32—Limitation of actions—Manitoba and Ontario Limitation of Actions Act.

B., a returned soldier, resident at Winnipeg, Manitoba, was issued a policy of insurance under the provisions of The Returned Soldiers' Insurance Act, 10-11 Geo. V, c. 54, and amendments thereto, the suppliant being named the beneficiary therein. The contract was signed at Ottawa, in the Province of Ontario, by the Minister of Finance, on behalf of the Dominion of Canada. B. died in 1932. The Court found that there was no fraudulent concealment or misrepresentation of facts on the part of B. in his application for insurance.

The respondent pleaded that suppliant's right of action was barred by the failure to commence action within the time required by s. 152 (1) of The Manitoba Insurance Act, or of a corresponding provision in the Insurance Act of Ontario. These statutes provide that "any action or proceeding against the insurer for the recovery of insurance money shall be commenced within one year next after the furnishing of reasonably sufficient proof of the maturity of the contract and of the right of the claimant to receive payment . . ." The Manitoba and Ontario Limitation of Actions Acts provide for the commencement of actions within six years after the cause of action arose. The Returned Soldiers' Insurance Act contains no provision relating to prescription and the limitation of actions. The Exchequer Court Act, R.S.C., 1927, c. 34, s. 32, provides: "The laws relating to prescription and the limitation of actions in force in any

1939
 ANNIE HULL
 v.
 THE KING.

province between subject and subject shall, subject to the provisions of any Act of the Parliament of Canada, apply to any proceeding against the Crown in respect of any cause of action arising in such province ”

Maclean J. *Held*: That the “ laws ” referred to in s 32 of The Exchequer Court Act are the public general Acts relating to the limitation of actions, unless a special period of limitation is fixed by some particular provincial statute for proceedings in respect of acts done in pursuance of or in the execution of such statute, and such statute clearly contemplates the same subject-matter as that involved in any proceeding taken against the Crown in the right of the Dominion of Canada.

2 That this proceeding is not barred by the terms of the Insurance Act of the Province of Manitoba, or that of Ontario, relating to the limitation of actions.

PETITION OF RIGHT praying a declaration that a contract of insurance issued to suppliant’s husband, now deceased, by the Dominion of Canada, pursuant to The Returned Soldiers’ Insurance Act, is in full force and effect, and that respondent is liable to pay suppliant any amounts payable under the terms of the said contract of insurance.

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

A. W. Morley and G. T. Chapman for suppliant.

C. V. McArthur, K.C. and F. R. Evans for respondent.

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

THE PRESIDENT, now (November 17, 1939) delivered the following judgment:

The suppliant here was named the beneficiary in a contract of insurance, issued by the Dominion of Canada, in the amount of \$3,000, on August 6, 1930, under the provisions of The Returned Soldiers’ Insurance Act, Chap. 54 of the Statutes of Canada, 1920, and amendments thereto, upon the life of her late husband, William J. Banks, a returned soldier, who died in November, 1932. The suppliant has since remarried, her present husband being one, Thomas Hull. The application for the said policy of insurance was made by the deceased Banks, in writing, on July 25, 1930. The respondent, upon the death of the insured, refused to pay to the suppliant any amounts pay-

able to her under the said contract of insurance upon the ground that the application therefor contained certain statements which were untrue to the knowledge of the applicant Banks, and which, it is claimed, rendered the policy null and void. The suppliant by her petition prays for a declaration that the said contract of insurance is still in full force and effect, and that the respondent is liable to pay to her any amounts payable under the terms of the said contract of insurance.

1939
ANNIE HULL
v.
THE KING.
Maclean J.

It will be convenient first to refer to the principal provisions of The Returned Soldiers' Insurance Act, and amendments thereto, under which the contract of insurance in question issued. Sec. 3, ss. (1) and ss. (5) are as follows:

3. (1) The Minister may enter into an insurance contract with any returned soldier in Canada or with any widow, providing for the payment of five hundred dollars or any multiple thereof, not, however, exceeding five thousand dollars in the event of the death of the insured.

(5) The contract may also provide that if the insured becomes totally and permanently disabled and rendered incapable of pursuing continuously any substantially gainful occupation, and if such disability is not deemed to be attributable to his service so as to bring him under the provisions of The Pension Act, the premiums thereafter falling due under the contract shall be waived and the insured shall be entitled to receive as a disability benefit an annual payment not exceeding one-twentieth of the sum insured, the said benefit to continue during the lifetime of the insured but not to exceed twenty such payments in all; and that if the insured dies before the twentieth such payment has been made the balance of the sum assured shall be payable as a death benefit, in accordance with the provisions of this section.

Sec. 13 provides that:

The Minister may refuse to enter into an insurance contract in any case where there are in his opinion sufficient grounds for his refusing.

And Sec. 15 provides that:

No medical examination or other evidence of insurability shall be required in respect of any contract issued under this Act: Provided, however, that the Minister may, for the purpose of determining whether he shall refuse to enter into a contract of insurance in any case under the provisions of section Thirteen of this Act, require such medical examination or other evidence of insurability of the insured as he may deem necessary.

No medical examination was required in this case by the Minister.

1939
ANNIE HULL Chap. 42 of the Statutes of Canada, 1922, provides that:

v.
THE KING.

Maclean J.

In the exercise of the powers conferred upon the Minister by sections thirteen and fifteen of the said Act, the Minister shall be governed by the provisions of the Schedule to this Act.

Provided that applicants with or without pensionable disability who are so seriously ill that they have no expectancy of life, and who have dependents who are entitled to become beneficiaries under the contract as provided under the Act, shall be insurable under The Returned Soldiers' Insurance Act up to, and inclusive of, 1st January, 1923.

Classes I and II of the Schedule referred to in sec. 10, ss. (2) of the Statutes of Canada, 1922, are as follows:

Class I. Applicants who are not seriously ill.

(a) An applicant with dependents, ill with a pensionable disability.

Application is to be accepted.

(b) An applicant without dependents, who is ill with a pensionable disability.

Application is to be accepted.

(c) An applicant with dependents, ill with a disability that is not pensionable.

Application is to be accepted.

(d) An applicant without dependents, ill with a disability that is not pensionable.

Application is to be accepted.

Class II. Applicants who are seriously ill.

(a) An applicant with dependents, seriously ill with a pensionable disability.

Application is to be accepted.

(b) An applicant with dependents, dangerously ill, with a disability that is not pensionable.

Application is to be refused.

(c) An applicant without dependents, seriously ill with a pensionable disability.

Application is to be refused.

(d) An applicant without dependents, seriously ill with a disability that is not pensionable.

Application is to be refused.

Class III of the Schedule, as amended, relates to applications from persons in so serious a condition of health that they have no reasonable expectation of life, and the Schedule provides that such "applications are to be refused."

A brief reference might perhaps be made at this stage to what is called the "Veterans' Bureau," a branch of the Department of Pensions and Public Health, and which I shall have occasion to mention later. The Pension Act, Chap. 157, R.S.C., 1927, as amended by Chap. 35 of the Statutes of Canada, 1930, provides by sec. 10k that:

(1) Provision shall be made for the constitution of a branch of the Department to be known as the "Veterans' Bureau" which, subject to the direction of the Minister, shall be administered by a chief pensions advocate who shall be assisted by such other pensions advocates and such additional staff as may be required for the proper performance of the duties of the branch.

1939
ANNIE HULL
v.
THE KING.
—
Maclean J.
—

Sec. 53 of the Pension Act as so amended provides that:

Upon the reference of any application to the chief pensions advocate as aforesaid, it shall be his duty

- (a) To notify the claimant and any interested soldiers' service organization of the reference of the claim to him;
- (b) to cause the case to be prepared for presentation on behalf of the claimant to the Pension Tribunal;
- (c) when the case is so prepared, to cause application to be made to the registrar of the Pension Tribunal, at the request of the claimant, and on notice to the chief commission counsel, to have a time and place fixed for the hearing of the application; and
- (d) to arrange for the presentation of the claim before the tribunal at such time and place either by himself or a pensions advocate, unless the claimant elects to have the same presented by some other person at his own expense.

The above provisions of the Pension Act thus make provision for the establishment of the Veterans' Bureau, and the appointment of pensions advocates whose duties, *inter alia*, are to prepare the case of applicants for pension for presentation to the Pension Tribunal, and by subsequent amendments to the Act pensions advocates are now required to be barristers of good standing at the bar of any of the provinces of Canada. As will later appear, the deceased, Banks, subsequent to the date of the insurance contract in question, applied for pension under the Pension Act, and in preparing his case for presentation to the Pension Tribunal, he was assisted by one of the pensions advocates of the Veterans' Bureau, by whom certain forms, to be used in support of his application were supplied, and which, when completed, were submitted to the Pension Tribunal.

It will be apparent that the purpose of The Returned Soldiers' Insurance Act was to provide an unusually liberal scheme of insurance for certain of those who had served in the Great War. In the case of any of those who were ill, but not seriously ill, with a pensionable or non-pensionable disability, with or without dependents, the application was to be accepted; if they were seriously ill with a pensionable disability, and with dependents, the application was to be accepted; if the applicant were dangerously ill with

1939
 ANNIE HULL
 v.
 THE KING.
 Maclean J.

a disability that was not pensionable, and with dependents, the application was to be refused; if the applicant were without dependents, seriously ill with a disability that was or was not pensionable, the application was to be refused; and if the applicant were in so serious a condition of health that he had no reasonable expectation of life, the application was to be refused. It may be presumed that many of those eligible for insurance under this Act would be unable to obtain insurance in regular life insurance companies. The Act even provides that the Minister may enter into an insurance contract with the widow of a returned soldier, upon the same premium terms that were available to her deceased husband, for the benefit of certain beneficiaries. The Act also provides that if the insured had become totally and permanently disabled, incapable of pursuing any gainful occupation, and such disability were not deemed attributable to war service so as to bring him under the provisions of the Pension Act, the premiums thereafter falling due were to be waived and the insured would become entitled to receive as a disability benefit a certain annual payment during his lifetime. I should perhaps mention that the departmental file of Banks referable to his enlistment, his war service, and his discharge, would be available to the authorities having to consider his application for insurance under the Act, and that file would reveal any casualties or illnesses suffered by him during the period of his war service, and down to the time of his discharge.

[The learned President reviewed the evidence and concluded that it had not been established that there was any fraudulent concealment or misrepresentation of facts on the part of Banks in his application for insurance.]

The Crown pleads that the suppliant's right of action is barred on the ground that the same was not commenced within one year after the furnishing of proof of the death of Banks, and relies on sec. 152 (1) of The Manitoba Insurance Act, and in the alternative to a corresponding section in The Insurance Act of the Province of Ontario. In November, 1932, the petitioner furnished the Returned Soldiers' Insurance Branch of the Department of Pensions with sufficient proof of the death of Banks, and of the maturity of the contract of insurance. The date of filing of this petition in the Exchequer Court was November 18,

1936. It does not appear from the record when the petition was filed with the Secretary of State, but it must have been some time prior to November, 1936. The record does not appear to indicate when the petition was served upon the Attorney-General of Canada, but that, in my opinion, is not of importance, and at least no point was raised concerning the date of the service of the petition.

Sec. 152 (1) of The Manitoba Insurance Act provides that "any action or proceeding against the insurer for the recovery of insurance money shall be commenced within one year next after the furnishing of reasonably sufficient proof of the maturity of the contract and of the right of the claimant to receive payment, or within six years after the maturity of the contract, whichever period shall first expire, but not afterwards." The Manitoba Limitation of Actions Act, s. 3, ss. (f), as amended by Chap. 24, Statutes of Manitoba, 1932, provides that "actions for the recovery of money (except in respect of a debt charged upon land), whether recoverable as a debt or damage or otherwise, and whether on a recognizance, bond, covenant or other specialty, or on a simple contract, express or implied, and actions for an account or for not accounting within six years after the cause of action arose." The Limitations Act of the Province of Ontario contains a similar provision. Sec. 32 of the Exchequer Court Act provides that: "The laws relating to prescription and the limitation of actions in force in any province between subject and subject shall, subject to the provisions of any Act of the Parliament of Canada, apply to any proceeding against the Crown in respect of any cause of action arising in such province." The Returned Soldiers' Insurance Act contains no provision relating to prescription and the limitation of actions and the question arises whether it is the Manitoba Insurance Act or the Manitoba Limitation of Actions Act, or the corresponding statutes of the Province of Ontario, which applies here. The contract of insurance here in question was signed at Ottawa in the Province of Ontario, by the Minister of Finance, on behalf of the Dominion of Canada.

Mr. McArthur argued that while the provisions of the Manitoba Insurance Act did not bind the Crown in the right of the Dominion, yet it was open to the Crown to take advantage of sec. 152 of the Manitoba Insurance

1939
ANNIE HULL
v.
THE KING.
Maclean J

1939
 ANNIE HULL
 v.
 THE KING.
 Maclean J.

Act, or in the alternative the corresponding provision of The Insurance Act of Ontario. The Returned Soldiers' Insurance Act, and the Manitoba and Ontario Insurance Acts, are, in almost every respect, in such contrast that it is hardly to be believed that the Parliament of Canada ever contemplated that the limitation periods of the latter Acts were intended to apply to actions arising under The Returned Soldiers' Insurance Act. I think it is the Manitoba Limitation of Acts Act, or the corresponding Ontario Act, that is applicable here.

The Exchequer Court Act having provided that the laws relating to prescription and the limitation of actions in force in any province between subject and subject shall apply to any proceeding against the Crown in respect of any action arising in any province, it would appear to me that the "laws" there referred to are the public general Acts relating to the limitation of actions, unless a special period of limitation is fixed by some particular provincial statute for proceedings in respect of acts done in pursuance of or in the execution of such statute, and such statute clearly contemplates the same subject-matter as that involved in any proceeding taken against the Crown in the right of the Dominion, and under a law of the Dominion of Canada. The contract of insurance in question here was not entered into under the authority and terms of the Insurance Acts of Manitoba or Ontario. Such statutes are in scope and purpose entirely different from The Returned Soldiers' Insurance Act under the terms of which the contract of insurance here in question was entered into. I would seriously doubt if it were ever contemplated by the legislature that the limitation of actions provision of any provincial Insurance Act should apply to contracts of insurance entered into under the terms of The Returned Soldiers' Insurance Act.

It is true that The Returned Soldiers' Insurance Act deals with the subject-matter of life insurance, but on a basis and for an end altogether different from that contemplated by the provincial Insurance Acts which have been mentioned; the provisions of The Returned Soldiers' Insurance Act were made available to applicants of a special class, in a limited amount, for a limited period, and upon liberal and unusual terms as to cost, health and

medical examination. The considerations determining the period of limitation of actions in the public general Insurance Acts of the provinces would be different, I think, from those which would arise in a special enactment such as The Returned Soldiers' Insurance Act, one specially designed for the welfare and protection of dependents of certain returned soldiers. It is unnecessary to review in detail the provisions of the provincial Insurance Acts which have been here mentioned but generally speaking they are so dissimilar to those of The Returned Soldiers' Insurance Act that they may be said, in the practical sense, to relate to a different subject-matter altogether. In the insurance world The Returned Soldiers' Insurance Act would hardly be classified or recognized as an Act pertaining to life insurance. I am therefore of the opinion that the proceeding here is not barred by the terms of the Insurance Act of the Province of Manitoba, or that of Ontario, relating to the limitation of actions.

1939
ANNIE HULL
v.
THE KING.
Maclean J.

The suppliant therefore succeeds in her petition, for the principal amount mentioned in the insurance contract less the amount of the premiums which were paid and returned. I know of no principle upon which the suppliant can recover the interest claimed by her, and as set forth in her petition. The suppliant will have the costs of the petition.

Judgment accordingly.

BETWEEN:

DOMINION NATURAL GAS CO. LTD. . . . APPELLANT;

AND

MINISTER OF NATIONAL REVENUE. . . RESPONDENT.

1939
Nov. 21.
1940
Jan. 3.

Revenue—Income—Income War Tax Act, R.S.C., 1927, c. 97, secs. 3, 5 and 6—“Outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence”—“Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income”—Legal expenses incurred in defending action at law to protect franchise—Charge against revenue—Appeal allowed.

Appellant owned a franchise to supply gas to the inhabitants of the City of Hamilton and elsewhere. In 1931 an action at law was begun against appellant by the United Gas and Fuel Company of Hamilton

1940

DOMINION
NATURAL
GAS CO
LTD.

v.

MINISTER
OF NATIONAL
REVENUE.

Maclean J.

Ltd., which company attacked the franchise rights and privileges of appellant. Appellant successfully defended the action and deducted from its taxable income for the year 1934 the sum of \$48,560.94 being the legal expenses incurred by it. This deduction was disallowed by the Commissioner of Income Tax whose decision was affirmed by the Minister of National Revenue.

Held: That the advantages and benefits accruing from the successful defence of the action were of a revenue character, and the cost of the action was a necessary expense in carrying on the trade and in earning the annual net profit and gain of appellant.

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 Maclean, President of the Court, at Ottawa.

Hon. George Lynch-Staunton, K.C. for appellant.

J. J. Hunt, K.C., M. McLean and A. A. McGrory for respondent.

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

THE PRESIDENT, now (January 3, 1940) delivered the following judgment:

This is an appeal from the decision of the Minister of National Revenue and relates to a claim for deduction on an assessment for income tax, for the fiscal year ended December 31, 1934.

The facts may be briefly stated. The appellant, hereinafter called "the Dominion Company," was possessed of a franchise to supply gas to the inhabitants of the City of Hamilton and elsewhere, and the United Gas and Fuel Company of Hamilton, Ltd., hereinafter called "the United Company," also had a franchise to supply gas to the inhabitants of the City of Hamilton. In 1931, the United Company brought an action against the Dominion Company claiming (1) a declaration that the Dominion Company was wrongfully maintaining its mains in the streets of the City of Hamilton and wrongfully supplying gas to the inhabitants of that city, (2) an injunction restraining the Dominion Company from continuing so to use the streets of the city and from continuing to supply gas to the inhabitants, (3) a mandatory order requiring

the Dominion Company to remove its mains and other property from the streets and elsewhere in the city, and (4) damages. The Dominion Company, as might be expected, considered this as a very serious attack upon its franchise rights and privileges, and its trade, and its directing officers were of the view that it was obliged to contest the action.

In due course the action came on for trial before the Supreme Court of Ontario, and the action was dismissed. An appeal was then taken by the United Company from the decision of the trial Court to the Appellate Division of the Supreme Court of Ontario and the appeal was dismissed. The United Company then appealed to the Judicial Committee of the Privy Council, and again it was unsuccessful. All this litigation cost the Dominion Company \$48,560.94, in addition to any taxed costs recovered against the United Company.

There came a time when the Dominion Company was required to file its income tax return for the year 1934, which it did, showing its taxable income to be \$202,326.86, but this was later increased by the taxing authorities to \$250,890.80, and this resulted from the disallowance as an item of trade expense the said sum of \$48,560.94, the legal expenses incurred by the Dominion Company in resisting the action of the United Company. And the question for decision is whether the said sum is allowable as a deduction in computing the taxable income of the Dominion Company for the taxation period in question.

The Dominion Company contends that the said sum disbursed for legal expenses was a necessary one in the conduct of its trade, and that it is an allowable deduction under the provisions of the Income War Tax Act. On behalf of the Minister it was conceded that the said legal expenses were incurred by the Dominion Company in defending the said action, and that the said sum was so expended, but, it is contended, that the same was not an expense wholly, exclusively and necessarily laid out or expended by the Dominion Company for the purpose of earning its income, and was in fact an expense incurred with a view to preventing the extinction or partial extinction of a profit earning enterprise; and that the sum expended as legal fees by the Dominion Company was an application of earned profits for the purpose of earning future

1940
DOMINION
NATURAL
GAS CO.
LTD.
v
MINISTER
OF NATIONAL
REVENUE.

Maclelan J.

1940
 DOMINION
 NATURAL
 GAS CO.
 LTD.
 v.
 MINISTER
 OF NATIONAL
 REVENUE.
 Maclean J.

profits, and therefore an expenditure on account of capital, one not permissible as a deduction in computing the Dominion Company's assessable income under the Act.

The sections of the Income War Tax Act which are at all relevant here may at once be referred to. First, s. 3 defines "income" to mean the "annual net profit or gain or gratuity . . . or as being profits from a trade or commercial or financial or other business or calling . . ." Then, s. 5 provides that "income," as defined by the Act, shall be subject to certain exemptions and deductions, and they are therein enumerated. Then, s. 6, the important section in this case, enumerates a number of cases in which deductions are not to be allowed in computing the amount of the profits or gains to be assessed. Sec. 6 in part reads thus:

6. 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;

(b) any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence, except as otherwise provided in this Act.

As I shall have occasion later to mention, the deductions that are permitted to a trader in computing his profits or gains are not affirmatively stated in the Act. They are to be ascertained by an examination of the deductions which are not allowed.

As a number of English decisions were cited before me it may be desirable to refer briefly to the provisions of the English Income Tax Acts which correspond to s. 6 (a) and (b) of the Income War Tax Act. The English Acts prohibit deductions in respect of "any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purpose of the trade, profession, employment or vocation." This provision corresponds closely to s. 6 (a) of the Canadian Act. The Acts provide that any capital withdrawn from, or any sum employed or intended to be employed as capital in the trade, is not deductible, and also any capital employed in improvements of premises occupied for the purposes of the trade. It is of course fundamental that any profit made from the sale or realization of a capital asset is not a receipt of the trade. In England, capital is treated as being

either fixed or circulating. A fixed capital asset is described as an asset which it is intended to keep and use in a trade, and a circulating asset is an asset which is acquired or manufactured for the purpose of being turned over or sold in the course of carrying on trade. Outgoings which result in the acquisition of a fixed capital asset, or which produce an advantage of a permanent and enduring nature are not deductible, but such advantage must be analogous to an asset. For example, the following items have been held by the English Courts not to be deductible: The expenses of removal to new premises or the fitting up of new shops; the cost of conversion of premises; the cost of dredging a deep-water channel; the cost of improvement of the permanent way of a railway; the payment for surface damage by a colliery; the cost of a surrender of leases; the cost of draining a mine in preparation for new operations; the payment to an insurance company for a policy to underwrite the liability of a trader to pay pensions; a sum paid for an option to purchase fixed capital assets; the expenses of an issue of debentures; and the loss on shares acquired for business purposes. Several of these examples were cited before me by counsel for the Minister as illustrative of the capital nature of the legal expenses in question here.

1940
 DOMINION
 NATURAL
 GAS CO.
 LTD.
 v.
 MINISTER
 OF NATIONAL
 REVENUE.
 Maclean J.

As I propose referring later to some American cases it will be as appropriate here as elsewhere to refer to two or three provisions of the statute there in force in respect of the income tax. The Revenue Laws of the United States provide that in computing net income there shall be allowed as a deduction "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . ." That provision is the one corresponding to s. 6(a) of the Canadian Act. In computing net income no deduction is permissible in respect of "any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate," or in respect of "any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made"; so far as I can observe those are the principal provisions referable to capital disbursements.

The Income War Tax Act, as has been said of the corresponding English Act, does not provide a code of the law

1940
 DOMINION
 NATURAL
 GAS CO.
 LTD.
 v
 MINISTER
 OF NATIONAL
 REVENUE.
 Maclean J.

on the subject of income. It is silent as to many matters of the first importance. For example, the Act contains no explicit directions that in computing the profits of a trade any expense (as to which there is no express prohibition) is to be deducted, if on the facts of the case it is a proper debit item to be charged against incomings. The generally recognized rule as regards trade expenses is that a deduction is permissible which is justifiable on business and accountancy principles, but this principle is subject to certain specific statutory provisions, which prohibit the allowance of certain expenses as deductions in computing the net profit or gain to be assessed. To the extent that ordinary business and accountancy principles are not invaded by the statute they prevail. In computing the amount of the profits and gains to be assessed the Act does not sanction specific deductions, but by prohibiting certain deductions it impliedly allows other deductions. In order that a trade expense may be allowable as a deduction, the amount expended must be, "wholly, exclusively and necessarily" laid out for the purpose of "earning the income," which means the "annual net profit or gain," but this must not be construed so as to preclude the deduction of those expenses as a result of which receipts of profits may accrue in the future. The principle is well established that expenses to earn future profits are allowable deductions, for example, the cost of a reasonable amount of advertising is usually admitted as a business expense, although the result of a particular advertisement might not be reflected in the year in which the cost was incurred. Nor does it follow that all the deductions a trader might make in ascertaining his profit are necessarily allowed by the Act as an expense or deduction. Therefore, in considering what is an allowable expense or deduction, we must first enquire whether it is one prohibited by the Act; if it is not prohibited, then we must consider next whether it is of such a nature that according to sound business and accountancy principles it is a proper item to be charged against the receipts in a computation of the annual net profit or gain, and was expended for earning the same, and therefore allowable, or, whether it is an expense that should be charged as a capital expenditure, and therefore one not deductible in computing the amount of the profit or gain to be assessed. In the case under

consideration, the legal expenses incurred by the Dominion Company do not fall within the prohibited deductions and the question to be determined is whether it was one that should be charged against revenue or against capital. If it were properly a charge against revenue then the appeal herein must be allowed, if against capital then the appeal must be refused.

A number of English authorities were cited before me on behalf of the respondent in support of the contention that the expenditure here was a non-recurring expense, an expenditure made once and for all, and therefore a charge against capital and not deductible in ascertaining the net profit or gain for the purposes of the income tax. That contention was the subject of discussion in the case of *Anglo-Persian Oil Co. Ltd. v. Dale* (1). In that case there will be found, in the judgment of Lord Hanworth, M.R., a reference to several cases of the nature cited before me, and possibly others. The question there was whether a sum paid by the Anglo-Persian Oil Company to terminate an agency was an admissible deduction. The Commissioners held it was not an admissible deduction in computing the profits and gains of the company. On appeal, Rowlatt J. held it was a revenue payment and was deductible in ascertaining the net profits of the company, and in this he was sustained by the Court of Appeal. I would refer particularly to a passage from the judgment of Romer L.J., wherein, after a reference to some of the difficulties encountered in determining what are permissible deductions, he proceeded to say:

At the end of the year 1925, however, all these authorities were considered by the House of Lords in *British Insulated and Helsby Cables v. Atherton*, and the law applicable to such cases as the present was, as it seems to me, placed beyond the realms of controversy. The boundary line between deductions that were permissible and those that were not had previously been uncertain and difficult to follow. As regards the large majority of deductions, there was and could be no conceivable doubt. They were clearly on one side of the line or the other. But as regard a comparatively small number, it was difficult to say on which side of the line they fell. This was particularly the case where, as in the present case, an expenditure is not a recurring one, but is made once and for all. It was pointed out by Lord Cave in *Atherton's* case that an expenditure, though made once and for all, may nevertheless be treated as a revenue expenditure, and he then added this: "But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a

1940
 DOMINION
 NATURAL
 GAS Co.
 LTD.
 v
 MINISTER
 OF NATIONAL
 REVENUE.
 Maclean J.

1940
 ~~~~~  
 DOMINION  
 NATURAL  
 GAS Co.  
 LTD.  
 v.  
 MINISTER  
 OF NATIONAL  
 REVENUE.  
 ———  
 Maclean J.  
 ———

trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

It should be remembered, in connection with this passage, that the expenditure is to be attributed to capital if it be made "with a view" to bringing an asset or advantage into existence. It is not necessary that it should have that result. It is also to be observed that the asset or advantage is to be for the "enduring" benefit of the trade. I agree with Rowlett J. that by "enduring" is meant "enduring in the way that fixed capital endures." An expenditure on acquiring floating capital is not made with a view to acquiring an enduring asset. It is made with a view to acquiring an asset that may be turned over in the course of trade at a comparatively early date. Nor, of course, need the advantage be of a positive character. The advantage may consist in the getting rid of an item of fixed capital that is of an onerous character, as was pointed out by this Court in *Mallett v. Staveley Cord & Iron Co.*

Now this being the test to be applied in such cases as the present, it is obvious that the question whether an expenditure made once and for all is or is not to be treated as chargeable to capital and not revenue is one of fact only. Being a question that the Commissioners are eminently qualified to answer, it is to be hoped that in future they will answer it by reference to the language of the test laid down by Lord Cave, and not as though they are deciding a question of law. Too often in the past the Commissioners have found that a particular sum is or is not a permissible deduction. That is a question of law, or at any rate mixed law and fact. If they will find that the expenditure in question was or was not made, as the case may be, with a view to bringing into existence some asset or advantage for the enduring benefit of the trade, their finding will be one of fact, and if there be some evidence upon which the finding can reasonably be made, it will not be subject to review in the Courts.

I am of the opinion that the expenditure in question here cannot be said to be a capital outlay or loss, that is to say, it was not, in the language of the Act, an "outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence." There would seem to be no warrant for holding that the fixed capital of the Dominion Company was benefited by the expenditure, or that its trade from a capital point of view gained any advantage by the expenditure. No advantage accrued to the capital of the Dominion Company by the success attending its defence of the action brought against it. The situation as to capital remained as it was.

We may then consider if the expenditure in question was one necessarily incurred for the purpose of earning the income, within the meaning of s. 6 (a) of the Act. As has been frequently said, no degree of ingenuity can frame a formula so precise and comprehensive as to solve all the questions that may arise in computing the annual net profit or gain of a trader, and reasoning by analogy from

the facts of one case to the facts of another case is not entirely satisfactory and is liable to lead to erroneous conclusions. I understood Mr. Lynch-Staunton to say on the hearing of this appeal that the revenue authorities had actually allowed, tentatively at least, as a deduction, the legal expenses of both the Dominion Company and the United Company, but this decision or ruling was apparently not adhered to. I mention this only as an indication of the difficulties frequently encountered in deciding whether or not an expenditure incurred was one necessary for earning the annual net profit or gain.

Considerable reliance was placed by counsel for the respondent on the case of *Ward & Company Ltd. v. Commissioner of Taxes* (1), and therefore I feel compelled to make a brief reference to it. There the taxpayer, a brewery company, made certain expenditures with a view of influencing public opinion in a poll of the voters of New Zealand about to be held on the question of prohibition of intoxicants, by printing and distributing anti-prohibition literature. The taxpayer sought to deduct the expenditure in the assessment of the income derived from its business on the ground that it was made for the purpose of preventing the extinction or depreciation of the business from which the income was derived. It was held by the New Zealand Court of Appeal that no deduction was allowable in respect of such an expenditure because it was "not exclusively incurred in the production of the assessable income . . .", which decision was, on appeal to the Judicial Committee of the Privy Council, sustained, their Lordships holding that the expenditure was a voluntary expense incurred with a view to influencing public opinion, and not one necessary for the production of profit, and that it was not in fact incurred for that purpose. I should not have thought myself that any other conclusion was possible, but at any rate it is not, in my opinion, an authority applicable to the state of facts here.

No distinction is to be drawn between legal expenses and other business expenses. The question always is whether the expense was a necessary one for the purpose of earning the annual net profit or gain of the taxpayer. In the well known case of *Usher's Wiltshire Brewery Ltd. v. Bruce* (2), legal expenses were allowed as a deduction.

(1) (1923) A.C. 145

(2) 1915) A.C. 433 at 437.

1940  
 DOMINION  
 NATURAL  
 GAS CO  
 LTD.  
 v.  
 MINISTER  
 OF NATIONAL  
 REVENUE.  
 Maclean J.

In that case these expenses consisted of "solicitors costs and disbursements in respect of the renewal of publicans' licences or tenancy agreements, the assessments of tied houses, obtaining a full licence, complaints against tenants, and advising as to thefts of beer." There is little discussion in the speeches of their Lordships concerning the particular deduction claimed for legal expenses, and, in fact, it would appear that no objection was taken by the Attorney-General against their allowance. The legal expenses were held to be a proper debit in ascertaining the balance of profit and loss in the taxpayer's trade. In Gordon's Digest of Income Tax Cases, under the caption of "Legal, Auditing and Technical Expenses," will be found reference to several cases in which legal expenses were allowed as deductions, and other cases in which they were disallowed.

I might now refer to some United States cases which involved the question of the allowance of legal expenses as deductions in computing the net taxable income of the taxpayer. As earlier mentioned, the United States statute provides that "in computing net income there shall be allowed as deductions all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." In *Kornhauser v. United States* (1), it was held by the Supreme Court of the United States that, where a taxpayer successfully defended an accounting suit brought by his former law partner respecting shares of stock which the taxpayer had received for professional services performed by him, during the existence of the partnership as the partner alleged, but after its termination as claimed by the taxpayer, the legal expenses paid by the taxpayer in defending the suit were deductible from gross income as "an ordinary and necessary business expense" incurred in carrying on a business. In *Commissioner v. Peoples-Pittsburgh Trust Co.* (2), it was held that expenses incurred by the taxpayer in successfully defending himself against a criminal charge involving fraud in making up the income tax return of a corporation of which he was chairman were deductible in his personal income tax return as an "ordinary and necessary business expense." In *Commissioner v. Continental Screen Co.* (3), attorneys were employed to represent the taxpayer before

(1) 276 U.S. 145.

(2) 60 Fed (2nd) 187.

(3) 58 Fed. (2nd) 625.



the Federal Trade Commission on a charge of operating in violation of the Sherman Anti-Trust Act, with the result that an order was eventually made dismissing the complaint. The legal fees paid to the attorneys were held deductible in computing net income. The Circuit Court of Appeals, Sixth District, in this case said: "The proceeding before the Trade Commission was undoubtedly an "action" against the respondent which was "directly connected with" or which "proximately resulted" from its business. To respondent's board of directors the situation was ominous. The life of the business was endangered. Under such circumstances respondent followed the very natural and ordinary procedure suggested by the vital necessity of the situation. It employed counsel to protect its interest and agreed to pay for their services. Any other course upon the part of its board of directors would have been unusual and would, no doubt, have subjected them to well founded criticism by its stockholders." This case was cited with approval by the Circuit Court of Appeals, Second Circuit, in the case of *National Outdoor Advertising Bureau v. Helvering* (1), on the ground that "the taxpayer's resistance was there justified and was necessary to the protection of his business." In *Citron-Byer Co. v. Commissioner* (2), a corporation and two of its officers were indicted for an alleged offence which arose directly out of its business, and it being determined by the court that no such offence had been committed it was held that the legal fees paid by the corporation to counsel, in defending the prosecution, were deductible and constituted an ordinary and necessary business expense.

It seems to me that if legal expenses are incurred in successfully defending an action in which one's title to existing assets, rights or facilities are put in serious question, such expenses should normally be admissible as deductions, and particularly would this be so in the case where the earning of profits are directly dependent upon and require the utilization of such assets, rights or facilities, as was the case here. If the action is unsuccessfully defended the revenue authorities might contend that there was no asset, right or facility to defend, and that therefore

1940  
 DOMINION  
 NATURAL  
 GAS CO  
 LTD.  
 v.  
 MINISTER  
 OF NATIONAL  
 REVENUE.  
 Maclean J.

(1) 89 Fed. (2nd) 878.

(2) 21 B.T.A. 308.

1940  
 DOMINION  
 NATURAL  
 GAS Co.  
 LTD.  
 v.  
 MINISTER  
 OF NATIONAL  
 REVENUE.  
 Maclean J.

such expenses should not be allowed as a deduction in computing net taxable income, but that is not this case. If such expenses arose out of the promotion or acquisition of additional assets, rights or facilities, it is probable no deduction would be permissible. It was imperative here that the Dominion Company defend the action and the failure of its directors to do so would probably have rendered themselves liable in damages to the shareholders of that company. The action threatened the earnings of the Dominion Company, wholly or partially, and had the action succeeded it would have been unable to sell gas, at least in some sections of the City of Hamilton; the company's capacity to earn revenue was put in jeopardy and, I think, it is immaterial that its capital assets, or some of them, were incidentally threatened with extinction or depreciation. It was because the Dominion Company was producing and selling gas that it had to defend the action and thus protect and preserve its credit and its revenue. The United Company sought an injunction restraining the Dominion Company from continuing to supply gas to the inhabitants of the City of Hamilton, which, had the United Company been successful, would have prevented the Dominion Company from earning its usual revenue. The advantages and benefits accruing from the successful defence of the action were of a revenue character, and the cost of the same was, I think, a necessary expense in carrying on the trade, and in earning the annual net profit and gain. It seems to me that the legal expenses here incurred cannot be regarded as anything else than a charge against revenue. In my opinion the legal expenses incurred by the Dominion Company were incident to its trade, and were incurred for the purposes of its trade and the earning of its annual net profit or gain. I therefore think that the deduction claimed by the Dominion Company should be allowed. The appeal is therefore allowed and with costs.

*Appeal allowed.*

BETWEEN:

MARTHE FIEL ..... PLAINTIFF;

AND

DORIA LEMAIRE, WIDOW OF THE  
LATE CAMILLE DUGUAY..... DEFENDANT.

1939  
Feb. 14.  
—  
Nov. 21.

*Copyright—Infringement—Good faith or ignorance in copyright as  
defence—Injunction—Damages.*

Plaintiff is the author of and owner of the copyright in a short story entitled "Le sang-froid de Marie," which was first published in the *Bayard*, a publication edited in Paris, France, at the end of which her name appeared.

The Publishers Holding Corporation Limited, of Canada, prints and edits supplements which, by agreement with the owners of various newspapers, are furnished to the latter free, on condition that the said supplements be distributed by them with their newspapers to their subscribers, and which supplements bear the name of the newspaper with which they are to be distributed.

Defendant entered into such an agreement with the P. H. Corporation Limited, and on July 29, 1937, she distributed to her subscribers with her newspaper a supplement in which was reproduced the story aforesaid and on which supplement was printed the name of her newspaper and the words "Founder, Camille Duguay," Duguay being the name of her late husband and partner. Hence this action asking for a declaration of infringement, an injunction, damages and costs.

Defendant, in substance, alleged most of the above facts, *inter alia*, that the printing and editing was not done by her; that she did not "publish" the work aforesaid; that she acted in good faith and in ignorance of any copyright in the work, and referred to Section 22 of the Copyright Act. The copyright was not registered under the provisions of the Act.

*Held:* That the plaintiff was the owner of the copyright in the work in question, and that registration of a copyright, under the provisions of the Act, is a formality not necessary to the existence of copyright.

2. That ignorance of existence of copyright, or the good faith of defendant is no answer to an action like the present one.
3. That the proper attitude of mind of a copyist toward the work that he copies is that copyright in the latter exists, unless he has evidence to the contrary. (Dennistoun J. in *Gribble v. Manitoba Free Press* (1931) 3 W.W.R. 571, followed).
4. That, by distributing to its subscribers with its newspaper, *La Voix des Bois Francs*, the supplement in question with the name of its newspaper and the name of its founder printed thereon and containing plaintiff's work, without the permission or authority of the author,

- 1939  
 FIEL  
 v.  
 LEMAIRE  
 Angers J.
- the defendant infringed plaintiff's copyright in said work, notwithstanding that the said supplement was printed or edited by a third party.
5. That the act of the defendant being an isolated one, not continued or likely to be continued, the Court refused an order for injunction but granted damages, with a reference to determine the same.

ACTION by plaintiff for a declaration that copyright in a certain story, ownership of which is claimed by plaintiff, has been infringed by defendant, and for an injunction to restrain such infringement, damages and costs.

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

*Jean Genest, K.C.* for plaintiff.

*Marie Louis Beaulieu, K.C.* and *Jules Poisson, K.C.* for defendant.

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

ANGERS J., now (November 21, 1939) delivered the following judgment:

Il s'agit d'une action en violation de droit d'auteur.

La demanderesse, Marthe Fiel, auteur et écrivain, de Brueil en Vexin, France, a publié dans le *Bayard*, journal édité à Paris, dans le cours du mois d'août, 1936, un conte intitulé "Le sang-froid de Marie." Une découpeure du journal contenant l'article a été produite comme pièce 1.

Ce conte a été reproduit, avec quelques légères modifications, dans un supplément édité par Publishers Holding Corporation Limited, une corporation constituée en vertu de la Loi des Compagnies d'Ottawa ayant son siège social en la cité de Montréal, et distribué à ses abonnés. Ce supplément est le même pour tous les abonnés à l'exception de l'entête qui est celui du journal auquel il est destiné.

Le conte a paru dans le supplément du 29 juillet 1937, envoyé avec le journal *La Voix des Bois Francs*, du même jour dont la défenderesse est propriétaire et éditrice; une copie du journal et une copie du supplément ont été produites comme pièce 3.

Dans l'exposé de sa réclamation la demanderesse dit, en substance, ce qui suit:

elle est l'auteur et la seule titulaire du droit d'auteur du conte intitulé "Le sang-froid de Marie," publié pour la première fois dans le journal *Bayard de France*, de Paris. en août 1936;

la défenderesse a, le 29 juillet 1937, illégalement et sans le consentement de la demanderesse et en contravention de la Loi du droit d'auteur et de la Convention de Berne publié, produit et reproduit ledit conte dans le supplément de son journal hebdomadaire *La Voix des Bois Francs*;

la défenderesse a illégalement et sans autorisation publié, produit et reproduit ladite œuvre littéraire "Le sang-froid de Marie" ainsi que d'autres œuvres littéraires dans ledit supplément sans le consentement de l'auteur de ces œuvres et, à moins d'en être empêchée par ordonnance de cette cour, la défenderesse a l'intention de publier illégalement et sans autorisation ladite œuvre de la demandresse ainsi que d'autres œuvres;

la demanderesse, comme conséquence de la publication non autorisée de son œuvre, a été privée de profits et elle a subi des dommages-intérêts;

pour ces raisons, la demanderesse demande;

une déclaration à l'effet que la demanderesse est la seule titulaire du droit d'auteur dans l'œuvre littéraire "Le sang-froid de Marie," que ses œuvres sont protégées au Canada, durant la vie de l'auteur et une période de cinquante ans après sa mort, sans l'accomplissement d'aucune formalité et que la demanderesse a seule le droit de publier ou d'imprimer ou de faire publier ou imprimer au Canada ladite œuvre littéraire "Le sang-froid de Marie" ainsi que ses autres œuvres littéraires et que personne, y compris la défenderesse, ne peut, que ce soit pour ou sans profit, publier, imprimer ou distribuer ladite œuvre littéraire sans le consentement de la demanderesse;

une déclaration à l'effet que la défenderesse a violé le droit d'auteur de la demandresse dans ladite œuvre littéraire "Le sang-froid de Marie" par sa publication, sa production ou sa reproduction non autorisée;

une ordonnance interdisant à la défenderesse de violer le droit d'auteur de la demanderesse dans ladite œuvre littéraire "Le sang-froid de Marie" ou toute autre œuvre littéraire en publiant, imprimant ou distribuant ladite œuvre littéraire sans le consentement de la demanderesse;

1939  
 FIEL  
 v.  
 LEMAIRE  
 Angers J

1939  
 FIEL  
 v.  
 LEMAIRE.  
 Angers J.

un relevé des profits réalisés par la défenderesse et des dommages-intérêts.

Dans son plaidoyer la défenderesse nie les allégués de l'exposé de la réclamation et plaide ce qui suit:

en supposant que la défenderesse ait publié des œuvres littéraires appartenant à d'autres auteurs que la demanderesse, ce qu'elle nie avoir fait, la demanderesse n'a pas qualité pour plaider ce fait;

la défenderesse ne tombe pas sous le coup de la Loi du droit d'auteur;

la défenderesse n'est ni propriétaire, ni éditrice, ni imprimeur du supplément dans lequel a été publié l'article dont so plaint la demanderesse;

ledit supplément a été imprimé édité et publié par la Cie des Hebdomadaires Limitée et, si la demanderesse a des droits c'est contre elle ou ses ayants cause qu'elle devrait les faire valoir;

en supposant que la défenderesse ait publié un article dont le droit d'auteur appartient à la demanderesse, ce qu'elle nie avoir fait, il s'agirait d'un cas isolé et la demanderesse ne peut prendre de conclusions en injonction;

la défendresse ignorait le droit d'auteur de la demanderesse et même qu'il y eût un droit d'auteur couvrant la matière publiée dans son supplément et elle avait un motif raisonnable de croire qu'aucun droit d'auteur n'existait; au surplus l'œuvre de la demanderesse n'est pas enregistrée à Ottawa.

Dans sa réponse, la demanderesse allègue en substance ce qui suit:

le supplément dont il s'agit a été imprimé avec l'autorisation de la défenderesse sous le nom *la Voix des Bois Francs*, le journal hebdomadaire de la défenderesse, et il a été présenté par la défenderesse comme étant son journal et sa publication; la défenderesse est en conséquence responsable de la publication, de la production et de la reproduction de l'œuvre de la demanderesse dans ledit supplément; la défenderesse est, dans les circonstances, empêchée de prétendre que ledit supplément n'est pas le sien.

La défenderesse a été interrogée au préalable; sa déposition a été mise en preuve intégralement.

La défenderesse a déclaré qu'au moment de la fondation du journal *La Voix des Bois Francs* en 1928 son mari et

elle en étaient propriétaires conjoints. Depuis le décès de son mari survenu le 29 mars 1936, elle en est seule propriétaire.

Au dire de la défenderesse, le tirage du journal est de 1,400 copies; sa circulation est dans la ville de Victoria-ville, où il est publié, dans les environs et dans la province de Québec en général.

La défenderesse a dit qu'elle ne regardait jamais le supplément; ce n'est qu'après avoir reçu l'action ou une lettre du procureur de la demanderesse qu'elle a été au courant du fait que le supplément du 29 juillet 1937 contenait le conte de la demanderesse.

La défenderesse a fait un contrat avec Publishers Holding Corporation Limited, qui lui fournit le supplément en question; un duplicata de ce contrat, qui est en date du 12 mars 1937—cette date est imprimée comme le reste du contrat et il y a lieu de présumer qu'elle n'est pas toujours celle de son exécution—a été produit comme pièce 4.

Ce contrat contient, entre autres, les stipulations suivantes:

1. La partie de première part s'oblige à livrer, au moins huit jours avant la date de la publication, à la partie de seconde part, un supplément de pas moins de huit pages format tabloid, en autant d'exemplaires qu'il y aura de noms et de quantités inscrites sur la liste régulière d'abonnés et de dépositaires de l'hebdomadaire publié par la partie de seconde part; et ce supplément portera le nom de cet hebdomadaire.

2. La partie de seconde part s'oblige à annexer ou insérer ce supplément dans son hebdomadaire susdit, à chaque semaine.

3. La partie de première part défraiera l'augmentation du port, occasionnée par l'augmentation du poids, par suite de cette addition du supplément à l'hebdomadaire susdit.

4. La partie de première part s'engage à ne contracter pour répandre son supplément qu'en la teneur du présent contrat et avec un hebdomadaire faisant partie en date du 27 novembre 1936, de l'Association des hebdomadaires canadiens français; . . . . .

9. Le président, le secrétaire-tresorier et l'avocat-conseil de l'Association des hebdomadaires canadiens français forment, avec le président et l'administrateur-gérant de la partie de première part un comité présentement constitué, qui a les pouvoirs suivants:

(a) Le contrôle absolu de la rédaction dudit supplément, sous la direction religieuse d'un abbé choisi par le comité susdit, ce supplément ne devant d'ailleurs traiter d'aucune matière politique litigieuse et ne pourra contenir aucun article ou annonce de portée électorale, provinciale, fédérale ou municipale, mais s'étendre autant que possible sur les sujets d'intérêts paroissiaux ou religieux, étudier les problèmes de l'agriculture, de la sociologie, y compris les sports et les questions féminines, avec autant de gravures ou illustrations que la variété l'exige, y compris les pages pour enfants, etc.

1939  
 FIEL  
 v.  
 LEMAIRE.  
 Angers J.

1939  
 ~~~~~  
 FIEL
 v.
 LEMAIRE
 ~~~~~  
 Augers J.  
 ~~~~~

12. La partie de première part ne s'oblige pas à fournir ledit supplément dans un délai fixe; mais dès qu'elle en commencera la publication les présentes entreront en vigueur pour la durée ultérieure de deux années, et derechef indéfiniment de deux années en deux années, à moins que l'une ou l'autre partie ne congédie le contrat sur un préavis de soixante jours avant l'expiration de chaque durée biannuelle; et la partie de première part n'aura droit de donner cet avis à la partie de seconde part que si elle retire entièrement du public ledit supplément.

Publishers Holding Corporation Limited expédiait le supplément à l'imprimeur du journal auquel il était destiné et celui-ci l'insérait dans le journal avant d'en faire la distribution aux abonnés ou de le mettre en dépôt dans les débits de journaux.

La défenderesse déclare qu'elle ne connaît pas Marthe Fiel, la demanderesse, et ne sait pas si elle est l'auteur du conte en question.

En réponse à une question du procureur de la demanderesse si elle a obtenu la permission de l'auteur de publier cet article, la défenderesse répond qu'elle ne pouvait pas demander cette permission parce qu'elle ignorait ce que contenait le supplément.

La défenderesse reconnaît qu'un comité devait être constitué, qui aurait le contrôle de la rédaction du supplément; elle a consenti à la nomination de ce comité. Celui-ci, aux termes du premier paragraphe de la clause 9 du contrat ci-dessus reproduit, devait être composé du président, du secrétaire-trésorier et de l'avocat-conseil de l'Association des hebdomadaires canadiens-français et du président et de l'administrateur-gérant de Publishers Holding Corporation Limited. La défenderesse déclare qu'elle croyait que ce comité faisait son devoir. Il me paraît évident que, si ce comité a assumé ses fonctions, il n'avait pas la compétence nécessaire. La défenderesse, au surplus, affirme que le supplément n'a jamais été soumis au comité de contrôle pour la raison que, bien qu'il devait être livré au moins huit jours avant la publication du journal, il arrivait juste à temps pour être inséré dans le journal; le supplément est même arrivé quelquefois en retard et l'on a dû retarder l'expédition du journal.

La preuve établit que la défenderesse ne payait rien à Publishers Holding Corporation Limited pour ce supplément; il lui était fourni gratuitement. Bien plus, en vertu de la clause 3 du contrat, Publishers Holding Corporation Limited s'engageait à défrayer l'excédant des frais de port

du journal, occasionnés par l'augmentation du poids provenant de l'addition du supplément. Il semble manifeste que la compagnie entendait se rémunérer au moyen de la publicité.

La défenderesse a déclaré qu'elle recevait encore le supplément—l'examen préalable est du 20 décembre 1938—, qu'elle avait signé un contrat pour deux ans et qu'elle respectait sa signature, pratique de moins en moins commune aujourd'hui, soit dit en passant.

La défenderesse n'exerce aucun contrôle sur le supplément et ne s'occupe pas de savoir s'il viole des droits d'auteurs.

La circulation de la *Voix des Bois Francs* était de 1,400 avant qu'on y ajoute le supplément; depuis que le supplément est fourni, la circulation est restée la même.

Entendue de nouveau au procès, la défenderesse a à peu près répété la version qu'elle avait donnée lors de son examen préalable.

On lui a dit que la compagnie avec qui elle avait fait le contrat relatif au supplément (pièce 4) n'existait plus. Elle est allée à Québec au bureau de la nouvelle compagnie—vraisemblablement la compagnie qui a acquis les droits de Publishers Holding Corporation Limited et qui continue à publier le supplément—, mais elle n'a pas signé de nouveau contrat. Elle continue néanmoins à recevoir le supplément.

Louvigny de Montigny, représentant pour le Canada de la Société des Gens de lettres de France, entendu comme témoin de la part de la demanderesse, a déclaré qu'il était au courant du fait que celle-ci est membre de la Société des Gens de lettres et qu'elle réside à Brueil en Vexin, France; il a correspondu avec elle il y a trois mois, ce qui nous reporte vers la mi-novembre 1938. Il a lu le "Sang-froid de Marie" dans le journal *Bayard*, où le conte a paru pour la première fois. Le témoin produit comme pièce 1 une découpeure du *Bayard* du mois d'août 1936, qu'il dit avoir reçue de la demanderesse. Je ferai remarquer en passant qu'en pareil cas il serait préférable que l'on mît au dossier une copie du numéro du journal dans lequel l'article, illégalement reproduit, a été publié pour la première fois au lieu d'une simple découpeure qui ne porte ni le nom du journal ni la date du numéro en question. Vu

1939
FIEL
v.
LEMAIRE
Angers J

1939
FIEL
 v.
LEMAIRE.
Angers J.

cependant qu'il n'y a pas eu d'objection à la preuve et qu'au surplus cette découpe est identifiée par le témoignage de de Montigny, cette irrégularité n'a en l'espèce aucune importance. Le témoin produit également comme pièce 2 une procuration de Marthe Fiel à Mes Belcourt et Genest, en date du 15 novembre 1937, autorisant ceux-ci à intenter la présente action.

La Convention de Berne pour la protection des œuvres littéraires et artistiques du 9 septembre 1886, amendée à Paris le 4 mai 1896, par un acte additionnel, révisée à Berlin le 13 novembre 1908 et de nouveau à Rome le 2 juin 1928, contient les dispositions suivantes qui me semblent pertinentes:

Article 2.—(1) Les termes "œuvres littéraires et artistiques" comprennent toutes les productions du domaine littéraire, scientifique, et artistique, quel qu'en soit le mode ou la forme d'expression, telles que: les livres, brochures et autres écrits;

(3) Les pays de l'Union sont tenus d'assurer la protection des œuvres mentionnées ci-dessus.

Article 4.—(1) Les auteurs ressortissants à l'un des pays de l'Union jouissent, dans les pays autres que le pays d'origine de l'œuvre pour leurs œuvres, soit non publiées, soit publiées pour la première fois dans un pays de l'Union, des droits que les lois respectives accordent actuellement ou accorderont par la suite aux nationaux, ainsi que des droits spécialement accordés par la présente Convention.

(2) La jouissance et l'exercice de ces droits ne sont subordonnés à aucune formalité; cette jouissance et cet exercice sont indépendants de l'existence de la protection dans le pays d'origine de l'œuvre. Par suite, en dehors des stipulations de la présente Convention, l'étendue de la protection, ainsi que les moyens de recours garantis à l'auteur pour sauvegarder ses droits, se règlent exclusivement d'après la législation du pays où la protection est réclamée.

(4) Par "œuvres publiées" il faut, dans le sens de la présente Convention, entendre les œuvres éditées. . . .

Article 7.—(1) La durée de la protection accordée par la présente Convention comprend la vie de l'auteur et cinquante ans après sa mort.

(2) Toutefois, dans le cas où cette durée ne serait pas uniformément adoptée par tous les pays de l'Union, la durée sera réglée par la loi du pays où la protection sera réclamée et elle ne pourra excéder la durée fixée dans le pays d'origine de l'œuvre. . . .

Article 9.—(1) Les romans-feuilletons, les nouvelles et toutes autres œuvres, soit littéraires, soit scientifiques, soit artistiques, quel qu'en soit l'objet, publiés dans les journaux ou recueils périodiques d'un des pays de l'Union, ne peuvent être reproduits dans les autres pays sans le consentement des auteurs.

Article 15.—(1) Pour que les auteurs des ouvrages protégés par la présente Convention soient, jusqu'à preuve contraire, considérés comme tels et admis, en conséquence, devant les tribunaux des divers pays de l'Union, à exercer des poursuites contre les contrefacteurs, il suffit que leur nom soit indiqué sur l'ouvrage en la manière usitée.

1939
 FIEL
 v.
 LEMAIRE.
 Angers J.

Le 10 avril 1928 le Canada a comme pays unioniste contractant, adhéré à la Convention de Berne telle que révisée à Berlin le 13 novembre 1908. Avant cette date le Canada faisait partie de l'Union internationale pour la Protection des Oeuvres littéraires et artistiques comme membre de l'empire britannique. Il a signé, le 2 juin 1928, l'acte de Rome revisant de nouveau la Convention de Berne; cet acte a été ratifié par arrêté ministériel (P.C. 1390) le 12 juin 1931; la ratification a été déposée à Rome le 27 juin 1931.

L'article 3 de la Loi du droit d'auteur (S.R.C. 1927, chap. 32) définit ainsi le droit d'auteur:

Pour les fins de la présente loi, le "droit d'auteur" désigne le droit exclusif de produire ou de reproduire une œuvre sous une forme matérielle quelconque, d'exécuter ou de représenter ou, s'il s'agit d'une conférence, de débiter en public, et si l'œuvre n'est pas publiée, de publier l'œuvre ou une partie importante de celle-ci; . . .

2. Pour les fins de la présente loi, l'expression "publication" désigne, par rapport à toute œuvre, l'édition d'exemplaires rendus accessibles au public; . . .

L'article 12 de la loi contient, entre autres, les dispositions suivantes:

Sous réserve des dispositions de la présente loi, l'auteur d'une œuvre sera le premier titulaire du droit d'auteur sur cette œuvre.

* * *

Mais lorsque l'ouvrage est un article ou une autre contribution à un journal, à une revue ou à un périodique du même genre, l'auteur, à défaut d'une convention à l'effet contraire, est censé posséder le droit d'interdire la publication de cet ouvrage ailleurs que dans ce journal, dans cette revue ou dans ce périodique.

L'article 17 décrète, entre autres, ce qui suit:

Sera considéré comme ayant porté atteinte au droit d'auteur sur une œuvre, quiconque, sans le consentement du titulaire de ce droit, exécute un acte qu'en vertu de la présente loi seul ledit titulaire a la faculté d'exécuter.

L'article 20 détermine les recours civils du titulaire du droit d'auteur; les dispositions pertinentes de cet article, tel que modifié par 21-22 Geo. V, chap. 8, art. 7, se lisent comme suit:

Lorsque le droit d'auteur sur une œuvre aura été violé, le titulaire du droit pourra recourir, sauf disposition contraire de la présente loi, à tous moyens de réparation, par voie d'ordonnance de cessation ou d'interdiction, de dommages-intérêts, de décomptes (accounts) ou autrement, moyens qui sont ou seront garantis par la loi en vue de la violation d'un droit.

1939
 FIEL
 v.
 LEMAIRE
 Angers J

3 Dans toute action en violation de droit d'auteur, si le défendeur conteste l'existence du droit d'auteur ou la qualité du demandeur, en pareil cas:

a) L'œuvre sera, jusqu'à preuve contraire, présumée être une œuvre protégée par un droit d'auteur; et

b) L'auteur de l'œuvre sera, jusqu'à preuve contraire, présumé être le possesseur du droit d'auteur.

Toutefois, lorsque la contestation concerne une question de cette nature, et si aucune concession du droit d'auteur ou d'un intérêt dans le droit d'auteur par cession ou par licence n'a été enregistrée sous l'autorité de la présente loi, en pareil cas:

2) si un nom paraissant être celui de l'auteur de l'œuvre y est imprimé ou autrement indiqué, en la manière habituelle, la personne dont le nom est ainsi imprimé ou indiqué sera, jusqu'à preuve contraire, présumée être l'auteur de l'œuvre;

4. Quiconque viole le droit d'auteur sur une œuvre protégée en vertu de la présente loi sera passible de payer, au détenteur du droit d'auteur qui aura été violé, les dommages-intérêts que ce détenteur du droit d'auteur pourra avoir subis par le fait de cette violation, et en sus, telle proportion, que le tribunal peut juger équitable, des profits que le contrefacteur aura réalisés en commettant cette violation de droit d'auteur. . . .

Vu la preuve au dossier et la présomption créée par le paragraphe 3 de l'article 20, je crois qu'il y a lieu de conclure que Marthe Fiel est l'auteur du conte intitulé "Le sang-froid de Marie" publié dans le journal *Bayard* de Paris, France, et reproduit dans la *Voix des Bois Francs*, que cette œuvre est protégée et que la demanderesse est titulaire du droit d'auteur à l'égard de ladite œuvre. La défenderesse n'a apporté aucune preuve à l'encontre de la qualité de la demanderesse non plus que de son droit d'auteur.

La première question qui se pose est de savoir si la défenderesse s'est rendue coupable de violation de droit d'auteur en distribuant avec son journal *La Voix des Bois Francs* un supplément portant le même nom, dans lequel était reproduit le conte de la demanderesse sans l'autorisation de celle-ci.

Si la défenderesse eût reproduit le conte "Le sang-froid de Marie" dans son journal même, il me semble qu'il ne pourrait y avoir de doute que cette reproduction aurait constitué une violation du droit d'auteur de la demanderesse; le cas tomberait sous le coup des articles 3 et 17 de la loi; la défenderesse en effet aurait sans le consentement de la demanderesse, titulaire du droit d'auteur, reproduit ce conte sous une forme matérielle, pour me

servir des termes de la loi, et exécuté ainsi un acte réservé au seul titulaire du droit d'auteur.

Est-ce que le fait que le supplément, qui accompagnait son journal et portait le même titre que celui-ci, est imprimé et édité par un tiers, savoir Publishers Holding Corporation Limited, exonère la défenderesse? Ou bien est-ce que l'addition de ce supplément au journal et sa distribution avec celui-ci aux abonnés constitue une violation du droit d'auteur de la demanderesse? Après étude de la loi et de la jurisprudence, j'en suis venu à la conclusion qu'il y a lieu de répondre à la première question dans la négative et à la seconde dans l'affirmative. En adoptant et faisant sien le supplément que lui fournissait Publishers Holding Corporation Limited, en y laissant mettre le nom de son journal et au-dessous les mots "Fondateur: Camille Duguay" et en le distribuant à ses abonnés, la défenderesse a assumé la responsabilité de ce qui y était contenu.

Malgré d'assez minutieuses recherches, je n'ai pu trouver aucun arrêt au point; la question telle qu'elle se soulève dans la présente cause, ne me paraît pas avoir été décidée; il y a tout de même quelque intérêt à consulter les ouvrages suivants: 26 Halsbury's Laws of England, 2^{ème} éd., p. 139, n° 274; Huard et Mack, De la propriété littéraire et artistique, 2^{ème} éd., p. 491, n° 1357.

La défenderesse a déclaré, tel que susdit, qu'elle n'était pas au courant du fait que le supplément contenait un article sur lequel existait un droit d'auteur; le supplément était expédié chaque semaine à l'imprimeur de *La Voix des Bois Francs*, qui l'insérait dans le journal et l'envoyait avec celui-ci aux abonnés et aux marchands de journaux. Un comité devait être formé au su de la défenderesse, lequel avait pour tâche de contrôler ce qui était publié dans le supplément. Ce comité a-t-il été constitué et, si oui, a-t-il exercé les fonctions qui lui étaient dévolues. La preuve sur ce point fait défaut. Un fait semble certain: si le comité a été organisé et s'il a assumé sa charge, il ne s'est pas soucié de la question du droit d'auteur. A-t-il agi de la sorte par ignorance, rien au dossier ne l'indique. Quant à la défenderesse, elle me paraît avoir été dans l'ignorance complète du fait que la demanderesse détenait un droit d'auteur sur le conte en question. Je suis convaincu qu'elle a agi de bonne foi.

1939
 FIEL
 v.
 LEMAIRE.
 Angers J

1939
 FIEL
 v.
 LEMAIRE
 Angers J.

Sa bonne foi, malheureusement pour elle, ne la libère pas de sa responsabilité: 7 Halsbury's Laws of England, 2^{ème} éd., p. 587, n° 911; Copinger on the Law of Copyright, 6^{ème} éd., p. 117; Ladas, International Protection of Literary and Artistic Property, tome 2, p. 816; Huard et Mack, op. cit., p. 595, n° 664bis. La défenderesse a consenti implicitement à la distribution d'un supplément, portant le nom de son journal et livré avec lui, dans lequel était reproduit, illégalement et sans autorisation, une œuvre littéraire protégée par un droit d'auteur; en agissant ainsi elle a, à mon avis, assumé la même responsabilité que si elle eût reproduit le conte dans le journal même.

Le procureur de la défenderesse a soutenu qu'il n'y avait pas lieu d'accorder une ordonnance de cessation ou d'interdiction vu qu'il s'agit d'un acte isolé, qui n'est pas susceptible de se répéter. Il est raisonnable de croire que la défenderesse ne projette point de publier ou reproduire de nouveau le conte de la demanderesse; il est vrai qu'elle n'a pris aucun engagement à cet effet, mais elle n'a plus d'intérêt à le faire. Je suis d'avis, dans les circonstances, qu'il n'y a pas lieu d'accorder une ordonnance de cessation ou d'interdiction. Le motif invoqué pour le refus de pareille ordonnance dans les causes de *Gribble v. Manitoba Free Press Co. Ltd.* (1) et *Byrne v. Statist Company* (2) me semble s'appliquer en l'espèce. Je crois à propos de citer ici un extrait des notes de l'honorable juge Prendergast, juge en chef du Manitoba, dans la cause de *Gribble v. Manitoba Free Press Co. Ltd.* (p. 576):

This only means, however, that the Court is not limited in this case to injunction, not that injunction could not be granted. But I agree with the learned trial judge that this is not a case for such redress. The appellant would have to show, which he has not done, that there is a probability of future damage (*Borthwick v. Evening Post*, 1888, 37 Ch. D. 449, 57 L.J. Ch. 406) or that the defendant is likely to continue the infringement: *Baily v. Taylor* (1829) 1 Russ. & My. 73, 8 L.J. (O.S.) Ch. 49, and *Cox v Land and Water Journal Co.* (1869) L.R. 9 Eq. 324, 39 L.J. Ch. 152.

Voir aussi *Ladas*, op. cit., p. 823.

Le procureur de la défenderesse a prétendu qu'au moment où elle aurait violé le droit d'auteur de la demanderesse sa cliente ne savait pas et n'avait aucun motif raisonnable de soupçonner que l'œuvre en question faisait encore l'objet d'un droit d'auteur; il a conclu de là que la

(1) (1931) 3 W.W.R. 570, 576

(2) (1914) 1 K.B. 622, 628.

demanderesse n'avait point de réclamation pour dommages-intérêts et qu'elle ne pourrait obtenir tout au plus qu'une ordonnance de cessation ou d'interdiction.

Le procureur de la défenderesse appuie sa prétention sur l'article 22 de la Loi du droit d'auteur, lequel est ainsi conçu :

Lorsque, dans une action exercée pour violation du droit d'auteur sur une œuvre, le défendeur allègue pour sa défense qu'il ignorait l'existence de ce droit, le demandeur ne pourra obtenir qu'une ordonnance de cessation ou d'interdiction par rapport à ladite violation, si le défendeur prouve que, au moment de la commettre, il ne savait et n'avait aucun motif raisonnable de soupçonner que l'œuvre faisait encore l'objet d'un droit d'auteur.

Toutefois, si lors de la violation, le droit d'auteur sur cette œuvre était dûment enregistré sous l'empire de la présente loi, le défendeur sera considéré comme ayant eu un motif raisonnable de soupçonner que le droit d'auteur subsistait sur cette œuvre.

Il est bon de noter immédiatement que le droit d'auteur sur le conte "Le sang-froid de Marie" n'a pas été enregistré sous l'empire de la Loi du droit d'auteur. Cette formalité, au reste, n'est pas requise pour l'existence du droit d'auteur.

La défenderesse a déclaré qu'elle ignorait absolument l'existence d'un droit d'auteur sur l'œuvre en question. Était-elle justifiable de l'ignorer? Je ne le crois pas. Les tribunaux qui ont eu à interpréter l'article 22, correspondant à l'article 8 de la loi anglaise (Copyright Act, 1911, 1 & 2 Geo. V, chap. 46), en ont restreint la portée considérablement quant à ce qui concerne la libération du contre-facteur du recours en dommages, comme l'indiquent, entre autres, les décisions suivantes: *John Lane, The Bodley Head Ltd. v. Associated Newspapers Ltd.* (1); *Byrne v. Statist Company* (2); *Gribble v. Manitoba Free Press Co. Ltd.* (3); *Mansell v. Star Printing & Publishing Company* (4). Voir aussi Copinger on the Law of Copyright, 6^{ème} éd., p. 171.

Il me semble opportun de citer un passage des notes de l'honorable juge Dennistoun, l'un des juges de la Cour d'appel du Manitoba, dans la cause de *Gribble v. Manitoba Free Press Co. Ltd.* (*ubi supra*), où il dit (p. 579) :

Sec 22 of the Act is the only section behind which the defendants can take shelter, and it is under the provisions of this section that the

(1) (1936) 1 All ER 379.

(4) (1937) 4 D L R. 1, 8; (1937)

(2) (1914) 1 KB. 622.

A C. 872.

(3) (1931) 3 W.W.R. 570.

1939
 ~~~~~  
 FIEL  
 v.  
 LEMAIRE.  
 ~~~~~  
 Angers J.
 ~~~~~

learned trial judge has passed in their favour. (Suit le texte de l'article). Par. 4 of the stated case, which was submitted by agreement of counsel, is as follows:

4. At the time of the publishing of the said article by the defendant, the defendant had received no actual notice that copyright in the said article was claimed by any person, except such notice as may have been effected by the nature of the article and the publishing of the plaintiff's name at the head of the said article as it appeared in the *Ottawa Journal*.

The trial judge, commenting on this, says:

I am satisfied that the publishers of the defendant newspaper were not aware at the time of publication by them of the plaintiff's copyright and had no reasonable grounds for suspecting that copyright existed.

Sec. 8 of the Imperial Act of 1911 is the source and origin of our sec. 22 and is in *pari materia* with it.

It is discussed by Copinger at p. 171 in a way which commends itself as sound reasoning

In what cases can the section apply? What "reasonable ground" can a direct copyist have for not suspecting the work he copies to be the subject of copyright? Copinger suggests, and I agree, that the proper attitude of mind of a copyist toward a work that he copies is that copyright in the latter exists, unless he has evidence to the contrary.

The only grounds for not suspecting copyright appear to be either (a) that the period of copyright protection has run out; (b) that he thinks that the work is of such a character that it ought not to be a subject of copyright; or (c) that the work is a foreign work (p. 173)

If a copyist were to ascertain that the author had died 100 years ago he might have reasonable grounds for thinking that no copyright existed.

The article in question is of a literary and biographical character and should have at once suggested to the *Manitoba Free Press* that it was subject to copyright. Despite the finding of the trial judge, I do not think the *Manitoba Free Press* can rely on ignorance as a justification, but is fairly and properly testing its right under article 9 of the Berne Convention.

Si la défenderesse avait lu "Le sang-froid de Marie" dans le *Bayard*, portant au bas le nom de la demanderesse, elle aurait su ou aurait dû savoir que ce conte était protégé par un droit d'auteur; l'ignorance de la loi n'est pas une excuse. Elle affirme qu'elle n'a jamais pris connaissance de ce qui paraissait dans le supplément; cette tâche était confiée à un comité chargé de se rendre compte de son contenu. La défenderesse se fait à ce comité, comptant apparemment qu'il s'acquittait de son devoir consciencieusement. Ce comité, s'il a exercé ses fonctions, a vraisemblablement pris en considération l'aspect moral, voire peut-être littéraire, des articles publiés dans le supplément et ne s'est pas soucié de la légalité de la publication de ces articles. Il est possible que son devoir se soit borné à déterminer si la matière comprise dans le supplément était recommandable au point de vue moral. Si tel était



le cas, il incombait à la défenderesse de s'assurer qu'aucun des articles inclus dans le supplément ne violait un droit d'auteur. Si, au contraire, le comité était tenu de vérifier l'absence de droit d'auteur sur les articles publiés dans le supplément et s'il a failli à son devoir, la défenderesse est responsable de la négligence de son mandataire: article 1727 C.C.

1939  
        
 FIEL  
 v.  
        
 LEMAIRE.  
        
 Angers J.  
      

La défenderesse a agi de bonne foi, mais elle a agi imprudemment et elle doit subir les conséquences de son imprudence. La principale coupable néanmoins, à mon avis, est la compagnie qui édite ce supplément et c'est elle, il me semble, que l'on devrait poursuivre, si l'on désire mettre fin à ces violations de droit d'auteur.

Après avoir examiné attentivement la preuve versée au dossier et avoir étudié avec soin la doctrine et la jurisprudence, je ne puis arriver à d'autres conclusions que la demanderesse est titulaire du droit d'auteur sur le conte "La sang-froid de Marie," que la défenderesse a violé ce droit d'auteur et que celle-ci doit être tenue responsable des dommages que la reproduction dudit conte dans le supplément de son journal a pu occasionner à la demanderesse. Il y aura donc renvoi de la cause au registraire, conformément aux dispositions de la règle 177 des règles et ordonnances de cette Cour, aux fins d'établir le montant des profits qu'a pu réaliser la défenderesse par la reproduction dudit conte dans son supplément, si profits il y a eu, de déterminer le quantum des dommages causés par ce fait à la demanderesse et de faire rapport à la Cour. Les dépens de tel renvoi sont réservés pour adjudication ultérieure.

Comme je l'ai déjà dit, je ne crois pas qu'il y ait lieu d'accorder une ordonnance de cessation ou d'interdiction.

La demanderesse aura droit à ses frais d'action contre la défenderesse, lesquels sont par les présentes fixés à deux cent cinquante dollars (\$250).

*Judgment accordingly.*

1939  
April 19-21,  
24-28  
May 1.  
July 29.

BETWEEN :

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

AND

BROWN'S THEATRES LIMITED.....DEFENDANT.

*Patents—Infringement—Subject-matter—Combination patent—Invention—Utility—Patentability—Industrial value—Benefit to the public.*

The action is one for infringement by defendant of five patents owned by plaintiffs. The Harrison patent claimed an invention for a horn constructed according to the exponential law and having a mouth diameter approximately one-quarter the wave length of the critical frequency of the horn; the Court found that there was no infringement of this patent because the defendant's construction does not fall within the ambit of the particular construction described and claimed by Harrison.

The invention claimed in the Wentz patent relates to improvements in acoustic devices such as are used in receiving and transmitting sound, and ordinarily referred to as loud speakers; the distinguishing characteristic is the use of a spherical plug in the sound chamber for the purpose of decreasing the cross-sectional area of a portion of the sound chamber. The Court found that the sound chamber employed by the defendant and that described by Wentz are not alike, nor can defendant's sound chamber be said to be the equivalent of Wentz's sound chamber, and there was no infringement.

The object of the Miller patent is stated to be a film sound reproducing system operating on alternating current. This patent was held to lack subject-matter and therefore there was no infringement. The Wilson patent relates to improvements in electron discharge devices. The Court found that there was subject-matter in Wilson and there had been infringement by the defendant.

The DeForest patent claims an invention for the control of electric currents by and in accordance with variations of light; this patent was found to be without utility and therefore void and without subject-matter.

*Held:* That a claim for a particular means to effect certain purposes is not infringed where the same purposes are effected by different means; nor is a combination to effect certain results infringed by a combination of similar parts operating in a different manner, though the results effected are the same.

2. That it is not permissible to claim an article which as an article requires no inventive ingenuity merely because, if used in a particular way, it will be useful in achieving a particular purpose.

3. That the combination disclosed in the Wilson patent is in principle to be differentiated from that disclosed in prior patents, and is novel and possesses subject-matter.
4. That an invention to be patentable must confer on the public a benefit; utility, as predicated of inventions, means industrial value and no patent can be granted for a worthless art or arrangement.

1939

NORTHERN  
ELECTRIC  
Co. LTD.,  
AND  
WESTERN  
ELECTRIC  
Co. INC.  
v.  
BROWN'S  
THEATRES  
LIMITED.

ACTION by plaintiffs herein to have it declared that five patents owned by them are valid and were infringed by defendant company.

Maclean J.

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

*O. M. Biggar, K.C.* and *R. S. Smart, K.C.* for plaintiffs.  
*H. N. Chauvin, K.C.* and *Frank B. Chauvin* for defendant.

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

THE PRESIDENT, now (July 29, 1939) delivered the following judgment:

This is an action for the infringement of five patents owned by the plaintiffs. The applicants for these patents were Harrison, Wentz, Miller, Wilson and Deforest respectively, and by these names I shall designate the several patents here in question. The evidence, and arguments of counsel, were directed to these patents in the order named, and this order I shall observe in my discussion of them.

It was admitted in writing by the defendant that it has installed and is operating at the Community Theatre located in Toronto, Ontario, a sound reproducing and amplifying equipment according to the arrangement shown in certain drawings of the Cincinnati Time Recorder Company attached to the admission. It was also admitted that the sound reproducing and amplifying equipment employs a high frequency loud speaker constructed as shown in certain drawings of the Jensen Radio Manufacturing Company accompanying the admission.

The Harrison patent, No. 302,394, issued on July 22, 1930, and is a reissue of patent No. 258,045, dated February 9, 1926, and that is the first to be considered. The

1939

NORTHERN  
ELECTRIC  
Co. LTD,  
AND  
WESTERN  
ELECTRIC  
Co. INC.  
v.  
BROWN'S  
THEATRES  
LIMITED.

Maclean J.

following paragraphs extracted from the specification will reveal the main characteristics of the invention and its objects:

This invention relates to acoustic devices such as horns used in conjunction with loud speaking receivers and phonographs, an object being to produce a horn capable of faithfully and efficiently transmitting sound vibrations over a broad range of frequencies.

Another object is to produce a horn which is adapted to be constructed in compact form suitable for mounting in a cabinet.

In accordance with the general features of the invention a horn is provided in which the progressive increase in cross-sectional area follows the exponential law. Specifically this feature contemplates a horn having a rate of taper such that the areas of successive wave fronts increase by a constant per cent per unit of length, and a mouth opening properly related to the other constants of the horn as is more particularly explained hereinafter.

After a definition of certain technical terms, and reference to certain formulæ, the specification proceeds:

Although any horn constructed in accordance with the above formulæ will have a uniform rate of change of impedance, for best results it is preferable to proceed as follows:

First, the two end areas should be chosen. The area of the small end is preferably chosen to correspond with the opening in the receiver or acoustic device with which the horn is to be used. The mouth area is usually determined from the conditions under which the horn is to be used and the larger it can be made, granted there is sufficient horn length, the lower are the frequencies it can effectively radiate. It has been found that the mouth of a horn is a poor radiator of vibrations having wave lengths greater than twice its diameter, vibrations having longer wave lengths being largely reflected.

Next the rate of taper of the horn is determined as this in properly designed horns determines the length of the horn. A rate of taper should be chosen such that the horn freely transmits all frequencies which the mouth can radiate. The rate of taper should be such that the wave length of the critical frequency is several times the mouth diameter, a wave length of four times the mouth diameter has been found satisfactory. The critical frequency is that frequency below which the surge impedance of an infinite length of horn is a pure reactance.

The claims entering into the controversy are 1 and 17, which are as follows:

1. A horn having an opening in which the progressive increase in cross-sectional area is substantially according to the exponential law, and a mouth diameter approximately one-quarter the wave length of the critical frequency.

17. A horn having a substantially constant rate of increase in cross-sectional area per unit of length throughout its length, and a mouth opening equivalent in area to that of a circle whose diameter is approximately one-quarter the wave length of the critical frequency of the horn

These two claims mean substantially the same thing.

The invention claimed by Harrison is a horn constructed according to the exponential law and having a mouth diameter approximately one-quarter the wave length of the critical frequency. What is claimed is not a horn made according to the exponential law but a horn made according to that law and which has a mouth opening whose diameter is approximately one-quarter the wave length of the critical frequency of the horn. The critical frequency is that frequency below which the horn ceases to function satisfactorily; it will not radiate satisfactorily frequencies below the critical frequency. A horn may be regarded as a transmission line or link between the loud speaker diaphragm and the outside air. The exponential horn is a device for coupling the motion of the loud speaker diaphragm to the volume of air which it is desired to excite, and the shape of the horn follows a known mathematical equation.

According to the exponential law the taper of the horn increases constantly, so that the cross-sectional area of the opening enlarges as the flare increases. The exponential law does not, as I understand it, fix the rate of taper; it requires only that the cross-sectional area increase constantly. The rate of increase may be selected, but it is the constant increase of whatever rate is selected that is taught by the exponential law. And the exponential law does not prescribe any rule as to where one should stop in the construction of a horn, that is, so far as length is concerned. A horn made according to the exponential law would not be patentable, and in fact I do not understand this to be claimed by Harrison. The mathematical formula for the law of rhythmic or logarithmic shape was conceded by Harrison to have been long known. It was disclosed and explained in the article of Webster, which was read at a meeting of the American Physical Society in 1914, and which was published in 1918. Webster gives the transmission characteristics of horns of different forms, including the cylindrical, the conical, and the exponential, and he works out these characteristics mathematically. He states the fundamental mathematical principles of these horns from which one skilled in mathematics and in the acoustic art may arrive at the complete solution of the problem of acoustical transmission by means of exponential horns. The formulæ mentioned by Webster are the

1939  
 NORTHERN  
 ELECTRIC  
 CO. LTD.,  
 AND  
 WESTERN  
 ELECTRIC  
 CO. INC  
 v.  
 BROWN'S  
 THEATRES  
 LIMITED.  
 Maclean J.

1939  
 NORTHERN  
 ELECTRIC  
 Co. LTD,  
 AND  
 WESTERN  
 ELECTRIC  
 Co. INC.  
 v.  
 BROWN'S  
 THEATRES  
 LIMITED.  
 Maclean J

same as those shown in Harrison. The latter sets forth in his specification the same fundamental equations but expresses them in different symbols. All that Harrison purports to add to Webster is to teach where the length of an exponential horn might end and at the same time give a satisfactory radiation of the frequencies desired to transmit. And the rule he lays down in this connection is that the mouth diameter is to be approximately one-fourth the wave length of the critical frequency, though limits above and below that dimension are stated. To state it with greater precision Harrison discloses where one may terminate the length of a horn and yet radiate and transmit the low frequencies as well as the higher frequencies.

Harrison, who gave evidence at the trial, admitted that there was no difficulty in radiating the higher frequencies beyond the audible limits. The problem Harrison sought to solve was the construction of a horn that would radiate the lower frequencies and yet be of a usable or convenient size. He had in mind horns of six feet and over in length and he was concerned with the dispensing of horns of great length and bulk, and the construction of the shortest horn possible according to the exponential law, but one which would radiate the lower frequencies desired, as well as the higher frequencies. That was his problem, and his solution, as stated in claims 1 and 17, was to make a horn according to the exponential law, and which had a mouth diameter approximately one-quarter the wave length of the critical frequency, and it is claimed that if a horn were so constructed it would be of a convenient dimension and would radiate the low frequencies as well as the higher frequencies, that is to say, it would transmit sound vibrations over a broad range of frequencies. Harrison states a formula, number 5, for ascertaining the critical frequency of any exponential horn, and, I think it has been established quite clearly by the evidence that this formula corresponds with one of the formulæ set forth in Webster's paper for ascertaining the critical frequency of an exponential horn.

Now, as I have more than once stated, the particular type of horn described and claimed by Harrison is an exponential horn the mouth diameter of which is one-quarter the wave length of the critical frequency. When the critical frequency is ascertained that must be accepted

definitely as the stage at which the horn will just operate and below which it will not operate, and consequently the theoretical point between operativeness and inoperativeness is not a useful one to rely upon for fidelity in the transmission of low frequencies. In order to be on the safe side Harrison, as I understand it, after ascertaining the critical frequency suggests doubling the critical frequency, to ensure a clear radiation, and this has the effect of reducing the wave length by one half. This is a new frequency for transmission, reached by doubling the actual critical frequency, and the mouth diameter of the horn is then to be one-quarter the wave length of that frequency instead of one-half, as mentioned at one stage in Harrison's specification wherein he says that the wave length should not be greater than twice the diameter of the horn. I am not certain that I have succeeded in stating this clearly, or perhaps quite accurately, but, if I have failed, it is not, I think, a matter of great consequence.

The defendant was concerned not with a broad range of frequency as was Harrison, but with a narrow range of the higher frequencies, from 1,200 up to 6,000 cycles, and it claims that in the use of its horn there was no relationship between the mouth opening and the wave length of the critical frequency, as is claimed by Harrison. The frequencies that Harrison was concerned with were those as low as 100 or 200 cycles and up as far as the horn would transmit. The defendant's horn has a mouth diameter of 5.1 inches, and the wave length of the calculated critical frequency is 11 inches.

If a horn has a mouth diameter substantially greater than one-quarter the wave length of the critical frequency the radiation will be more satisfactory for the high frequencies than one made according to Harrison, but it would not radiate the low frequencies as satisfactorily as would a horn made according to Harrison. The defendant's horn, having a larger mouth opening than that prescribed by Harrison, will not radiate the lower frequencies but it will function more satisfactorily for the higher frequencies, and for this it was particularly designed and is used.

The contention made on behalf of the defendant is that there is no infringement because the mouth diameter of the defendant's horn is substantially greater than one-quarter the wave length of the critical frequency, or the

1939  
 NORTHERN  
 ELECTRIC  
 Co LTD.,  
 AND  
 WESTERN  
 ELECTRIC  
 Co. INC.  
 v.  
 BROWN'S  
 THEATRES  
 LIMITED.  
 ———  
 Maclean J.

1939  
 NORTHERN  
 ELECTRIC  
 Co. LTD.,  
 AND  
 WESTERN  
 ELECTRIC  
 Co. INC.  
 v.  
 BROWN'S  
 THEATRES  
 LIMITED.  
 Maclean J.

limits above and below that, as stated in Harrison. It was argued by Mr. H. N. Chauvin that if the mouth diameter is greater than one-quarter the wave length of the critical frequency, there would be no problem to solve, because the ratio between the mouth diameter and the wave length of critical frequency is such that there could be no doubt as to the capacity of the horn to radiate satisfactorily the higher frequencies. Harrison, he states, was seeking a horn which would radiate low frequencies, which, I think, is correct, and there would be no problem about the higher frequencies. Harrison was not concerned with a device such as the defendant's where the frequencies do not go below 1,200 cycles; he was attempting to demonstrate that a horn might be designed to transmit the low frequencies and still be of a reasonable size, and if there is any invention in Harrison it lies in that. In the construction described and claimed by Harrison there is the factor of mathematical precision, which in turn demands an arbitrary requirement as to the physical dimensions of the mouth diameter of his horn, and to that, I think, he is tied. When he claims an exponential horn having "a mouth diameter approximately one-quarter the wave length of the critical frequency" those words are, I think, to be regarded as words of physical description of the apparatus claimed. The defendant's horn cannot, I think, be said to fall within any such description of Harrison's alleged invention.

I need not decide whether or not there is subject-matter in Harrison, and I did not understand defendant's counsel to contend that there was not. I think, however, that there is no infringement because the defendant's construction does not fall within the ambit of the particular construction described and claimed by Harrison.

Next, I come to the Wenté patent which issued in February, 1929, on the application of Edward C. Wenté filed in May, 1927. The invention is said to relate to improvements in acoustic devices such as are used in receiving and transmitting sound, and ordinarily referred to as loud speakers. A specific object of the invention was to improve the transmission characteristics of loud speaking receivers at the upper portion of the sound frequency range.



A great deal of evidence, and elaborate arguments by counsel, were directed to various phases of this patent and its alleged infringement by the defendant, to which I have given full consideration, but, I think, the real question here at issue may be disposed of in fairly brief terms.

This patent was fully considered by me in the case of *Western Electric Co. Inc., et al. v. Baldwin International Ltd.* (1), and I need not repeat what I there said. I held the patent to be valid and to have been infringed, for the reasons there appearing.

The elements of Wenté's combination patent are set forth in claim 4, the claim in suit here, as follows: "An acoustic device comprising a piston diaphragm having a flexible peripheral portion and a substantially dish-shaped central portion, means for driving said diaphragm at the periphery of its central portion, a horn, a sound chamber between said diaphragm and said horn, a plug in said sound chamber for decreasing the cross-sectional area of a portion of the sound passage therethrough." Loud speakers, so called, were known and in use prior to Wenté. I think it is quite correct to say that the claim to invention in Wenté resides in the inclusion in the combination of a sound chamber having a dome shaped plug inserted therein, which decreases the area of a portion of the sound passage. The diaphragm and plug are so shaped and arranged that converging sound passages are formed thereby, extending from the centre of the diaphragm and from its peripheral portion to a common sound chamber. The detailed description of the invention relates almost entirely to the sound chamber and the spherical plug, and the method of construction and assemblage.

The vital importance attached to Wenté's sound chamber, that is, a sound chamber having a plug secured therein, will be recognized from the following excerpt from Wenté's specification, wherein he states:

When employed in conjunction with a horn having no inherent losses, a loud speaker constructed in accordance with the above description has an efficiency of approximately 30 per cent, measured from the electrical energy input to the acoustic energy output, over a wide range of frequencies. Measurements made on a loud speaker of this type, from which the plug 23 has been removed from the sound chamber, and which employs a diaphragm about 2.75" in diameter, show that the frequency

1939  
 NORTHERN  
 ELECTRIC  
 Co. LTD.,  
 AND  
 WESTERN  
 ELECTRIC  
 Co. INC  
 v.  
 BROWN'S  
 THEATRES  
 LIMITED.  
 Maclean J.

1939

NORTHERN  
ELECTRIC  
Co. LTD,  
AND  
WESTERN  
ELECTRIC  
Co. INC.

v.

BROWN'S  
THEATRES  
LIMITED

Maclean J.

response falls off at frequencies above about 3,000 cycles per second at such a rate that practically no radiation takes place at a frequency of about 6,300 cycles. By inserting the plug into the sound chamber the frequency response characteristic of the loud speaker is improved to such an extent that the point of low radiation is moved up to a frequency of about 14,000 cycles per second and the efficiency of the loud speaker is practically uniform up to a frequency above 5,000 cycles

It will therefore be observed that the distinguishing characteristic of Wenté is the use of a spherical plug in the sound chamber for the purpose of decreasing the cross-sectional area of a portion of the sound chamber, and the favourable results produced thereby are described in that portion of the specification which I have just quoted. A sound chamber associated with a diaphragm, in acoustic devices, being old, it was the particular arrangement of parts, including a sound chamber with a plug secured therein, that gave novelty and utility to the combination of Wenté, and the evidence in *Western Electric Co. v. Baldwin, supra*, appeared sufficient, in my opinion, to establish invention for the combination.

The defendant's sound chamber is simply an open aperture, the walls of which are diverging. It is, I think, the conventional sound chamber used in a loud speaker and which I apprehend anyone might use in any such device. The defendant's sound chamber is entirely different in conception and form from that of Wenté, and I see no room for debate about this, so significant and obvious is the distinction between the two sound chambers. One could hardly be heard to say that these sound chambers are alike, or that the defendant's sound chamber is the equivalent of Wenté's sound chamber.

It has been laid down time and again that a claim for a particular means to effect certain purposes is not infringed where the same purposes are effected by different means; nor is a combination to effect certain results infringed by a combination of similar parts operating in a different manner, though the results effected are the same; but the claim is infringed when a variation in detail which amounts only to a colourable imitation is used. Wenté chose a certain combination of parts, and in particular a combination with a sound chamber in which was inserted a plug, and to that he must be held, and though the form of his sound chamber required a particular shaped dia-

phragm, that is of no consequence. I do not think it can be said that the defendant's combination is merely a colourable imitation of Wenté.

I think the defendant's sound reproducing device is in fact a combination different from that described and claimed by Wenté. The plaintiffs, by cutting from the walls of the defendant's sound chamber, a spherical plug shaped section, and suggesting in some way its replacement in the sound chamber from whence it came, sought to establish a similarity between the two sound chambers in question, but with this effort I was not impressed.

My conclusion is that there is no infringement of Wenté by the defendant.

The Miller patent will next be considered. This patent issued in June, 1933, on the application of Miller made in September, 1931. This patent relates to sound reproducing systems, and more particularly to sound reproducing systems operated from an alternating current source.

The specification first points out that various types of sound reproducing systems such as known types of phonographs and radio sets, have been operated from alternating current sources with reasonable success. However, it is said, difficulty has been experienced in operating an alternating current film sound reproducing equipment suitable for sound picture systems, due to the very high amplification between the photoelectric cell and the sound radiator and the high quality of reproduction necessary.

The specification then states:

Heretofore, known types of film sound reproducing systems have been mainly or entirely operated by direct current sources.

Commercial types of direct current generators are not suited to service of this type due to the pronounced ripple produced in their output by the usual method of commutation which produces a steady hum in the reproduced sound. Special generators designed to overcome this difficulty are difficult to construct due to the small power and size required and have not proved an entire success. As a result, the direct current used in sound reproducing systems has been mainly supplied by storage batteries. The storage batteries required, however, are bulky, require skilled operation and maintenance and a separate current supply and apparatus for charging.

Owing to the disadvantages attending the use of storage batteries, attempts have been made to replace the storage batteries with a source of supply derived from commercial alternating current circuits due to the constancy and reliability of these circuits and the ease with which the voltage may be transformed to any desired value. Rectified alternating current has been successfully used on the amplifiers feeding

1939  
 NORTHERN  
 ELECTRIC  
 Co. LTD.,  
 AND  
 WESTERN  
 ELECTRIC  
 Co. INC.  
 v.  
 BROWN'S  
 THEATRES  
 LIMITED.  
 ———  
 Maclean J.

1939

NORTHERN  
ELECTRIC  
CO. LTD.,  
AND  
WESTERN  
ELECTRIC  
CO. INC.  
v.  
BROWN'S  
THEATRES  
LIMITED.

Maclean J.

directly into the sound reproducers and has resulted in a system having economic and operating advantages over the use of storage batteries. The use of rectified alternating current as a power supply for the other circuits in the reproducing system, has not heretofore proven commercially successful. Due to the very high amplification of the output of the photo-electric cell, it has been found that in known systems the ripple remaining due to incomplete rectification produces a hum in the output of the sound reproducer which is detrimental to the enjoyment of the sound. By using extreme precautions, it is possible to produce a supply of rectified alternating current which is practically as constant as the supply from the storage battery but the elaborate and complicated installation required has prevented these systems from becoming commercially successful.

In known systems of film sound reproduction, a certain amount of noise is produced by the sound radiator even during supposedly silent periods. This noise is caused by various irregularities in the system such as fluctuations in the output from the amplifiers, lack of cleanliness and uniformity in the sound record, and many others. The total volume of noise due to these causes is kept low enough that no disagreeable effect is produced on the listener. The volume of noise is generally near to or below the threshold of audibility of the listener. J. C. Steinberg has shown in his article "The Relation Between the Loudness of a Sound and its Physical Stimulus," the Physical Review, Second Series, Vol. 26, October, 1925, that when the components of a complex sound near the threshold of audibility have values less than the values required for them to be audible when heard alone, they do not contribute to the loudness of the complex sound. In the present invention, the power supply is so arranged that the noise produced by variations in the supply is reduced to near the threshold of audibility and thus does not contribute to the loudness of the noise due to other causes. The total noise produced is thus not appreciably greater than the noise produced when the system is operated by storage batteries. At the same time, the system is so arranged that the irregularities in the power supply do not tend to cause a modulation of the sound frequency currents. It has been found that a system having the degree of imperfection in rectification limited as described above voids the complications which have prevented the systems producing practically constant current from an alternating current source from becoming commercially successful.

The object of the invention is stated to be a film sound reproducing system operating on alternating current. The particular features of the invention are said to be the use of rectified and filtered current to supply the power required by the system, the reduction of undesired noise due to operation on alternating current to a value less than the value of the undesired noise due to other causes in the system, and the arrangement of the system so that the variations in the filtered current are prevented from producing a modulation of the sound frequencies. By reason of these features it is claimed that the noise effects of the various parts of the system individually are maintained below certain limits, by means of proper filtering

or "smoothing" of the rectified current supply to each element respectively, and that the total noise effect is thus held within such limits that the final sound output is of a high standard of quality. The noise or "hum" which it is desired to reduce or eliminate is due to the fact that the current alternates, and this noise or hum is inherent in any alternating current system.

All the claims of the patent seem to be very similar, and claims 1, 2 and 3 may be mentioned. They are as follows:

1. A system for reproducing sound embodying, in combination, a source of illumination, a photoelectric cell, a photographic record of sound, means to cause said record to travel between said source and said cell, means for reproducing said sound controlled from said cell a source of alternating current, a rectifier and a filter in the supply circuit for said source of alternating current, said filter being arranged to reduce variations in the current supply to said source of illumination to such an extent that the effect of said variations is less than the effect of variations in the remainder of the system.

2. In a sound reproducing system, in combination, a source of illumination, a photoelectric cell, a film having a photographic record of sound, means to cause said film to travel between said source and said cell, means controlled from said cell for reproducing said sound a source of alternating current, a supply circuit for said source of illumination comprising a rectifier and a filter operated from said source of alternating current and arranged to reduce the variations in said alternating current to such value that the noise caused by said variations produces no perceptible increase in the noise produced by other irregularities in said system.

3. A method of reproducing sound embodying in combination a source of illumination, a photoelectric cell, a photographic record of sound, means to cause said record to travel between said source and said cell, means for reproducing said sound controlled from said cell, a source of alternating voltage, a rectifier and a filter operated from said source of alternating voltage to supply a polarizing potential to said cell and arranged to reduce the variations in said potential to such value that the noise produced by said variations causes no perceptible increase in the noise produced by other irregularities in said system.

It is to be observed that these claims state that a rectifier and filter are elements in the combination of parts described, and so "arranged" as to reduce the variations in the alternating current to such value that the noise caused by variations in the current supply cause no perceptible increase in the noise produced by any other irregularities in the system. There is no suggestion of any particular type of rectifier. What is disclosed are half wave rectifiers, and the usual filtering devices of choke coil and condenser. Miller concedes in his specification that rectified alternating current had been successfully used on the

1939  
 NORTHERN  
 ELECTRIC  
 CO. LTD.,  
 AND  
 WESTERN  
 ELECTRIC  
 CO. INC.  
 v.  
 BROWN'S  
 THEATRES  
 LIMITED.  
 Maclean J.

1939  
 NORTHERN  
 ELECTRIC  
 Co. LTD.,  
 AND  
 WESTERN  
 ELECTRIC  
 Co. INC.  
 v.  
 BROWN'S  
 THEATRES  
 LIMITED.  
 Maclean J

amplifiers feeding directly into the sound reproducers, and he concedes that by using extreme precautions it was possible by such means to produce a supply of rectified alternating current which was practically as constant as the supply from a storage battery, that is, a direct current supply.

But Miller's means for substituting a rectified alternating current in place of a direct current from storage batteries do not appear to disclose anything novel. Diagrams put in evidence, Exhibits 21, 22, 23 and 24, show that Miller's means of procuring the desired result by the use of a rectified alternating current is the same as that earlier in use for the same purpose. He does not appear to introduce any new element in his circuit, and we have the old elements in a rectifier to rectify the alternating current, and a filter consisting of condensers and choke coils, to smooth out the variations in the rectified current. He appears only to suggest that it is not necessary to smooth out entirely the ripple of the alternating current, because there is inherent in the system, due to various causes, a certain amount of noise, and that with a rectified alternating current it is not necessary to go below this because any hum remaining after a certain amount of filtering of the alternating current would not be objectionable, providing that such hum or noise were below the threshold of hearing.

Now, that idea or suggestion is put forward as a patentable one, but Miller does not suggest any other than well known means of putting the idea into practice, which in patent law is necessary, if the idea is a patentable one. Essentially, all that Miller says is to rectify and filter the alternating current by the usual means until you remove the noise of the ripple until it no longer contributes to the noise caused by other irregularities in the system, for example, such noises as are caused by fluctuations in the output from the amplifiers, or lack of cleanliness and uniformity in the sound record, and which are ultimately reproduced by the sound radiator. The plaintiff led evidence to show that the defendant's sound reproducing device was free of the objectionable hum or noise. This has the appearance of saying, as was well put by Mr. Chauvin, that if by the careful use of known rectifying

and filtering means one obtains a satisfactory sound reproduction, Miller is therefore infringed. Such a proposition would, I think, be untenable.

I perhaps should state that it was the hum inherent in an alternating current which prevented its earlier adoption in reproducing systems. For this reason the direct current was used to operate the system and to carry the signal impulses so as to avoid distorting the signal impulses. Then there arrived the time when it was found that the alternating current could be rectified and the hum eliminated or satisfactorily reduced.

Miller, in my opinion, seems to me merely an exposition upon the use of operation of known means and method for the rectification and filtering of an alternating current when employed in a sound reproducing system. It merely points out that it is not necessary to filter the rectified current to the extreme capacity of the means employed therefor, and it explains why it is not necessary to go beyond a certain degree of filtering. But no means are described for determining when that point has been reached. It is a matter of judgment and appreciation as to when the hum has been sufficiently smoothed out, or as to when it is of no greater value than the other noises which are to be found in the system. The idea may be meritorious but I do not think it is a patentable one. I might further add that what Miller claims is an article, a combination of elements, which did not require inventive ingenuity to produce. I do not think it is permissible to claim an article which as an article requires no inventive ingenuity merely because, if used in a particular way, it will be useful in achieving a particular purpose, as was said by the Master of the Rolls, Sir Wilfred Greene, in *Mullard Radio Valve Co. Ltd. v. British Belmont Radio Ltd.* (1).

Upon a construction of the patent itself it would seem clear that all Miller suggests is the idea of arranging the system so that the variations in the alternating potential or current will be reduced to such value that the noise produced by them is not materially greater than the noises produced by the irregularities in the sound record, caused by one reason or another. A rectified alternating current,

1939  
 NORTHERN  
 ELECTRIC  
 Co. LTD.,  
 AND  
 WESTERN  
 ELECTRIC  
 Co. INC.  
 v.  
 BROWN'S  
 THEATRES  
 LIMITED.  
 ———  
 Maclean J.  
 ———

1939  
 NORTHERN  
 ELECTRIC  
 Co. LTD.,  
 AND  
 WESTERN  
 ELECTRIC  
 Co. INC.  
 v.  
 BROWN'S  
 THEATRES  
 LIMITED  
 Maclean J.

properly filtered, was old in the art as a source of energy in vacuum tube devices, and its application to energize an amplifier in sound reproduction from film would not constitute invention. Miller shows a circuit arrangement for rectifying and filtering an alternating current but in that there is nothing novel. Both the descriptive portion of the specification and the claims of Miller emphasize filtering as the method for minimizing the irregularities of current which produce hum. If there is any other effect in Miller's arrangement which contributes to the accomplishment of this object, it is not disclosed. He refers constantly to filtering but he does not explain how any vacuum tube circuit of itself goes beyond the effects of the filter itself. After he is through with filtering he suggests something in the arrangement of the system which goes beyond the filtering in minimizing the effects of the variations in the filtered current, but he does not disclose what it is.

In my opinion therefore Miller is without subject-matter and it follows that there is no infringement.

I come next to the Wilson patent. This patent relates to improvements in electron discharge devices and issued in May, 1922, on the application of Wilson made in October, 1919.

Wilson claims to have put a negative bias on the grid through a resistance in the circuit by means of a space current supplied to the plate or cathode. The specification states:

This invention relates to electron discharge devices in which the impulses to be amplified, repeated or rectified are applied to a control electrode such as a grid. It has been found that in devices of this type, a coated filament having been employed, that a potential difference which may be called a contact difference in potential actually exists between the grid and the filament when a current is flowing from the filament to the plate. This potential difference assumes different values for different tubes even in the case where precautions are taken to employ as near as possible the same material for the grid and the same sort of alkaline earth oxide coating for the filament. This difference in potential makes it impossible to always use precisely the same circuit arrangement for the vacuum tube if identical results are to be obtained. In any case, however, this difference in potential is such as to cause no serious difference in the operation of the tube, especially if it is to be employed for amplifying large impulses, but in case the tube is to be employed as a detector or amplifier of weak impulses, it is desirable from a manufacturing standpoint that identical circuit arrangements should give identical results.



It will be observed that the specification points out that the difference in potential causes no serious difference in the operation of the tube, if it is to be employed for amplifying large impulses, but employed as a detector of weak impulses the potential may cause variations and it is accordingly desirable from a manufacturing standpoint that identical circuit arrangements should give identical results.

The specification then proceeds:—

If the contact difference in potential has a tendency to a positive value, it is found necessary in certain circuits, such as amplifier circuits to apply a negative potential to the grid in order to make it negative with respect to the filament. This effective value is desirable in order that no current can flow in the grid-filament circuit of a vacuum tube.

The usual method of applying the negative grid potential is to employ either a separate source, such as a dry cell, or to employ a resistance in the filament circuit, the drop in potential across this resistance being supplied to the grid. In both cases the negative potential is applied to grid irrespective of the value of the contact difference in potential between grid and cathode, so that although in general it may improve the action of vacuum tubes, in many cases, that is, where the contact difference in potential is a large negative value, it is detrimental.

An object of the invention is stated as follows:—

An object of the present invention is to compensate to some extent at least for the variations in this contact difference in potential between grid and cathode.

This is accomplished by supplying to the grid or control electrode a potential derived from the drop across a resistance which is in circuit with the source supplying the space current between the cathode and anode. This resistance is so connected that the grid acquires a negative potential equal to the drop across it. The drop across this resistance is proportional to the space current and consequently is dependent to some extent on the value of the contact difference in potential, since a positive value thereof will increase the space current, which would increase the negative potential of the grid, thereby cutting down the space current; on the other hand, a negative value of the contact difference in potential will decrease the space current which results in a grid potential tending to increase the space current. Hence the arrangement compensates for variations in this contact difference in potential.

The specification then presents the details of the invention by reference to the drawing which represents diagrammatically a circuit embodying the invention. The invention claimed by Wilson would thus appear to be confined to placing the resistance, designated by the numeral 6 in the drawing, in the circuit with a source supplying the space current between the cathode and the anode. Previously, he states, it was in the grid filament circuit

1939

NORTHERN  
ELECTRIC  
Co. LTD.,  
AND  
WESTERN  
ELECTRIC  
Co. INC.  
v.  
BROWN'S  
THEATRES  
LIMITED.

Maclean J.

1939  
 NORTHERN  
 ELECTRIC  
 Co. LTD.,  
 AND  
 WESTERN  
 ELECTRIC  
 Co. INC.  
 v.  
 BROWN'S  
 THEATRES  
 LIMITED.

Maclean J.

and he now proposes to place it in the circuit with the source supplying the space current. In further details of the invention he refers to a choke coil 8 which he states maintains substantially constant the current from battery through resistance 6, and the outgoing impulses are led off to the device 9, the telephone or loud-speaker, by a separate circuit which is connected in shunt to the circuit containing the elements 6, 7 and 8.

The claims said to be infringed are 1 and 5 and they are as follows:—

1. An electron discharge device having grid and anode circuits, a source of space current, an impedance common to said grid and anode circuits, and means for maintaining substantially constant the current through said impedance.

5. An electron discharge device comprising an anode, a cathode, a grid, a source of space current, and means for supplying between said cathode and grid a potential dependent in value upon the current supplied by said source and substantially independent of the value of the outgoing impulse.

From these claims it appears, having reference to the numerals employed in the specification and drawing, that choke coil 8 is the means adopted for maintaining constant the space current, and the outgoing circuit is divided, one branch leading off the impulses through a condenser to the device of telephone 8, and the other leading the space current down through the choke coil 8 to the battery 7, and then through the resistance 6.

The Canadian patent to Mathes, No. 185,275, which was cited as an anticipation of Wilson, shows a circuit arrangement comparable only in part to Wilson. The complete circuit is led off in Fig. 2, through condenser 12 down to the primary of the transformer, and then the current carrying the impulses is brought back to the cathode, in the same manner suggested by Wilson. The steady current then goes down through the choke coil 11, through the battery 5, and back to the cathode through the condenser wire connecting the common point of batteries 5 and 6 to the cathode and to ground. The cathode is also connected through battery 6, choke coil 4, and resistance 15, to the input circuit. As a result of this the resistance 8 in Mathes is not directly in the circuit which carries the space current from the anode to the cathode, whereas in Wilson the resistance is in that circuit. Wilson's method of providing a grid bias went into extensive application, and, I understand, is embodied in most modern receivers.

I think it would be correct to say, as claimed on behalf of the defendant, that Wilson would not be entitled to claim as invention the use of a choke coil for keeping the current constant, or for the condenser and choke coil for the purpose of dividing the output current and leading the impulse current back to the filament without going through the battery and the resistance. That was a means, I think, well known to the art at the time of his alleged invention, and Mathes shows this. But that still leaves Wilson's combination for producing a grid bias by a drop of potential through a resistance in the circuit carrying the space current from the anode to the cathode. Therefore, I think, it must be conceded that the combination of Wilson is in principle to be differentiated from Mathes, and that it is novel and possesses subject-matter. I do not think Wilson's arrangement can be said to have been obvious. Mathes obtains his grid bias by means of a resistance in the input circuit shunted across a battery different from the output battery, and nowhere does he suggest that this resistance might be inserted in the anode output circuit, which is the plate circuit, and that is what Wilson does. Patents to Lowenstein and Langmuir were also cited on behalf of the defendant, but I do not think they are relevant upon the real point in debate here, that is, whether there is invention in the circuit arrangement whereby a grid bias is obtained from the plate current and not from the filament current.

My conclusion is therefore that there is subject-matter in Wilson. So far as I have been able to understand the defendant's circuit it seems to me that the negative bias is there obtained substantially in the manner described and claimed by Wilson. I am therefore of the opinion that Wilson is infringed by the defendant.

I turn now to the fifth and last patent involved in this case, the De Forest Patent, which issued in December, 1923, the application therefor having been filed in October, 1920. The title given to this invention is "Method of and Means for Controlling Electric Currents by and in Accordance with Light Variation."

The invention is directed to the control of electric currents by and in accordance with variations of light. The specification states that useful applications of a system

1939  
 NORTHERN  
 ELECTRIC  
 Co. LTD.,  
 AND  
 WESTERN  
 ELECTRIC  
 Co. INC.  
 v.  
 BROWN'S  
 THEATRES  
 LIMITED.  
 Maclean J.

1939  
 {  
 NORTHERN  
 ELECTRIC  
 Co. LTD.,  
 AND  
 WESTERN  
 ELECTRIC  
 Co. INC.  
 v.  
 BROWN'S  
 THEATRES  
 LIMITED.  
 \_\_\_\_\_  
 Maclean J.  
 \_\_\_\_\_

of this nature are many, one of which being the reproduction of photographically recorded sounds for sound reproduction purposes, for example, in talking moving pictures. The invention is said to consist substantially in the construction, combination, location and relative arrangement of parts together with the method involved and the circuitual arrangements employed in accordance therewith. The patent drawings diagrammatically illustrate four different views of the system embodied in the invention.

The claims sued upon are 7, 8 and 9, which are embodied only in Fig. 4 of the drawings. Those claims are as follows:

7. The combination with an audion, of a light sensitive device included in a circuit connecting the grid and filament electrodes of said audion, and a source of current included in said circuit and shunted around said device.

8. The combination with an audion, of a light sensitive device included in a circuit connecting the grid and filament electrodes of said audion, and a potentiometer included in said circuit and shunted around said device

9 The combination with an audion, of a light sensitive device included in a circuit connecting the grid and filament electrodes of said audion, a source of current and a potentiometer included in said circuit and each shunted around said device.

With reference to Fig. 4, De Forest in his specification states:

In Fig 4 I show another method of connecting the light sensitive device 21 to the grid leak of an audion 5 which may or may not be in an oscillating state Here a polarizing battery 40 is connected around the device 21, as is also a potentiometer resistance 41 from which a sliding contact 42 leads off to the grid electrode 11 of the audion 5. A "ballast" resistance 43 is connected in this last lead as shown. By this arrangement I am enabled to obtain an exceedingly sensitive adjustment and consequent efficient control of the modulating or best effect produced by the light variations.

It is agreed that the arrangement just above described, and as embodied in Fig. 4, is inoperable, and any circuit arrangement made in accordance with such directions, and the drawings and claims, would wholly lack utility. This, it is agreed, is in consequence of the failure to include a resistance in the circuit arrangement, either immediately above the numeral 40 in Fig. 4, or somewhere between the battery 40 and the light sensitive device; I understood Mr. Biggar to say that the kind of arrangement shown in Fig. 4 was known as a shunt feed and was well known for use in connection with vacuum tubes but not

with photoelectric cells, and I understood his contention to be that when this shunt feed was shown to be applied in association with photoelectric cells the use of a resistance became obvious, and that this would be known to those skilled in the art at the date of the specification. There is conceded also to be an error in the drawing Fig. 4 wherein is shown a double connection to the battery 40, which error it is claimed would be obvious to any electrician. This error was not, I think, put before me by counsel for the defendant as being fatal to the claims in question, and probably it was a drafting error. In any event, in my view of the case, it may be disregarded. At any rate it does not appear to be of such serious importance as the absence of a resistance.

1939  
 NORTHERN  
 ELECTRIC  
 Co LTD.,  
 AND  
 WESTERN  
 ELECTRIC  
 Co. INC.  
 v.  
 BROWN'S  
 THEATRES  
 LIMITED.  
 Maclean J.

In Fig. 1 there is shown a resistance and the specification refers to it thus: "I prefer to provide a high resistance leak path 19 between the grid and filament electrodes of audions 6, and in a similar grid-filament circuit of oscillating audion 5 I provide in addition to the resistance 19, a source of current 20 and a light sensitive device 21 through which the system is controlled." A resistance is also shown in Fig. 3, but not in Fig. 2. But Fig. 4, and the reference thereto in the specification, apparently was intended to present a method, different from anything earlier described or shown in the other drawings, for connecting the light sensitive device to the grid leak of an audion.

The absence of a resistance, and therefore the utter lack of utility in De Forest, was known to the plaintiffs prior to the bringing of this action, and no effort was ever made to amend the specification, in the manner prescribed by the Patent Act. I find it difficult to assume that De Forest ever concluded in his own mind that a resistance was imperative in his arrangement shown in Fig. 4, or that his failure to indicate plainly the necessity for the inclusion of that element was a mere inadvertence. It is impossible to say that either assumption would be well founded. The probable reason for the absence of a resistance is, I think, to be found in Mr. Biggar's explanation, that is, that the arrangement that De Forest had in mind, and which is shown in Fig. 4, was one that had been used in association with vacuum tubes, and which would be well known to De Forest, and that he adapted it for use in

1939  
 NORTHERN  
 ELECTRIC  
 Co. LTD.,  
 AND  
 WESTERN  
 ELECTRIC  
 Co. INC.  
 v.  
 BROWN'S  
 THEATRES  
 LIMITED.  
 ———  
 Maclean J.  
 ———

connection with photoelectric cells, believing that it would be sufficient and effective in a circuit arrangement for controlling electric currents in accordance with light variations. And it transpires now that it will not work. That cannot be considered, I think, at this date, as being an obvious omission or an inadvertent deficiency in description, from the consequence of which the inventor should now be relieved. The specification here was prepared in 1920, nineteen years ago, and upon the evidence before me as to the state of the art at that time, I cannot say that it would be obvious to those skilled in the art that a resistance would be a necessary element to make operable the device then described and claimed by De Forest, and as illustrated in Fig. 4. It was incumbent upon De Forest to disclose his suggested circuit arrangement in operable form, so that when his patent expired the public would readily know how to construct and use it, that is to say, the consideration for his monopoly should have been clearly and accurately stated.

I am not prepared to go so far as invited by plaintiffs' counsel, and to hold that the absence of a resistance in the circuit of De Forest was something which would be obvious, in 1920, to a competent engineer engaged in the designing and construction of an apparatus for controlling electric currents in accordance with light variations. As I have already suggested, it is probable that De Forest intended to associate with his photoelectric cell the arrangement which was then known as a shunt feed, and which had been used in connection with vacuum tubes, and that he shows in Fig. 4. But De Forest was mistaken in thinking this arrangement was adaptable for the purpose he had in mind, and his invention was therefore incomplete. The defendant's system includes the resistance spoken of here, and it would appear to be more reasonable to say that whoever designed the defendant's device made an invention rather than De Forest, who made a disclosure of an inoperable device.

An invention to be patentable must confer on the public a benefit. Utility, as predicated of inventions, means industrial value. No patent can be granted for a worthless art or arrangement. Here there is described and claimed something that lacks utility, because it is inoperable for the purpose for which it was designed. In the circum-

stances here it does not appear reasonable to say that the worker competent in the art would at the date of the specification,—and that is the date to which we must go— at once recognize the necessity for the insertion of a resistance in the circuit arrangement and at once supply it, in order to make the apparatus operable. I am not prepared to go that far. The structural defect in De Forest is not of the character that invites one to read and construe the specification in a way to support the patent, and I do not think this should be done. If I found that the defendant infringed De Forest it would be saying that the defendant infringes an article which is inoperable and useless, and which never went into use. That would seem an unreasonable and illogical conclusion to reach.

1939  
 NORTHERN  
 ELECTRIC  
 Co. LTD.  
 AND  
 WESTERN  
 ELECTRIC  
 Co. INC.  
 v  
 BROWN'S  
 THEATRES  
 LIMITED  
 Maclean J.

I find very little in the way of decided authority to assist one in a case of this kind under discussion. In the notes following the case of *Darcy v. Allin* (1), I find the following: "The utility of the invention is distinctly recognized in all of them, as part of the motive or consideration; but this condition would appear to differ from the others, in admitting of degrees. If an invention be totally useless, the purposes and objects of the grant would fail, and such grant would consequently be void, not only on the ground of false suggestion and failure of consideration, but also on the ground of its being prejudicial, as having a tendency to stop improvement." Those grounds seem to me to be substantial. And practically the same view was expressed by Parke B., in *Morgan v. Seaward* (2).

I am of the opinion therefore that the patent to De Forest, wholly lacking utility, is void and without subject-matter, and the action of the plaintiffs, so far as this patent is concerned, must therefore fail.

In the result, the plaintiffs succeed in their action for infringement of the Wilson patent, and with costs, and the defendant succeeds in respect of the other patents sued upon, and with costs, the costs taxed by the plaintiffs to be offset against those taxed by the defendant.

*Judgment accordingly.*

(1) 1 W.P.C. at p. 8.

(2) (1837) 1 W.P.C. 187 at p. 197.

1939  
Oct. 30  
Nov. 25

BETWEEN:

TUCKETT TOBACCO CO. LTD.....PETITIONER;

AND

ROMEO ST. GERMAIN, trading as  
J. O. FOREST & COMPANY, and  
the said J. O. FOREST & COM-  
PANY ..... } RESPONDENTS.

*Trade mark—Petition to expunge—“Bell Boy”—“Page Boy”—Mark likely to lead to confusion—Unfair Competition Act, 22-23 Geo. V, c. 38, secs. 26 (g), 31 (3) & 38.*

Petitioner applied for registration of design marks described as “the representation of the upper part of the body of a bell boy holding a package of cigarettes” and as “a medallion containing the representation of a bell boy’s head.” The marks had been used by petitioner for some time in connection with the manufacture and sale of cigarettes prior to the date of the applications for registration.

The Registrar of Trade Marks rejected the application on the grounds *inter alia* that the figure shown in one application represented a “page boy’s head, and not that of a bell boy,” and that in the other application the figure shown represented “a page boy and not that of a bell boy.”

Subsequent to the adoption of petitioner’s design marks, the respondent J. O. Forest & Company began to use and applied for registration of the words “Bell Boy” as a trade mark to be used on leaf tobacco, cigarettes, cigars and cut tobacco.

Petitioner, as required by the Registrar, amended its applications by substituting the word “page” for the word “bell” and the applications as so amended were allowed and the design marks were registered in November, 1938. On June 27, 1939, petitioner learned that the issue of the Canadian Patent Office Record of June 20, 1939, contained a notice of the registration of the word mark “Bell Boy” at the instance of the respondents.

The petitioner prays that the word mark “Bell Boy” be expunged from the register of trade marks.

*Held:* That the word mark “Bell Boy” should be expunged from the register of trade marks.

- 2. That the petitioner in its application might have described its design mark as a representation of either a “bell boy” or a “page boy,” or both.
- 3 That the word mark “Bell Boy” on the goods of the respondents would be liable to lead to confusion, and would be calculated to permit of and encourage the passing off of the respondent’s goods for those of the petitioner.



4. That the Registrar should have treated the application of J O Forest & Company as a fresh one, and that the petitioner, then the owner and registrant of the design marks in question, and there being no change in the state of facts since the first consideration of the case, should have been notified thereof in conformity with s 38 of the Unfair Competition Act and should have been asked if it had any objection to the proposed registration of J O. Forest & Company.

1939  
 TUCKETT  
 TOBACCO  
 CO. LTD.  
 v.  
 ROMEO  
 ST. GERMAIN  
 AND  
 J. O. FOREST  
 & Co  
 Maclean J.

PETITION by petitioner herein to have respondents' design mark expunged from the Register of Trade Marks.

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

*O. M. Biggar, K.C.* for petitioner.  
*C. E. Ferland* for respondents.

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

THE PRESIDENT, now (November 25, 1939) delivered the following judgment:

The petitioner, Tuckett Tobacco Company Ltd., prays that the word mark "Bell Boy," registered by the respondent J. O. Forest & Company, in June, 1939, and numbered N.S. 11,673, be expunged from the register of trade marks. The salient facts are established to be as follows.

In April, 1923, the petitioner, for the purpose of distinguishing certain goods manufactured by it, from similar goods manufactured by others, adopted and commenced to use pictorial representations of a boy in buttons in a red tunic and wearing a round red forage cap, certain of the representations showing the figure of the boy down to the waist and in the act of offering a package of cigarettes, while others represented only his head. The goods manufactured by the petitioner upon which the said marks were used, were cigarettes, described as "Navy Cut Virginia," and bearing the name of Phillip Morris & Company Ld., of which company the petitioner was the successor in Canada, and such cigarettes have been from the date of the adoption of the said mark continuously sold throughout Canada in a very substantial way, both in quantity and value. No application to register the said mark was made by the petitioner until November 20, 1936.

1939  
 TUCKETT  
 TOBACCO  
 Co. LTD.  
 v.  
 ROMEO  
 ST. GERMAIN  
 AND  
 J. O. FOREST  
 & Co.  
 ———  
 Maclean J.  
 ———

In the month of September, 1936, the petitioner's attention was directed to the sale by the respondents of a cigarette tobacco in a package bearing the words "Bell Boy" and a pictorial representation of a boy in a red tunic and trousers and wearing a red forage cap, and, on October 2nd following, the petitioner wrote to the respondent J. O. Forest & Company drawing attention to the fact that the design on this package conflicted with that used by the petitioner for many years, and requesting the discontinuance of the use of such mark.

No answer to this communication having been received the petitioner, by its solicitors, made a search at the Trade Marks Office and ascertained that the respondent J. O. Forest & Company had made an application under the Unfair Competition Act, 1932, for the registration of the words "Bell Boy" as a trade mark to be used on leaf tobacco, cigarettes, cigars and cut tobacco, the said application being based upon the allegation that the respondent's use of the said mark had begun in September, 1935. Thereupon the Registrar was advised on November 4, 1936, by the petitioner's solicitors, that the petitioner had for many years been using a design consisting of the head and shoulders of a bell boy as a trade mark for cigarettes, and that it objected to the allowance of such application, and the Registrar was requested to refuse the same.

On November 20th following, the petitioner filed applications for the registration as design marks of the pictorial representations used by it as already mentioned, the principal feature of the mark being described in one of the applications as "the representation of the upper part of the body of a bell boy holding a package of cigarettes," and in the other as "a medallion containing the representation of a bell boy's head." The petitioner proposed the use of such design marks in connection with the sale of tobacco in all its forms, and particularly cigarettes, cigarette papers, cigarette tubes, tobacco snuff and cigars.

On December 3, 1936, the Commissioner of Patents, then the Registrar under the Unfair Competition Act, 1932, notified the petitioner's solicitors that the said applications were defective in certain particulars, among others in the fact that the descriptions of the design marks were inaccurate in that the figure shown in one application represented a "page boy's head, and not that of a bell boy,"

and that in the other application the figure shown represented "a page boy and not that of a bell boy." In response to this notification the Commissioner was advised on behalf of the petitioner that the defects suggested were not in fact defects, that the Commissioner was free to index the applications as he saw fit, and that the applications should either be allowed or refused as they stood.

No further communication was received by the petitioner or its solicitors on the subject until on August 6, 1938, when the petitioner's solicitors made an oral enquiry from the then Registrar of Trade Marks as to the reasons for the delay of more than eighteen months in dealing with the petitioner's applications, and they were advised that the Registrar desired to consider further whether or not he had power to compel the petitioner to adopt his view that the occupation of the boy shown in the design marks sought to be registered was properly described as that of a "page boy."

On September 21st following, the Registrar advised the petitioner's solicitors that if the petitioner's applications were amended so as to describe the boy shown in the design marks as a "page boy" instead of a "bell boy" he would allow such applications, and that he proposed to refuse the application of J. O. Forest & Company for the registration of the word mark "Bell Boy," having he said, regard to the fact that the petitioner's use of its design marks long antedated the first use of the former's word mark.

The petitioner's solicitors, while adhering to the view that the Registrar had no right to insist upon the amendment suggested, decided, about September 21, 1938, to submit to the requirement made by the Registrar in order to avoid further delay, and on the faith, it is alleged, of the Registrar's statement that the application of J. O. Forest & Company, which, like the petitioner's application, was still pending, would be rejected, implying thereby that the registration of the petitioner's design marks would prevent the registration of the word mark "Bell Boy," according to the rule laid down in sec. 26 of the Unfair Competition Act, and particularly clause (g) thereof. Accordingly the petitioner's applications were amended by substituting the word "page" for the word "bell," and the petitioner's applications as so amended were thereupon

1939  
 TUCKETT  
 TOBACCO  
 Co. LTD.  
 v.  
 ROMEO  
 ST. GERMAIN  
 AND  
 J. O. FOREST  
 & Co.  
 Maclean J.

1939  
 TUCKETT  
 TOBACCO  
 Co. LTD.  
 v.  
 ROMEO  
 ST. GERMAIN  
 AND  
 J. O. FOREST  
 & Co  
 Maclean J

allowed and the design marks registered in November, 1938, as of November 20, 1936, and as Nos. N.S. 10,440 and 10,441. On September 29, 1938, which was apparently subsequent to the amendment of the petitioner's description of its design marks, the respondents were notified by the Registrar that the application of J. O. Forest and Company was refused on the ground of its similarity to the design marks of the petitioner which had been in use since April, 1923, whereas the trade mark "Bell Boy" had been first used by J. O. Forest & Company only in September, 1935. When the notice of this refusal was communicated to J. O. Forest & Company the petitioner's design marks had either been registered or stood approved by the Registrar for registration.

The respondents, within the time limited by sec. 51 of the Unfair Competition Act, then gave notice to the Registrar and to the petitioner of an appeal to the Exchequer Court from the refusal to register the application of J. O. Forest & Company, and such notice was duly filed with the Registrar of the Exchequer Court, but no notice of the hearing of the respondent's appeal was given at any time. Later, the appeal was abandoned by notice filed in the Exchequer Court on June 1, 1939, which notice was dated May 31, 1939, but no notice of the abandonment was ever given to the petitioner, and no advice was at any time received by the petitioner from the Registrar on the subject of the appeal, or of its abandonment.

On or about June 27, 1939, the attention of the petitioner was drawn to the appearance, in the issue of the Canadian Patent Office Record dated June 20, 1939, of notice of the registration of the word mark "Bell Boy" at the instance of the respondents, and thereupon the petitioner, through its solicitors, caused enquiries to be made from the Registrar as to the explanation of the publication of this notice. The particulars of the explanation made by the Registrar need not be mentioned except to say that the Registrar, and it is not denied, expressed his regret for his failure to notify the petitioner's solicitors of the fact that he had reversed his former decision.

The respondents then commenced to use their registered word mark "Bell Boy" in association with a pictorial representation of a boy in a red tunic and trousers, and wearing a round forage cap. The respondents now allege

that after the commencement of this proceeding, on advice of counsel, they ceased to employ the said pictorial representation and now use instead thereof a representation of a boy or young man in civilian clothes, presumably discharging the duties of an hotel porter or some such hotel employee, carrying several pieces of luggage for a hotel guest.

I find it difficult to appreciate the action taken by the Registrar in this matter. I cannot easily appreciate why any serious distinction should be made between the functions of a "bell boy" and a "page boy," even though a distinction may be made in some large and fashionable establishments, and particularly in a trade mark case where the contest is essentially as to whether the figure of a boy represents a "page boy" or a "bell boy." I think the public would understand the petitioner's design marks to represent a youth employed for doing errands, carrying messages, and so on, as in a hotel; the dress or uniform of the boy, and its colour, is not described or limited in the petitioner's application. I apprehend that a pictorial representation of the head, or the upper part of the body, of a bell boy, would be much the same as that of a page boy, and it is the representation of such portions of the body of a boy that the petitioner has registered. It is, I think, a matter of common knowledge that the words "bell boy" and "page boy" are used interchangeably by the public to describe the employment of a youth in a hotel, and who performs such duties as responding to calls from rooms, carrying messages to hotel guests, and carrying out a variety of duties assigned to him. A severance of such duties may be convenient and desirable in some cases, but even then the public are not, I think, meticulous about describing one as a "page boy" and the other as a "bell boy"; and the youth who once responded to the title of "bell boy" is in fact now almost as extinct as the dodo, his enemy having been the telephone. It seems to me to be altogether unnecessary to engage in any refinements between a page boy and a bell boy, in determining the registrability of the word mark in question here. I think the petitioner, who does not in actual practice use the words "page boy" in association with, or as part of, its design marks, might well have described his design mark, in his application, as a representation of

1939

TUCKETT  
TOBACCO  
Co. LTD.

v.

ROMEO  
ST. GERMAIN

AND

J. O. FOREST  
& Co.

Maclean J

1939  
 TUCKETT  
 TOBACCO  
 Co. LTD.  
 v.  
 ROMEO  
 ST. GERMAIN  
 AND  
 J. O. FOREST  
 & Co.  
 ———  
 Maclean J.  
 ———

either a "bell boy" or a "page boy," or both, and they might well have been indexed under both names. The petitioner was required by s. 31 (3) of the Act to describe the principal features of its design marks, so as to enable the Registrar to index the same, but for no other purpose so far as I can discern. The amendment made to the description as originally filed would not really alter the significance attached to the design marks themselves by the public, as the public would have no knowledge of the verbal amendment made, or in fact how the design marks were originally described, or how they were indexed in the office of the Registrar.

The petitioner, in order to avoid further delay in obtaining registration of his marks, assented to amend its application as suggested by the Registrar, on the faith, as alleged by the petitioner and which is not in any way denied, that the respondents' application would be refused, and this is supported by the fact that almost contemporaneously with the granting of the petitioner's application, the respondents' application was officially refused, and the respondent was so advised and in the terms to which I have already made reference. The Registrar then decided that there was a similarity between the petitioner's design marks and the respondents' word mark, and the respondents themselves have virtually admitted that similarity by ceasing to use a pictorial representation of what they call a "bell boy" in association with their registered word mark. It is provided by s. 26 (g) of the Act that a word mark shall not be registrable if it suggests some feature of a design mark already registered for use in connection with similar wares and which is so characteristic of the design mark that its name would not be unlikely to be used to define or describe the wares in connection with which the design mark is used. Clear of the statute altogether that would be a fair statement of the law, and reference to this principle may be found in Kerley on Trade Marks, Sixth Edition, at page 275. It seems to me that it would not be unlikely that the word mark "Bell Boy" on the goods of the respondents might be accepted as a description of the goods of the petitioner in connection with which its design marks are used. It would I think be liable to lead to confusion, and would be calculated to permit of and encourage the passing off of the respondents'

goods for those of the petitioner, and thus unfair trading would be the consequence, not so much by the respondents as by dealers. For the foregoing reasons the registration of J. O. Forest & Company should, I think, be expunged. I have no doubt but that the Registrar's first view of the case was the correct one.

Furthermore, I might add, that in view of all the facts here disclosed, and in view of the grounds of the first decision made by the Registrar in the premises, the Registrar must be deemed to have entertained some doubt as to the propriety of granting the application of J. O. Forest & Company, upon any reconsideration of the same. In any event, I think, the Registrar, in all the circumstances of the case, should have treated the application of Forest & Company as if it were a fresh one, if he were to reconsider it at all, and that the petitioner, at that date the owner and registrant of the design marks in question, and there being no change in the state of facts since the first consideration of the case, should have been notified thereof in conformity with s. 38 of the Unfair Competition Act, and asked whether or not it had any objections to the proposed registration of Forest & Company. I find it difficult to believe that the Registrar did not entertain some doubt as to whether the application of Forest & Company should be granted without the petitioner being heard, after it had been refused earlier on the grounds I have already mentioned, and there being no change in the state of facts in the meanwhile. In the circumstance here, I think, the procedure laid down in s. 38 of the Act should have been followed, and the petitioner should have been asked if it had any objection to the proposed registration. The failure to do so would, I am inclined to think, afford sufficient ground alone for expunging the registration of Forest & Company, or, for opening up that registration so that the petitioner might be heard, though I do not propose to make any definite pronouncement upon that aspect of the case.

The petition is therefore allowed and with costs.

*Judgment accordingly.*

1939  
 TUCKETT  
 TOBACCO  
 Co. LTD.  
 v.  
 ROMEO  
 ST. GERMAIN  
 AND  
 J. O. FOREST  
 & Co.  
 Maclean J.

1938  
June 7.  
—  
1939  
Sept. 29.  
—

BETWEEN:

JULIUS KAYSER & CO. LTD. . . . . APPELLANT;

AND

MINISTER OF NATIONAL REVENUE . . . RESPONDENT.

*Revenue—Income War Tax Act, R.S.C. 1927, c. 97, secs. 9B (ss. 11), 18, 20 & 23A—Money advanced by Canadian company to non-resident parent corporation and remaining outstanding for one year, no interest thereon being paid or credited to the Canadian company—Liability for tax—Appeal dismissed.*

Appellant is a limited company incorporated in Canada. All of its outstanding shares, except the directors' qualifying shares, are beneficially owned by a non-resident company. Appellant from time to time made advances of its funds to the parent company. The amount of such advances was shown as outstanding at the end of appellant's financial year, no interest thereon having been paid or credited to appellant. Appellant was assessed for income tax purposes, interest at the rate of 3 per cent on the money advanced to the parent company. This assessment was confirmed by the Minister of National Revenue.

*Held.* That the money advanced to the parent company by appellant was paid out of undistributed income which the appellant had on hand at the time of such advance.

2 That the appellant having paid out its profits by means of advances to the parent company, rendered itself subject to the provisions of s. 23A of the Income War Tax Act and was properly assessed for income tax purposes at the rate of interest determined by the Minister of National Revenue.

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

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

*A. H. Elder, K.C.* for appellant.

*J. G. Ahern, K.C.* and *A. A. McGrory* for respondent.

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

ANGERS J., now (September 29, 1939) delivered the following judgment:

This is an appeal from an assessment by the Commissioner of Income Tax dated the 30th of October, 1936, affirmed by the Minister of National Revenue on July 26, 1937, under sections 58 and following of the Income War Tax Act.



The appellant is a body corporate and politic, incorporated by letters patent issued in virtue of the Companies Act, 1934 (24-25 Geo. V, chap. 33), having its head office in the City of Sherbrooke, in the Province of Quebec.

1939  
JULIUS  
KAYSER  
& Co. LTD.  
 v.  
 MINISTER  
 OF  
 NATIONAL  
 REVENUE.  
 ———  
 Angers J.  
 ———

By the assessment in question a tax is levied on an additional sum of \$12,746.68, not included in the tax-payer's return, representing, in the words of the notice of assessment, "interest on advances to Parent Company outstanding from June 30/34 to June 30/35 \$424,889.44 at 3 per cent."

The return, which is for the fiscal year ending June 30, 1935, is dated October 30, 1935, and was presumably delivered to the Minister on that date.

A notice of assessment, altering the amount of the tax as aforesaid, was sent to the appellant on October 30, 1936.

Within the delay mentioned in section 58 of the Act, namely on November 27, 1936, the taxpayer served a notice of appeal upon the Minister.

On July 26, 1937, the Minister rendered his decision affirming the assessment and notified the appellant accordingly.

Within one month from the date of the mailing of the Minister's decision, to wit on August 23, 1937, the appellant sent to the Minister a notice of dissatisfaction in compliance with section 60 of the Act.

The appellant thereupon gave security for the costs of the appeal to the satisfaction of the Minister, as required by section 61 of the Act.

On November 16, 1937, the Minister replied in conformity with section 62, denying the allegations contained in the notice of appeal and the notice of dissatisfaction and confirming the assessment.

Pleadings were filed pursuant to an order directing the parties so to do.

The appellant, in its statement of claim, alleges in substance:

All of its outstanding shares (having under all circumstances full voting rights) are beneficially owned by a non-resident company, viz. Julius Kayser & Co., of New York City, a corporation created under the laws of the State of New York, herein referred to as the parent company;

1939  
JULIUS  
KAYSER  
& Co. LTD.  
v.  
MINISTER  
OF  
NATIONAL  
REVENUE.  
Angers J.

from time to time prior to June 30, 1935, appellant had made advances or appropriations of its funds in favour of the said parent company and the amounts thereof were treated by appellant as due by said parent company, the total amount outstanding on June 30, 1935, at the close of appellant's financial year, being \$818,767.88, of which an amount of \$424,889.44 had been so advanced by appellant to said parent company prior to the beginning of said financial year on July 1, 1934, and had consequently remained outstanding during the said year and no interest thereon had been paid or credited to appellant;

at all times the amounts of loans or advances or appropriation of its funds by appellant in favour of said parent company as a shareholder were less than the amount which appellant had on hand as undistributed income;

the said remittances by appellant to the parent company by way of loans or advances or appropriation of its funds in favour of the latter did not necessarily arise from the carrying on by appellant of its manufacturing business and were not incidental thereto;

the appellant has been assessed in respect of its net taxable income for the year ended June 30, 1935, declared by it under the provisions of the Act, on an additional amount of alleged taxable income in the sum of \$12,746.68, as representing interest deemed to have been received by appellant as income at the rate of 3 per cent per annum, from June 30, 1934, to June 30, 1935, on the aforesaid amount of \$424,889.44 outstanding during the said period as loans or advances theretofore made by appellant to said parent company;

the appellant objected to the said assessment and appealed therefrom; the respondent rendered a decision affirming the assessment and notified the appellant accordingly; thereupon the appellant mailed to the respondent a notice of dissatisfaction and furnished security for the costs of the appeal; the respondent replied denying the allegations contained in the notice of dissatisfaction and confirming the assessment as having been properly made under section 23a of the Act;

the action of respondent is not justified under section 23a or any other provision of the Act, but on the contrary is in conflict with the provisions of sections 18 and 20 of the Act;

the assessment in question is unfounded and illegal to the extent to which it treats as taxable income of appellant, during the taxation period aforesaid, the amount of \$12,746.68.

In his statement of defence the respondent pleads in substance as follows:

He admits that all the appellant's outstanding shares (which have under all circumstances full voting rights) are beneficially owned by a non-resident company, viz. Julius Kayser & Company, of New York City;

he admits that the applicant had made advances to Julius Kayser & Company, a non-resident company, in the amount of \$424,889.44 and that these advances had been made prior to the beginning of appellant's fiscal year commencing July 1, 1934, and had remained outstanding during the whole of said fiscal year, without interest thereon having been paid or credited to appellant;

he admits the alleged assessment and appeal therefrom;

he denies the other allegations of the statement of claim;

the appellant, a Canadian company, advanced moneys to a non-resident company and such advances in the amount of \$424,889.44 remained outstanding for a period of one year, no interest thereon being paid or credited to the Canadian company;

the Minister of National Revenue, acting within the powers conferred upon him by the Income War Tax Act, particularly section 23a thereof, determined that interest of \$12,746.68, being at the rate of 3 per cent on the sum of \$424,889.44, shall be deemed to have been received as income of the appellant for the fiscal year commencing July 1, 1934, and therefore taxable under the Act;

the provisions of section 18 of the Act, under which loans or advances by a corporation to its shareholders are deemed to be dividends to the extent indicated therein, are not applicable when determining the income of the corporation subject to taxation, the provisions of said section being applicable only when determining the income of the shareholder;

the provisions of section 18 are not inconsistent with those of section 23a, which specifically applies to the taxation of the appellant.

1939  
 JULIUS  
 KAYSER  
 & Co. LTD.  
 v.  
 MINISTER  
 OF  
 NATIONAL  
 REVENUE.  
 ———  
 Angers J.  
 ———

1939

JULIUS  
KAYSER  
& Co. LTD.  
v.  
MINISTER  
OF  
NATIONAL  
REVENUE.  
—  
Angers J.

The issue was joined by appellant's reply, which prays acte of admissions contained in the statement of defence and denies the other allegations thereof.

Walter Mutchler, general manager of the appellant company, testifying on behalf of his employer, declared that the advances of funds made by the appellant to Julius Kayser & Company, of New York, were in no way incidental to the business of the Canadian company and that they always were much less than its undistributed income on hand.

He stated that the appellant's business could have been carried on without these advances, which, according to him, were not useful to the company's business.

Julius Kayser & Company, of New York, supplies the Canadian company with the raw silk which the latter needs. Asked if the parent company furnished the appellant with any other services, the witness replied: "very little."

The advances made to the parent company by the appellant are entered in the latter's book in a current account in the name of Julius Kayser & Company, New York. It seems to me expedient to cite here a passage from Mutchler's testimony concerning this account:

Q \* \* \* And in that current account Julius Kayser, New York, is credited with the purchase of raw silk made on your behalf?

A. Yes.

Q And it is debited with the advances which you make to it?

A. Yes.

Q. So by looking at the current account it would seem that these advances made by you went in part in payment of the purchase price of the raw silk purchased for your company?

A I would not say that, because there is always enough there to cover our purchases without that amount going in.

Q. Yes, there is always enough, but at first sight that is what the account would appear to show, that part of these advances have been used to pay up the amount you owe the New York company for the purchases made for you?

A Oh, you might say that, and you might say there is a whole lot more left. It is not incidental to the company, I wouldn't say.

Witness said it was his company's custom to send its available cash to the parent company in New York.

Mutchler was asked if the advances in question had been made by appellant to the New York company pursuant to an agreement between the two that the appellant would make them in anticipation of purchase of raw silk or other raw material; the witness replied in the negative

and said that there had never been any agreement to that effect. According to him, when the parent company sees that there is more money on hand in Montreal than is needed, it decides to take some of it down to New York.

Mutchler stated that the appellant company was a wholly owned subsidiary of the New York company.

The moneys that are sent to the parent company are shown in appellant's books as advances made to the former and the amount assessed as aforesaid and with which we are concerned arose in that way.

The appellant rests its claim on sections 18 and 20 of the Income War Tax Act. On the other hand, the respondent submits that the question at issue is governed by section 23a.

The first paragraph of section 18, which is the only one relevant, reads as follows:

For the purposes of this Act, any loan or advance by a corporation, or appropriation of its funds to a shareholder thereof, other than a loan or advance incidental to the business of the corporation shall be deemed to be a dividend to the extent that such corporation has on hand undistributed income and such dividend shall be deemed to be income received by such shareholders in the year in which made.

Section 20 is in the following terms:

The undistributed income of a corporation shall, for the purposes of sections fifteen, sixteen, seventeen, eighteen and nineteen, be deemed to be reduced by the amount deemed to be received by the shareholders as a dividend by virtue of the provisions of the said sections fifteen, sixteen, seventeen and eighteen.

Section 23a reads thus:

Whenever a Canadian company advances or has advanced moneys to a non-resident company and such advances remain outstanding for a period of one year without any interest or a reasonable rate of interest having been paid or credited to the Canadian company, the Minister may for the purposes of this Act, determine the amount of interest on such moneys which shall be deemed to have been received as income by the Canadian company

The evidence shows that the appellant company made advances in the sum of \$424,889.44 to Julius Kayser & Company, of New York, which beneficially owns all the issued shares of the capital stock of the appellant company (except the directors' qualifying shares), which have under all circumstances full voting rights.

The proof further discloses that these advances were made prior to July 1, 1934, that the amount thereof

1939  
JULIUS  
KAYSER  
& Co. LTD.  
v.  
MINISTER  
OF  
NATIONAL  
REVENUE.  
Angers J.

remained outstanding during the whole of the appellant company's fiscal year ending June 30, 1935, and that no interest was paid thereon.

It seems obvious that these advances were paid out of the undistributed income which the appellant company had on hand at the time they were made.

I do not think that the question at issue comes within the scope of section 18. The object of this section is to create a tax against a shareholder who receives a dividend under the disguise of a loan or advance; it has nothing to do with the corporation which pays it out. I may add that, if I had concluded that the question at issue does come within the scope of section 18, I would have been inclined to believe that the advances in question were incidental to the business of the appellant company.

Had the appellant company wished to declare as dividends the advances made to Julius Kayser & Company it could have done so and the dividends so declared would have been exempt from income tax in virtue of subsection 11 of section 9b, which reads as follows:

The tax imposed by subsection two hereof shall not apply in the case of dividends paid to a non-resident company by a Canadian company, all of whose shares (less directors' qualifying shares) which have under all circumstances full voting rights are beneficially owned by such non-resident company: Provided that not more than one-quarter of the gross income of the Canadian company is derived from interest and dividends other than interest and dividends received from any wholly owned subsidiary company: Provided further that such non-resident company is not a company incorporated since the 1st April, 1933; but this proviso shall not apply if the Minister is satisfied that such incorporation was not made for the purpose of evading the tax imposed under subsection two of this section.

There is nothing in the evidence to show that these advances were intended as dividends; quite the contrary. In the appellant company's books they are debited to Julius Kayser & Company; had they really been dividends, there is no reason why they should appear in the appellant company's books as a liability or debt of Julius Kayser & Company. Moreover, if these advances were dividends legally declared, the minute book of the appellant company should show it and a copy of the resolutions authorizing their issue should have been produced. The burden of proof was incumbent upon appellant and, in my opinion, it has failed in its task.

The appellant company chose to pay out its profits by means of advances and, in so doing, rendered itself subject to the provisions of section 23a.

For these reasons I have reached the conclusion that the assessment must be maintained and the appeal dismissed.

The respondent will have his costs against the appellant.

*Appeal dismissed.*

1939  
JULIUS  
KAYSER  
& Co. LTD.  
v.  
MINISTER  
OF  
NATIONAL  
REVENUE.  
Angers J.

BETWEEN:

DOWER BROTHERS LIMITED.....APPELLANT;

AND

THE REGISTRAR OF TRADE }  
MARKS ..... } RESPONDENT.

1939  
Dec. 11.  
1940  
Mar. 14.

*Trade Mark—Appeal from decision of Registrar of Trade Marks dismissed—Words “French Room” “descriptive or misdescriptive of the character or quality of the wares in association with which they are used, or of their place of origin”—Unfair Competition Act, 22-23 Geo. V, c. 38, s. 26 (1) (c).*

Appellant's application for registration of the words “French Room” as a word mark in association with wares ordinarily and commercially described as women's and misses' shoes, was refused by the Registrar of Trade Marks, from whose decision an appeal was taken to this Court. Evidence was adduced to show that the proposed word mark was a term extensively used in other stores to indicate a department devoted to the merchandizing of footwear and wearing apparel

*Held:* That the words “French Room” were “descriptive or misdescriptive of the character or quality of the wares in association with which they are used, or of their place of origin,” and therefore not registrable under the provisions of the Unfair Competition Act, 22-23 Geo. V, c. 38, s. 26 (1) (c).

APPEAL from the refusal of the Registrar of Trade Marks to register the words “French Room” as a word mark.

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

*R. S. Smart, K.C.* for appellant.

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

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

1939  
 DOWER BROS. THE PRESIDENT, now (March 14, 1940) delivered the following judgment:

LTD.  
 v.  
 REGISTRAR  
 OF  
 TRADE  
 MARKS.

Maclean J.

This is an appeal asserted on behalf of Dower Bros. Ltd., of Edmonton, Alberta, from the refusal of the Registrar of Trade Marks to register the word mark "French Room," in association with wares ordinarily and commercially described as women's and misses' shoes. In the application for registration it is stated that "in addition to the wares of the kind described, the appellant is commercially concerned with wares ordinarily and commercially described as other types of footwear and ready-to-wear garments." I do not construe the words just quoted from the application to be intended to mean that the applicant uses, or proposes to use, the word mark "French Room" in association with "other types of footwear and ready-to-wear garments." I assume that the appellant is engaged in the sale of footwear other than women's and misses' shoes, and also ready-to-wear garments whatever that comprehends, and that it proposes to distinguish its women's and misses' shoes by the word mark "French Room" from other footwear with which it is commercially concerned.

The Registrar refused to register the word mark "French Room" on the ground that the same was "a term extensively used in stores throughout the country to indicate a certain department devoted to the merchandizing of so-called exclusively styled footwear and wearing apparel of various kinds, either imported from France or sold at higher prices than goods obtainable in regular departments by reason of their superior craftsmanship, tailoring or quality," and that the words "French Room" were "descriptive or misdescriptive of the character or quality of the wares in association with which they are used, or of their place of origin," and therefore not registrable under the provisions of s. 26 (1) (c) of The Unfair Competition Act.

In support of the action taken by the Registrar there were introduced by Mr. Scott eight affidavits and to them I must refer. Mr. Young of the City of Winnipeg, there associated with The T. Eaton Co. Ltd., and occupying the position of Supervisor of Garment Departments, in his affidavit states:—

That in or about the year 1919 there was established in the Winnipeg Store what was known as the "French Room." In this room were dis-



played and offered for sale, dresses, coats, evening wraps, accessories and some varieties of footwear, all of which are imported from France.

That in more recent years reproductions of French models and merchandise from other European countries were displayed in the French Room, which on account of the variety of merchandise was renamed "Import Room" in or about the year 1927

That the term "French Room" is to-day used by our customers and our employees to describe a section of our Fancy Goods Department of the Winnipeg Store, wherein European novelties are offered for sale.

1939  
 DOWER BROS.  
 LTD.  
 v.  
 REGISTRAR  
 OF  
 TRADE  
 MARKS.  
 Maclean J.

Miss Sewell of the firm of Beresford Registered, of Montreal, in an affidavit states:

I am familiar with the shopping conditions and practices prevailing amongst the large departmental stores in the City of Montreal;

The firm of The T. Eaton Co Limited of Montreal operate a large departmental store at the corner of University and St. Catherine Streets. This firm has a room in its premises in which millinery is sold and this room has for some time been commonly known as the "French Room";

The firm of The Robert Simpson Co. Ld., Montreal, also operate a large departmental store on St. Catherine Street West in the City of Montreal. This firm has a room in which an exclusive line of dresses is sold and this room is commonly known as "The French Room"

The firm of Jas. A. Ogilvy Limited also operate a large departmental store on St Catherine Street West in the City of Montreal This firm has a room in which an exclusive line of dresses is sold and this room is commonly known as the "French Room."

Mr. Jamieson, Supervisor in the Department store of The T. Eaton Co., at Toronto, states in his affidavit that:

About twenty years ago or more The T. Eaton Company Limited established in the Yonge and Queen Street Department Store what was known as a "French Room" and the room was so referred to in the Company's advertisements from time to time and by employees and customers in the course of business.

Until five or six years ago The T. Eaton Company Limited had two "French Rooms," one used in connection with the sale of millinery, which is still carried on, and the other in connection with the sale of dresses, lingerie and accessories which accessories did on occasions include shoes

Originally, goods actually imported from France were displayed and sold from the said "French Room" but in course of time domestic goods, French design and other goods of high class domestic manufacture were introduced and sold from the "French Room"

Mr. Richardson, of Toronto, in an affidavit states:

I am at present the Vice-President and General Manager of Fairweather Limited, an old and established store situate in the City of Toronto and dealing particularly in the sale of high class ready to wear goods I came to Fairweather Limited as Merchandise Manager in September, 1936, having previously since 1934 been "French Room buyer," for the Robert Simpson Company of Toronto I have been associated with the Ladies' Wear business since 1920 and am thoroughly familiar with the trade and the terms used in connection therewith.

1939  
 DOWER BROS.  
 LTD.  
 v.  
 REGISTRAR  
 OF  
 TRADE  
 MARKS.  
 Maclean J.

At Fairweather Limited instead of the words "French Room" we use the word "Salon," but I have for many years been familiar with the words "French Room" as generally used in the trade either to designate certain high class goods or to designate a small exclusive part of the store in which are segregated expensive goods of high quality and exclusive style.

In the affidavit of Mr. Northway, President of John Northway and Son Ltd., of Toronto, it is stated:

For many years we have used the words "French Room" in connection with high class goods sold in our store, but until recently we had no express sign to that effect.

We now have a sign with the words "French Room" used in connection with that portion of our millinery department devoted to the sale of high class products.

For many years I have been familiar with the words "French Room" as used in business of the same nature as my own, originally I believe to indicate that the goods were either imported from or designed in France and subsequently to be understood to refer to any goods of high quality and high price.

Mr. Burton, General Manager of The Robert Simpson Company Ltd., of Toronto, states in his affidavit that:

About twenty-five years ago The Robert Simpson Company, Limited, established what was known as a "French Room," and the Room was regularly advertised under that name from time to time.

In this Room were displayed chiefly goods actually imported from France, although better class goods modelled on French importations were also displayed there.

Somewhere about two years ago the name of the Room was changed to "St. Regis Room," but to this day many of our customers still know the Room as the "French Room."

There were several reasons why it was thought desirable to change the name of the Room from "French Room" to "St. Regis Room." For one thing, owing to the steady improvement in the quality of local goods and to tariff changes, the goods displayed in the Room consisted from year to year less of goods actually imported from France and more of domestic goods of the best quality. Also it was thought that, for advertising purposes it was desirable to make a change in the name of the Room.

There were produced also the affidavits of Mr. Murray, of the firm of Murphy-Gamble Ltd., and Mr. Asselin of the firm of A. J. Freiman Ltd., both of Ottawa, but as they are substantially to the same effect as some of those to which I have already referred I need not quote from them.

The words "French Room," to be applied to women's or misses' shoes, on their face seem so inappropriate for the purposes of a trade mark that most persons would at

once be curious as to the reason prompting the adoption of such a mark. Literally construed the words plainly mean a "Room" called "French," descriptive words when so used, but seemingly misdescriptive of an article such as a woman's shoe; nor do those words suggest an invented word mark to be applied to an article of merchandise. I think the affidavits to which I have referred afford the explanation. The words "French Room" have come to indicate, in the larger cities, a certain room or department of a store which is devoted to the display and sale of a class or classes of wares indicating high quality, excellence, superiority, popularity, craftsmanship, or foreign origin, in contradistinction to goods of the same general character, exhibited for sale in the same store, but not of the same origin, or of the same excellence in quality, and probably not of the same price. Originally, I have no doubt, those words were used to indicate that the goods displayed in a "French Room" were of French origin, that is to say, they were imported from France. Those words may still be used for that precise purpose, but apparently it may relate now to goods of domestic origin or goods imported from some country other than France. The segregation of merchantable goods in one room, which space was called "French Room," was to distinguish those goods from others in the same premises, because of their quality, or their origin, or both. The origin or quality must have been intended as the distinguishing characteristic of such goods, so segregated, otherwise there would be no sense in the proprietor incurring the additional expense of devoting one room or department of his business premises to such a use. As shown by the affidavits, the words "French Room" are or have been used to indicate a display of goods of French origin, or goods possessing special qualities, and the public have come to believe that such words signify that such goods possess a special value or attraction over other goods falling within the same class, and for that reason they are displayed before customers in a special room or department given the name in question here.

The appellant here is interested in the sale of footwear, other than women's or misses' shoes, as disclosed in its

1939  
 DOWER BROS.  
 LTD.  
 v.  
 REGISTRAR  
 OF  
 TRADE  
 MARKS.  
 Maclean J.

1939  
 DOWER BROS.  
 LTD.  
 v.  
 REGISTRAR  
 OF  
 TRADE  
 MARKS.  
 Maclean J.

application, and I cannot conceive of any reason for adopting the words "French Room" as a mark for women's or misses' shoes unless it were to indicate the place of origin, or that they were imitative of French designs or models, or that they were of a quality or excellence superior to other footwear and garments on sale in the appellant's store. The words "French Room" have acquired a significance in the merchandising centres of the country, and the appellant seeks to designate some of his goods by that mark and thus attribute to his goods the qualities or characteristics usually imputed to goods displayed for sale in a room or department of a store, known as "French Room." I think the use of the word "French," particularly when used in connection with women's apparel, would lead many people into believing that France was the country of origin of the appellant's goods, although on a strict interpretation the use of that word does not necessarily indicate "France." The use of the word "French" in conjunction with another word, when applied to certain classes of goods for sale in merchandising establishments, would suggest, I think, that France was the place of origin, unless there were some accompanying notice or explanation to the contrary. It is notorious, and a matter of common knowledge, that many persons are, for a time at least, deceived by the use of the word "English" when applied along with another word to certain goods, as a trade mark. For example, the mark "English Mixture," when applied to containers of tobacco, will mislead purchasers into thinking that the same as sold originated in England, though the vendor might not so have intended. I think the words "French Room" will be understood by many as being directed to the quality of the appellant's shoes, or their place of origin, and in either case they would fall within the prohibition of s. 26 (1) (c) of the Unfair Competition Act. I think the Registrar was right in refusing the application and I dismiss the appeal with costs.

*Appeal dismissed.*

BETWEEN:

ISRAEL BURSHEIN ET AL. . . . . PLAINTIFFS;

AND

HENRY DISSTON &amp; SONS LIMITED. . . . . DEFENDANT.

1939  
Feb. 16.  
1940  
Mar. 21.

*Trade mark—Unfair Competition Act, 22-23 Geo. V, c. 38, s. 4, ss. 1, 2, 3 and 4, s 18, ss. 2 and 3—Trade marks “Woodsman” and “Lumberman”—Validity of registrations—Priority of use—Failure to register in accordance with provisions of Unfair Competition Act—Exclusive use of trade mark.*

The action is one for infringement of the trade marks “Woodsman” and “Lumberman” owned by the plaintiffs and registered by them on October 30, 1936. The marks are used in connection with various tools, including saw blades. In the application for registration the plaintiffs claimed use of the mark “Woodsman” since July, 1935, and of the mark “Lumberman” since September, 1935.

The defendant by way of counterclaim prayed that the registration of the words “Woodsman” and “Lumberman” be declared invalid and that they be expunged from the register of trade marks.

The Court found that the use of the mark “Woodsman” in Canada, by the plaintiffs, was anterior to its use by the defendant, and that the defendant had first used the mark “Lumberman” in Canada, in the year 1927

*Held:* That plaintiffs are entitled to the exclusive use, in Canada, of the trade mark “Woodsman.”

2. That the plaintiffs’ trade mark “Lumberman” is valid and must remain on the register, since the defendant failed to apply for registration of that mark within the time provided by the Unfair Competition Act.
- 3 That the plaintiffs are not entitled to the exclusive use, in Canada, of the trade mark “Lumberman,” since they were not the first to use or make known that mark in Canada.

ACTION for infringement of the trade marks “Woodsman” and “Lumberman” owned by and registered in the name of the plaintiffs.

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

*R. S. Smart, K.C. and M. B. Gordon* for plaintiffs.

*T. B. Farrell, K.C. and E. G. Gowling* for defendant.

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

1939

ISRAEL  
BURSHTEIN  
ET AL.  
v.  
HENRY  
DISSTON  
& SONS LTD

Angers J.

ANGERS J., now (March 21, 1940) delivered the following judgment:

The plaintiffs, Israel and Shoel Burshtein have been carrying on business in the City of Winnipeg, in the Province of Manitoba, under the name of National Jewelry & Importing Company, since January, 1927.

The defendant is a corporation carrying on business in the City of Toronto, in the Province of Ontario.

The plaintiffs own two trade marks consisting respectively of the words "Woodsman" and "Lumberman" used in connection with various tools for lumbering operations, including saw blades, registered under the provisions of the Unfair Competition Act, 1932, on October 30, 1936, the first one under No. N.S.7165 and the other under No. N.S.7166.

National Jewelry & Importing Company in its applications for registration of its trade marks claimed use of the trade mark "Woodsman" since July, 1935, and of the trade mark "Lumberman" since September, 1935.

The plaintiffs in their statement of claim allege that the defendant, prior to the filing thereof and subsequent to the date of first use of the plaintiffs' trade marks in Canada, has sold and offered for sale saw blades marked with the word "Woodsman" and the word "Lumberman" and has thus infringed the said trade marks; that the defendant, without plaintiffs' authority, has sold, distributed and advertised in Canada saw blades in association with the said trade marks; that plaintiffs by their adoption, use and registration of the said trade marks are entitled to the exclusive use thereof; that by reason of the aforesaid acts of the defendant the plaintiffs have suffered damage and the defendant made profit.

The statement of claim contains the ordinary conclusions.

In its statement of defence the defendant denies that the plaintiffs are proprietors of trade marks consisting of the words "Woodsman" and "Lumberman" or that the said words were properly registered; admits that it sold and offered for sale, without plaintiffs' authority, saw blades marked with the words "Woodsman" and "Lumberman," but denies that the said words are plaintiffs' trade marks or that, in so doing, it has infringed the plaintiffs' rights; says that plaintiffs are not entitled to the exclusive

use of the words "Woodsman" and "Lumberman" and that the registration of these words by the plaintiffs is invalid for the following reasons:

the plaintiffs did not apply for registration of the said words within six months of the dates on which they claim to have first adopted and used them;

the plaintiffs were not the first to adopt and use either of the said words in association with saw blades or articles of the same category, both of the said words having been adopted and used by the defendant prior to the dates of first use claimed by plaintiffs, the word "Lumberman" having been adopted and used in the United States by Henry Disston & Sons, Inc., a United States corporation affiliated in business with the defendant company and its predecessor in business in Canada, as early as 1882 and shortly thereafter in Canada, and the word "Woodsman" having been adopted and used by said Henry Disston & Sons, Inc. in the United States as early as 1900 and used and made known in Canada shortly thereafter, which said use of the said words was continued by the defendant company as its successor in business in Canada;

the word "Woodsman," prior to the date of first use claimed by plaintiffs, was adopted and used and formed an essential part of a trade mark registered by Hartwell Brothers, Limited, of Walkerville, Ontario, for goods in the same category as saw blades as set forth in the entries made in the register of trade marks on July 4, 1923, covering the words "Canadian Woodsman," as applied to handles for sharp edge tools;

the plaintiffs, when they adopted, used and registered the words "Woodsman" and "Lumberman" knew that they had been previously made known and used.

By way of counterclaim the defendant, repeating the allegations of its statement of defence, prays that the registration of the words "Woodsman" and "Lumberman" be declared invalid and be expunged from the register of trade marks.

The statement of defence, in support of the defendant's contention that the plaintiffs are not entitled to the exclusive use of the words "Woodsman" and "Lumberman" and that the registration thereof is invalid, further alleges: (a) that the said words are descriptive of the

1939  
 ISRAEL  
 BURSSTEIN  
 ET AL.  
 v.  
 HENRY  
 DISSTON  
 & SONS LTD.  
 Angers J.

1939  
 ISRAEL  
 BURSHTEIN  
 ET AL.  
 v.  
 HENRY  
 DISSTON  
 & SONS LTD.  
 Angers J.

goods in association with which they are used; (b) that, if the said words are capable of constituting trade marks, which is denied, then the two words are similar trade marks within the meaning of section 2 (k) of the Act and the invalidity of the registration of either of them renders the other registration also invalid. At the opening counsel for defendant waived these two grounds of attack against the validity of the trade marks.

The facts are simple and there is really no dispute about them.

Thomas R. Coates, manager and sales director of the defendant company, was examined on discovery, and counsel for plaintiffs consented that his testimony be used as evidence on behalf of defendant.

Coates said that the defendant company was incorporated in 1904 or 1905 and that he has been associated with it for 21 years. His company used the word "Woodsman" in July, 1935; the first invoice, a photostat copy whereof forms part of exhibit B, in the name of Abitibi Power & Paper Co., Ltd., for a No. 408 "Woodsman" pulpwood saw blade, is dated July 22, 1935. Also included in exhibit B are an order from the defendant to Bernard Cairns, Limited, for a rubber etching die for woodsman web saw blades dated July 4, 1935, and an invoice from Bernard Cairns, Limited, to Henry Disston & Sons for this rubber etching die dated July 10, 1935.

Coates produced as exhibit 1, on his examination for discovery, a label which, at the trial, was marked as exhibit A; he stated that this label is approximately the same as the etching on the blade.

The witness mentioned the dates of other invoices relative to saw blades bearing the mark "Woodsman" as being October 15, November 16, November 23 and December 26, 1935.

The defendant sold a few cross-cut saws with the mark "Woodsman" to one customer.

The word "Woodsman" has been used at different times in the United States but the defendant had not used it in Canada before July, 1935. The use of the mark "Woodsman" was discontinued on receipt of a letter from National Jewelry & Importing Company in May, 1938.

Henry Disston & Sons, Inc., of Philadelphia, is in the same business as the defendant company, and the latter



is and has always been a wholly owned subsidiary of the former. Coates declared that he had no record of any of the parent company's goods with the mark "Woodsmen" having ever been sold in Canada nor of any advertising of that mark having ever been made in Canada.

The trade mark "Lumberman" was used on cross-cut saws only. The defendant company used it in Canada and is still using it, but the pattern cross-cut saw on which it is used has a very limited sale in Canada.

Asked what first record of sale in Canada he had been able to find, the witness replied that his company had a record of sale in April, 1927, and also had one on January 5, 1934; the original orders have been destroyed but the defendant has the original charges for these two sales. Asked if he had any others, Coates answered that he did not check back, because it was "difficult to dig through a lot of information to get it." He added that the defendant company had used the name ever since he has been with it, to wit a period of 21 years; it has been one of its standard brands.

According to Coates, the defendant company never used a Canadian catalogue, but used the American catalogue, in which those saws are illustrated. Photostatic copies of the cover and of a page of each of the catalogues of 1904, 1914, 1918 and 1934 were produced as exhibit D. The pages of the catalogues of 1914, 1918 and 1934 bear the word "Lumberman"; the page of the 1904 catalogue bears the word "Lumbermen" (obviously a mistake).

Counsel for plaintiffs admitted that these catalogues were those of Henry Disston & Sons, Incorporated, that they had been in the hands of at least three hardware dealers in Canada for at least ten years and that these dealers knew that the catalogue had saws listed therein under the trade mark "Lumberman."

Coates said that the defendant carries in stock saws bearing the mark "Lumberman."

Shoel Burshtein, one of the plaintiffs, was examined for discovery; questions 21, 22, 25, 26 and 37 of his deposition were put in evidence. The witness' statements may be summarized as follows: in the certificate of registration of the word "Woodsmen," the date of first use is mentioned as July, 1935, but the witness cannot give the exact date in July when the word was first used; the plaintiffs

1939  
 ISRAEL  
 BURSHEIN  
 ET AL.  
 v.  
 HENRY  
 DISSTON  
 & SONS LTD.  
 Angers J.

1939  
 ISRAEL  
 BURSHTEIN  
 ET AL.  
 v.  
 HENRY  
 DISSTON  
 & SONS LTD  
 Angers J

do not invoice with the specific trade name, but indicate on the invoice the nature of the goods, for instance, "saw blades," mentioning the size and the number; so there is no way in which the witness could trace the exact date on which plaintiffs first used the word "Woodsman." I may perhaps quote question and answer 37, which sum up the situation fairly well:

Q. 37. I understand you have no documentary evidence, that is, no letters or invoices, that will assist us in tracing the exact date on which you used these marks.

A. It would be difficult to, because they would not be mentioned on the invoice; not the trade name of this article; because this is not our system of invoicing.

The proof discloses that the defendant first used the word "Woodsman" in July, 1935. On July 4, it ordered an etching die for "Woodsman" web saw blade from Bernard Cairns, Limited; on July 10, the die was delivered by the latter to the defendant; on July 22, the defendant shipped a "Woodsman" pulpwood saw blade to Abitibi Power & Paper Co., Ltd. I may conclude from these facts that the first use of the word "Woodsman" on a saw blade by the defendant took place on July 22, 1935: see exhibit B.

In their application for the registration of the trade mark "Woodsman" the plaintiffs mention July, 1935, as the date of first use, as appears from the certificate of registration filed as exhibit 2. This certificate constitutes *prima facie* evidence of the facts therein set out: section 18 of the Act. It was incumbent upon the defendant to prove that its first use of the word "Woodsman" was anterior to the month of July, 1935. The defendant having failed to do this, the trade mark "Woodsman" is unimpeachable and the plaintiffs are entitled to the exclusive use thereof in Canada.

As regards the trade mark "Lumberman," the plaintiffs, in their application for registration, mention September, 1935, as the date of first use: see exhibit 1. The defendant, on the other hand, has established that it used the word in 1927, as shown by the invoice to Royal Canadian Mounted Police of the 26th of February, 1927, and also in 1934, as indicated by the invoice to Highway Hardware dated January 6, 1934, both invoices forming part of exhibit C.

It was submitted by counsel for the defendant that, in view of the priority of his client's use of the word "Lumberman," it had the right to use it notwithstanding the registration of the word by the plaintiffs. According to him, the registration of the word "Lumberman" afforded protection to the plaintiffs as against third parties, but it did not affect the right of the defendant to use it by reason of its prior use of the word.

1939  
 ISRAEL  
 BUSHSTEIN  
 ET AL.  
 v.  
 HENRY  
 DIXSON  
 & SONS LTD.  
 Angers J.

It was argued by counsel for plaintiffs that, his clients being the registered owners of the trade marks, the use thereof by the defendant, even anterior to the registration, cannot be set up against the plaintiffs, because such use, under subsection (2) of section 4, does not confer any right, title or interest in the trade mark; subsection (2) says:

4. (2) The use of a trade mark or a distinguishing guise capable of constituting a trade mark by a person who is not registered as the owner thereof pursuant to the provisions of this Act shall not confer upon such person any right, title or interest therein as against the person who is registered as the owner of the same or a similar trade mark or distinguishing guise.

The trade mark "Lumberman" was registered by the plaintiffs after the expiry of the divers six-month periods specified by subsection (1) of section 4; the registration was made under the provisions of subsection (3) of said section 4.

I think it is expedient to quote subsections (1) and (3) of section 4:

4 (1) The person who, in association with wares, first uses or makes known in Canada, as provided in the last preceding section, a trade mark or a distinguishing guise capable of constituting a trade mark, shall be entitled to the exclusive use in Canada of such trade mark or distinguishing guise in association with such wares, provided that such trade mark is recorded in the register existing under the Trade Mark and Design Act at the date of the coming into force of this Act, or provided that in compliance with the provisions of this Act he makes application for the registration of such trade mark within six months of the date on which this Act comes into force, or of the date of his first use thereof in Canada, or of the date upon which the trade mark or distinguishing guise was first made known in Canada, as provided in the last preceding section, and thereafter obtains and maintains registration thereof under the provisions of this Act.

(3) Notwithstanding the provisions of subsection one of this section, the person who first uses or makes known in Canada, in association with wares a trade mark or a distinguishing guise capable of constituting a trade mark, may apply for and secure registration thereof after the expiration of any of the periods of six months specified by subsection one, provided the same or a similar trade mark or distinguishing guise has not been registered by another for use in association with the same or

1939  
 ~~~~~  
 ISRAEL
 BURSHTAIN
 ET AL.
 v.
 HENRY
 DISSON
 & SONS LTD

 Angers J.

similar wares, but such application shall not be allowed or the registration of such trade mark made before the expiration of a period of six months from the date of such application.

It was urged on behalf of defendant that the plaintiffs have not, by virtue of their registration, acquired an exclusive right to use their trade marks in Canada and that the Act contemplates, with regard to registration made by anyone who cannot qualify under subsection (1) of section 4, that others may be entitled to use the marks.

Counsel for defendant stated that, notwithstanding that subsection (3) of section 4 refers to the person who first uses the trade mark in Canada, it is obvious from that section as well as other sections of the Unfair Competition Act that the statute contemplates that a second user may register; in this connection counsel referred to the decision in *Canada Crayon Company Limited v. Peacock Products Limited* (1), with which he said he did not quarrel.

It was further submitted by counsel for defendant that section 4 of the Act recognizes the principle that the foundation of trade mark rights is first use; from this he concluded that, unless the plaintiffs can show that they were the first to use the trade marks and that they registered them within the time prescribed by subsection (1) of section 4, they have no right to exclusive use.

Dealing with the rights derived from the registration of the trade marks by plaintiffs, counsel for defendant admitted, rightly as I think, that his client or anyone else was precluded from securing registration of similar trade marks by paragraphs (f) and (g) of subsection (1) of section 26. Counsel added that, if the defendant could not register on account of plaintiffs' prior registration, it could not sue for infringement because subsection (4) of section 4 prohibits anyone from instituting an action for infringement of a trade mark unless the trade mark is registered; subsection (4) is in the following terms:

4. (4) No person shall institute any proceedings in any court to prevent the infringement of any trade mark unless such trade mark is recorded in the register maintained pursuant to this Act.

Counsel for defendant further admitted that the registrations obtained by the plaintiffs will enable them to

(1) (1936) Ex C.R. 178.

prevent anyone from adopting the same trade marks by reason of the operation of subsection (2) of section 18 combined with section 3.

Subsection (2) of section 18 reads thus:

18. (2) Such a certified copy (copy of the record of registration) shall also, subject only to proof of clerical error therein, be conclusive evidence that, at the date of the registration, the trade mark therein mentioned was in use in Canada or in the territorial area therein defined for the purpose therein set out, in such manner that no person could thereafter adopt the same or a similar trade mark for the same or similar goods in ignorance of the use of the registered mark by the owner thereof for the said purpose in Canada or in the defined territorial area within Canada.

The relevant part of section 3 is in the following terms:

3. No person shall knowingly adopt for use in Canada in connection with any wares any trade mark or any distinguishing guise which

(a) is already in use in Canada by any other person and which is registered pursuant to the provisions of this Act as a trade mark or distinguishing guise for the same or similar wares;

The defendant's claims may fairly be summed up as follows:

The registration by plaintiffs of their trade marks entitles them to protection against any suit by the defendant for infringement; it gives them the right to prevent anyone from adopting the same or similar trade marks in the future; it does not authorize them to stop the defendant from using the trade marks.

It was argued by counsel for defendant that, if he were right in saying that the basic rights to a trade mark are established through use and are property rights, the Unfair Competition Act would be *ultra vires* if it attempted to take away vested rights acquired by the defendant by virtue of its first use. The Parliament of Canada never intended to interfere with common law rights created by the use of the trade mark; that is the reason why, in counsel's opinion, subsection (4) of section 4 stipulates that one must be the first user of a trade mark if he is to get exclusive rights thereto.

As pointed out by counsel for plaintiffs, there is a curious difference in the language of subsection (1) and subsection (3) of section 4. Subsection (1) says that the person who first uses or makes known in Canada the trade mark and then registers it within the delay therein specified shall be entitled to the exclusive use thereof in Canada. Subsection

1939
 ISRAEL
 BURSHTAIN
 ET AL.
 v.
 HENRY
 DISSTON
 & SONS LTD.
 Angers J.

1939
 ISRAEL
 BURSHTEIN
 ET AL.
 v.
 HENRY
 DISSTON
 & SONS LTD.
 Angers J.

(3) enacts that, notwithstanding the provisions of subsection (1), the person who first uses or makes known in Canada a trade mark may secure its registration after the expiration of any of the six-month periods mentioned in subsection (1), provided the same or a similar trade mark has not been registered by another, in which case the registration will not be made before the expiry of six months from the date of the filing of the application. No mention is made in subsection (3) of exclusive use; nevertheless I am of the opinion that, if the applicant, who has first used or made known his trade mark in Canada, obtains the registration of the same, he is entitled to the exclusive use thereof.

As a result of the defendant's failure to apply for the registration of the trade mark "Lumberman," which the evidence shows to have been first used by the defendant in 1927, within six months from the coming into force of the Unfair Competition Act, namely, September 1, 1932, the registration of the plaintiffs' trade mark "Lumberman" is valid and must remain on the register.

The Registrar of Trade Marks evidently found that the trade mark registered by Hartwell Brothers, Limited on July 4, 1923, in relation to "handles for sharp edged tools," consisting of (*inter alia*) the words "Canadian Woodsman" and a design (exhibit E), was not an objection to the registration of the plaintiffs' trade mark "Woodsman." No evidence was adduced concerning the use of the trade mark of Hartwell Brothers, Limited. The plaintiffs' trade mark "Woodsman" does not apply to, but specifically excludes, "handles for sharp edged tools." The two trade marks in question do not apply to the same category of goods. After giving the matter due consideration I am of opinion that the existence on the register of the trade mark of Hartwell Brothers, Limited, was no bar to the registration of the plaintiffs' mark "Woodsman" and that the Registrar made no mistake in registering it.

Counsel for defendant admitted that the plaintiffs have good and valid registrations, but claimed that these registrations do not give them the exclusive use of the trade marks on account of the defendant's prior user. This contention, if founded, would only apply to the trade mark

“Lumberman,” because in the case of the trade mark “Woodsman” the defendant, as previously noted, failed to prove that it had been the first to use it in Canada.

The only question which I have to decide is whether the registration by the plaintiffs of the trade mark “Lumberman” entitles them to the exclusive use thereof in Canada and whether they can prevent the defendant from using it. After a careful perusal of the evidence and the argument of counsel and an attentive study of the statute and the doctrine, I have reached the conclusion that the above question must be answered in the negative. I believe that this conclusion logically arises from the words “first uses or makes known” contained in subsections (1) and (3) of section 4: see *Continental Oil Co. v. Commissioner of Patents* (1), in which the learned President, dealing with the application for registration of a word mark by Continental Oil Company, made within six months from the date of its first use in Canada, stated “it would also be necessary to establish that it was the first to use or make known that mark in Canada, in order to obtain the exclusive use of such mark in Canada.” This statement is perhaps only an *obiter dictum* in so far as the actual point in issue in that case is concerned but it is an opinion which, I may say with deference, seems to me proper and well founded. The same statement would likewise apply, in my judgment, to an application made under subsection (3) of section 4.

The plaintiffs’ trade marks being valid, the defendant’s counterclaim is dismissed.

There will be an injunction to restrain the defendant, its officers, servants, workmen and agents from selling, offering for sale or advertising any saw blades, not of the plaintiffs’ manufacture, in association with the plaintiffs’ trade mark “Woodsman” or any colourable imitation thereof and an order for the delivery up to the plaintiffs on oath of all saw blades infringing the said trade mark “Woodsman,” together with any advertising cuts and advertising literature used in connection therewith.

In view of its prior use of the word “Lumberman” in connection with saw blades, I do not think that the defendant can be restrained from selling, offering for sale

1939

ISRAEL
BURSHTEIN
ET AL.v.
HENRY
DISSON
& SONS LTD.

Angers J.

1939
 ISRAEL
 BURSHEIN
 ET AL.
 v.
 HENRY
 DISSON
 & SONS LTD
 Angers J.

or advertising saw blades marked with the word "Lumberman," provided it does not attempt to copy or imitate the plaintiffs' trade mark.

There will be a reference to the Registrar to determine the damages or loss of profit incurred by the plaintiffs as a result of the infringement by the defendant of the trade mark "Woodsmen."

Seeing that both parties succeed in part, there will be no order as to costs.

Judgment accordingly.

1939 BETWEEN:
 Sept. 18. B & B ROYALTIES LTD.....APPELLANT;
 1940
 March 11. AND
 THE MINISTER OF NATIONAL
 REVENUE
 RESPONDENT.

Revenue—Income—Income War Tax Act, R.S.C., 1927, c. 97, s. 2 (h) & s. 3—"Annual net profit or gain . . . directly or indirectly received by a person . . . from any trade, manufacture or business"—"Association"—"Net royalties" or "units of production" sold to investors by a company engaged in the business of drilling for and taking oil from certain specified lands.—Proceeds of such net royalties or units of production are not taxable as income of the company.

Appellant is engaged in the business of drilling for and taking oil from certain land in the Province of Alberta. It sold to investors a specified percentage, share or interest, in the production or in the net proceeds of production of a certain tract of land. Such percentage share or interest is referred to as a "net royalty" or "unit of production" and is evidenced by written certificates issued to the investor by a Trustee to which appellant assigned 80% of all production from that particular tract of land.

Payment for the sale of the oil produced was made to the Trustee and it accounted to the royalty certificate holders and to appellant therefor.

There were in all 100 units of production and of these there were sold to the public 56½ units for which royalty certificates were issued to the purchasers thereof by the Trustee; 10 units were issued to the original lessee of the land drilled on and 13½ units were allotted to appellant.

Appellant received from the Trustee, on account of its 13½ units, the sum of \$16,059.56, which amount it showed in its income tax return for the taxation period in question. The amount distributed by the Trustee to net royalty holders, other than appellant, was \$79,099.96. The net taxable income of appellant was assessed at \$52,762.02 by the Commissioner of Income Tax. This amount included the sum of \$79,099.96 paid to the other royalty certificate holders and was arrived at after allowing certain deductions for management expenses, depreciation and depletion.

1939
 B & B
 ROYALTIES
 v.
 MINISTER
 OF
 NATIONAL
 REVENUE.
 Maclean J.

This assessment was affirmed by the Minister of National Revenue, from whose decision an appeal was taken to this Court.

Held: That there was an irrevocable alienation by appellant to the Trustee, for a consideration paid, of a stated percentage of any production secured, or the proceeds of that production when sold, less certain deductions, and such percentage of production or the proceeds of that production was not a net profit or gain to appellant.

2. That the appellant and the owners of royalty interests do not form an "association" as defined by the Income War Tax Act.

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 Maclean, President of the Court, at Calgary, Alberta.

E. J. Chambers, K.C. for appellant.

C. J. Ford, K.C. for respondent.

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

THE PRESIDENT, now (March 11, 1940) delivered the following judgment:

This is an appeal from a decision of the Minister of National Revenue in which he declared the net taxable income of the appellant, hereinafter to be called "the Company," to be \$52,762.02, for the fiscal year ending November 30, 1938.

The question for determination is the amount received by the Company as net profit or gain, during the taxation period in question, from the sale of petroleum and natural gas recovered from a well drilled by the Company on certain lands in the Province of Alberta, pursuant to the terms of a lease assigned to the Company, the particulars of which will appear later. The case is one of considerable interest and importance and is not without its difficulties, and consequently it will be desirable to review at some length the main facts leading to the issue to be determined.

1939
 B & B
 ROYALTIES
 v.
 MINISTER
 OF
 NATIONAL
 REVENUE.
 Maclean J.

The controversy here emerges from a method sometimes resorted to by lessees of oil lands in the Province of Alberta, for securing, wholly or partially, the capital required for proving, drilling and bringing into production, oil wells in the oil bearing areas of that Province. This method involves the sale to investors of what are referred to variously as "royalty interests," "net royalties," "units of production," "percentages of production," or "fractional interests in production," that is to say, a specified percentage, share or interest, in the production or in the net proceeds of production of a certain oil well, or certain oil wells, or from a certain tract of land, as the case may be. The royalty interests so sold are usually evidenced by written certificates issued to the investor.

A lease of oil lands ordinarily stipulates the duration of the same, the terms of its renewal, the period within which drilling must be commenced by the lessee, and the percentage of production, called a "gross royalty," to be received by the original landowner or lessor, when and after production begins. The anticipated production of an oil well is divided by the lessee into one hundred units, each unit being one per cent of the production or yield, and, after making provision for any "gross royalties," these units of production, or some of them, are sold to the public, and are usually referred to as "royalties," or "net royalties." The term "royalty," I think, more properly applies to the interest in production reserved by the original lessor by way of rent for the right or privilege of taking oil or gas out of a designated tract of land, and such interest is not subject to deductions for operation, maintenance and management charges, by the lessee, and it is for that reason that such an interest is usually referred to as "a gross royalty." The remaining interests in production which are sold to the public in order to obtain capital, only participate in production after operating and management expenses, and other charges, are deducted and hence are usually referred to as "net royalties." It will be convenient, however, to continue the use of the terms "net royalties," or "royalty interests," in the sense they were used by the Company in this case.

In the working out of this method of financing the drilling of an oil well, and before net royalties or royalty interests in production are sold to the public by the

lessee of oil lands, it is, in some cases at least, the practice for the lessee to select a trustee, and to enter into an agreement with such trustee, on behalf of the lessee and of all those who may become interested as purchasers of net royalties, in the general terms which I am about to state. To the trustee there is then assigned all, or a certain percentage, of the oil recovered from the leased lands, or from a defined portion of such lands; or, it may be a percentage of the oil to be recovered from one designated well, located on the leased lands. In the case under discussion a trustee was selected by the lessee, and an assignment of that character was made to the trustee by the lessee, the particulars of which I shall describe presently. As I understand it, the oil, as and when produced, is usually sold by the lessee to some oil purchasing agency, evidenced by a contract in writing, with or without consent of the trustee according to the terms of the trust agreement, and, unless otherwise provided, the proceeds of such sale would be payable to the lessee and by him, subject to certain deductions, to the trustee, as provided by the trust instrument, or, if so provided by the contract of sale, or the trust instrument, the proceeds might be paid directly to the trustee by the purchaser, and the trustee would then account for the same to the lessee and those interested in the net royalties. Such trust agreements would, of course, vary in their terms, but the above describes broadly the method resorted to by the Company in this case, in financing its operations.

I may now turn to the particular facts of this case as they developed from time to time. In 1917, the Crown represented by the Minister of Interior of Canada, leased to one Robert Williamson Brown certain described lands, situate in the Province of Alberta, for the sole and only purpose of mining and operating for petroleum and natural gas, and of laying pipe lines and of building tanks, stations and structures thereon necessary and convenient to take care of the said products. When the natural resources were conveyed to the Western Provinces, in 1929, the title to the lands described in that lease passed to the Crown in the right of the Province of Alberta, at least I am assuming that to be so. The lease was for the term of twenty-one years, subject to the rents, royalties, conditions and covenants therein set forth; while it would

1939
B & B
ROYALTIES
v.
MINISTER
OF
NATIONAL
REVENUE.
Maclean J.

1939
 B & B
 ROYALTIES
 v.
 MINISTER
 OF
 NATIONAL
 REVENUE.
 Maclean J.

appear that the lands so leased were the subject of two separate leases they may be regarded here as one lease, hereafter to be referred to as the "Head Lease" and the grantor as the "Head Lessor." The lessee covenanted to pay to the Head Lessor a royalty on all natural gas and petroleum products taken out of the said lands, at such rate as might from time to time be specified by Order in Council; and this it is agreed was a gross royalty of ten per cent, in kind or in money at the option of the Head Lessor, of all commercial production recovered from the said lands, and free from all manner of deductions whatsoever.

On July 4, 1936, the said Robert Williamson Brown, by indenture, sublet to one Robert Arthur Brown a portion of the lands covered by the Head Lease for the balance of its term, subject to all the terms and conditions therein expressed. The consideration was \$10,000 in cash, the assumption and payment of the rents and royalties payable to the Crown under the Head Lease, and the payment to the said Robert Williamson Brown of a gross royalty of ten per cent of all commercial production taken from the said lands pursuant to the Head Lease, and recovered, saved and marketed therefrom, which said royalty was to be considered as royalty by way of rent reserved.

On July 6, 1936, the said Robert Arthur Brown assigned and transferred to the Company, B & B Royalties Ltd., all his right, title and interest in the Sub-Lease just above mentioned, for the following considerations, \$10,000 in cash, \$19,998 by the allotment and issuance of 19,998 fully paid up shares of the capital stock of the Company, the assumption and payment of all rents and royalties payable under the Head Lease and the Sub-Lease, and the payment in cash to the said Robert Arthur Brown of a net royalty of 10 per cent of the current market value, at the time and place of production, of all production of petroleum or natural gas recovered and sold from the lands described in the Sub-Lease.

By an agreement (hereafter referred to as "the Trust Agreement") dated July 8, 1936, and made between the Company, therein called the "Operator," and The Security Trust Co. Ltd., therein called the "Trustee," the Company assigned and set over to the Trustee, subject to certain deductions, 80 per cent of the whole of the

petroleum and petroleum products "produced, taken, saved and sold" from the lands described in the Trust Agreement, and which comprised a portion only of the lands described in the Sub-Lease. The Trust Agreement in part recites:

1939
 B & B
 ROYALTIES
 v.
 MINISTER
 OF
 NATIONAL
 REVENUE.
 Maclean J.

AND WHEREAS the Operator is desirous of selling or disposing of certain part or parts of the said rights acquired as aforesaid, but only in respect of the petroleum and natural gas production taken, saved and sold from that part of the lands hereinbefore referred to which comprise the West Half of the South Half of Legal Subdivision Eleven (11) and the East Half of the South Half of Legal Subdivision Twelve of Section Twenty-eight in the Township Eighteen (18), Range Two (2) West of the Fifth Meridian, containing Twenty (20) acres more or less (hereinafter called the "royalty lands") by the creation of royalty interests therein.

AND WHEREAS the Operator and the said Robert Williamson Brown have deposited the said Head Leases and a copy of the said Sub-Lease with The Trusts & Guarantee Company Limited at Calgary, Alberta, under the terms of an Agreement in writing under seal dated the 4th day of July, A.D. 1936, and the Operator has deposited a copy of the said Sub-Lease and a copy of the said Assignment of the said Sub-Lease dated the 6th day of July, A.D. 1936, with the Trustee.

AND WHEREAS the Operator proposes to sell by way of royalty interests a certain part of any production that may be taken, saved and sold by it from the said royalty lands pursuant to the terms of the said Sub-Lease.

AND WHEREAS the Operator has requested the Trustee to act as Trustee on behalf of its and on behalf of all persons, firms and corporations interested in such production under the terms of this Agreement and the Trustee has consented to so act subject to all the terms, conditions, stipulations, covenants and agreements hereinbefore set forth and contained.

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the premises and of the mutual covenants of the parties hereto, it is agreed by and between the parties as follows:

1. This Agreement shall be known as the "B & B Royalties Number One Trust Agreement," and the royalty trust certificates hereinafter referred to shall mean and include any certificates issued by the Trustee under the terms of this Agreement and such certificates shall be styled and described as "B & B Royalties Number One Trust Certificate" and shall be in the form and style described in the draft certificate attached hereto.

2. The Operator hereby assigns, transfers, conveys and sets over unto the Trustee Eighty (80%) per centum of the whole of the said petroleum, oil, naphtha, gasoline, and/or natural gas produced, taken, saved and sold from the said royalty lands by the Operator, its successors or assigns pursuant to the terms of the said Sub-Lease without any deduction or abatement therefrom whatsoever, except the full actual cost of caring for, delivering and marketing of the said products from and after the time of production from the well to be drilled thereon; of the machinery and equipment used in connection with any well from

1939
 B & B
 ROYALTIES
 v.
 MINISTER
 OF
 NATIONAL
 REVENUE.
 Maclean J.

which production is taken including the necessary separators, tanks, fittings, pipes, valves and appliances and the installation and maintenance thereof; of separating, treating, caring for, extracting and marketing of said production; of surface rights and rights of way; of administration expenses of not more than Two Hundred Dollars (\$200) per month; of all government Municipal or School Taxes or assessments imposed or levied in respect of the said production and equipment and in respect of the lands whereon such well is situated; and of all insurance premiums; it being the intention of the parties hereto that the said Eighty (80%) per centum of the said production as aforesaid shall belong to and be the property of the Trustee for the purposes of this Agreement, less the said deductions and if by reason of the sale of the said production through any pipe line or to any refinery or other consumer, the proceeds of such sale is made direct to the Trustee or if production is taken in kind hereunder by the Trustee, the Trustee shall repay to the Operator therefrom all the said deductions.

3. The Operator hereby covenants, promises and agrees with the Trustee, unless the production deliverable under this Agreement is taken in kind as hereinafter provided, to pay in cash to the Trustee the full Eighty (80) per centum of the gross proceeds of the sale or marketing of the said production, less only the deductions above referred to, on the 25th day of the month next following the month in which production deliverable or payable hereunder shall have been recovered, at the office of the Trustee at Calgary, Alberta.

* * * * *

4. The Operator further acknowledges and agrees that pursuant to the terms of the said Assignment dated the 6th day of July, A D. 1936, of the said Sub-Lease, Robert Arthur Brown is entitled to royalties totalling Ten (10%) per centum as set forth in the said Assignment and that the said royalties of Ten (10%) per centum are included in the royalties of Eighty (80%) per centum hereby assigned and conveyed to the Trustee and hereby authorizes and directs the Trustee to issue Royalty Trust Certificates to the said Robert Arthur Brown or his nominees under the provisions of this Agreement for the said Ten (10%) per centum.

Paragraph 14 of the Trust Agreement may have some importance, and it may be recited in full. It reads:

14. The Operator covenants and agrees with the Trustee that the proceeds of the sale or sales of royalty interests or units hereunder shall be deposited by it in its name in The Royal Bank of Canada, Calgary, Alberta, until the sum of not less than Twenty Thousand Dollars (\$20,000) has been so deposited and shall be considered as a trust fund and in the event that the said sum is not so deposited as the proceeds of the said sale or sales within ninety days from the date hereof, the Operator shall immediately thereafter refund or repay to the respective purchasers of the said royalty interest or units in the sums respectively subscribed, the full amount so paid to the Operator and deposited in the said bank as aforesaid. Unless and until the said sum of Twenty Thousand Dollars is subscribed and deposited as aforesaid no withdrawals from the said account shall be made by the Operator except for the purpose of the said repayment or refund.

Other terms of the Trust Agreement were: that the Company would work the well drilled on the leased lands so long as the same should be shown to yield oil in paying quantities and a profitable market for the same was available; that the Company should permit any person authorized by the Trustee to enter upon the lands and examine any well drilled or being drilled; that the Company would keep true and correct books and records showing the quantity of petroleum products recovered and sold and make such books and records available for the inspection of any person named by the Trustee, and furnish verified returns monthly showing the quantity of petroleum products recovered and saved; that the Trustee should keep proper records of the persons entitled to share in the net royalties, the amount and percentage held by each, and as authorized by the Company, issue to such persons Royalty Trust Certificates, showing therein the interest of such persons in the net royalties; that in the event of production being obtained in paying quantities the Trustee would, within five days of the receipt of the proceeds thereof, distribute the same, less the enumerated expenses and deductions, among those entitled thereto at the time of such distributions; that all moneys realized from the sale of any royalty interest or units, less any commission paid on the sale thereof, should be devoted and used exclusively by the Company for the purpose of the payment of the actual and proper expenses or costs of drilling a well or wells on the leased lands; and that the Trustee might, at the request of the appellant, and with the consent of at least fifty per cent in interest of the royalty certificate holders, approve and confirm any contract made by the appellant for the sale of any production, and that thereupon the terms and conditions of the sale would become binding upon all the holders of royalty certificates, and their assigns. There were certain provisions providing for the event of default by the Company in performing its obligations under the terms of the Trust Agreement but as no such default occurred they need not be mentioned.

The form of the royalty trust certificates prescribed by the Trust Agreement was as follows:

1939
 B & B
 ROYALTIES
 v.
 MINISTER
 OF
 NATIONAL
 REVENUE.
 Maclean J.

1939
 ~~~~~  
 B & B  
 ROYALTIES  
 v.  
 MINISTER  
 OF  
 NATIONAL  
 REVENUE.  
 \_\_\_\_\_  
 Maclean J.

B & B ROYALTIES No. 1 TRUST CERTIFICATE

This Certifies that .....  
 of the ..... of ..... in the Province  
 of ..... as being entitled to a net royalty  
 of ..... per centum (..... %) of all petroleum  
 natural gas, gasoline gas, naphtha and other petroleum products produced  
 from the first and present well being drilled by B & B ROYALTIES  
 LIMITED on the following lands, namely:

.....  
 subject to all the terms, provisions and conditions of the Trust Agree-  
 ment dated the 8th day of July, A.D. 1936, and subject in particular  
 to the prior charges against the interest of the Royalty Holders here-  
 under as appears by the said Trust Agreement, such charges being gener-  
 ally all production and marketing costs, including equipment therefor,  
 together with the cost of surface rights and the amount of taxes,  
 insurance and administration expenses, and made between B & B Royal-  
 ties Limited as the Operator of the First Part, and The Security Trust  
 Company Limited as the Trustee of the Second Part, which said  
 Agreement may be inspected during office hours at the office of the said  
 The Security Trust Company Limited at Calgary, Alberta. The said  
 royalty is transferable or assignable on the books of the said The  
 Security Trust Company Limited upon surrender of this certificate and  
 upon the execution by the owner thereof of the transfer or assign-  
 ment in the form endorsed hereon or such other form of transfer or assign-  
 ment as may be acceptable to the said The Security Trust Company  
 Limited, and upon the same being properly executed by both the trans-  
 feror and the transferee and delivered to The Security Trust Company  
 Limited, together with payment of its proper transfer fees.

Two further agreements must be referred to. On August  
 1, 1936, two agreements were entered into between the  
 Company and the British American Oil Co. Ltd., one relat-  
 ing to the sale and purchase of crude oil, and the other  
 to natural gas, but a brief reference to the former will  
 suffice. By this agreement the Company agreed to sell,  
 and the British American Oil Company agreed to purchase  
 all the oil produced by the Company from the leased lands,  
 so long as any oil was produced in paying quantities there-  
 from, at the prevailing field prices for a like product, at  
 the time and place of delivery. A condition was attached  
 to the obligation of the British American Oil Company  
 to purchase all of the Company's oil production, but that  
 need not be mentioned. It was also provided that the  
 appellant should furnish to the British American Oil Com-  
 pany divisional orders showing "what share of such oil  
 is payable to any party entitled to royalty oil or other  
 share of production and the purchaser may account directly  
 to such parties for same."



The purpose of furnishing divisional orders was not explained to me but I assume it was primarily a precaution suggested by experience to avoid any conflict in interests in oil sold to pipe line companies or refineries when there must take place a commingling of oil produced by or acquired from different vendors. These orders authorized the British American Oil Company to pay directly to the holders of royalty certificates the share or percentage of the proceeds to which they were severally entitled. In point of fact, I think, payments on account of the sales of production were made by the British American Oil Company directly to the Trustee, and the Trustee accounted to the royalty certificate holders and the Company. I might add that the two agreements above mentioned, for the sale and purchase of the Company's production, were made with the approval of the Trustee, and with the consent in writing of fifty per cent in interest of the royalty certificate holders, as provided for in paragraph 17 of the Trust Agreement.

The Company sold to the public fifty-six and one-half ( $56\frac{1}{2}$ ) units of production, realizing therefrom in cash a sum in excess of \$100,000, and royalty certificates were issued therefor to the purchasers by the Trustee; another ten (10) units were allotted to Robert Arthur Brown pursuant to the assignment of July 6, 1936, and thirteen and one-half ( $13\frac{1}{2}$ ) units were allotted to or retained by the Company. All of those mentioned units would represent 80 per cent of all the production, the net proceeds of which would be distributable among the unit holders, in proportion to their several interests. The remaining 20 per cent of production had been already reserved to the Crown under the Head Lease, and to Robert Williamson Brown under the Sub-Lease.

Coming now to the amount and disposition of the proceeds of the 80 per cent of oil produced and sold by the Company during the taxation period in question. This is succinctly told in a statement of receipts and disbursements issued by the Trustee and made an Exhibit in the cause. I cannot do better than to repeat it. That statement is as follows:

|                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|---------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1939<br><u>    </u><br>B & B<br>ROYALTIES<br>v.<br>MINISTER<br>OF<br>NATIONAL<br>REVENUE.<br><u>    </u><br>Maclean J.<br><u>    </u> | Receipts:<br><br>Oil Sales ..... \$136,377.51<br>Tail Gas Revenue ..... 1,462.13<br><hr/> \$137,839.64<br><br>Less Gross Royalties paid Province of<br>Alberta ..... \$13,637.76<br>Other ..... 13,783.93<br><hr/> 27,421.69<br><hr/> Balance—Total Trustees' Receipts ..... \$110,417.95<br><br>Disbursements—<br>To net Royalty Holders other than B & B Royalties Ld ... 79,099.96<br>Operating expenses, General ..... 13,650.08<br>Royalty on Tail Gas & Line Losses..... 900.03<br>Trustees' Fees & Expenses ..... 708.30<br>Net Royalty paid to B & B Royalties Ld..... 16,059.54<br><hr/> Total Trustees' Disbursements ..... \$110,417.95 |
|---------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

From the above statement it will be seen that the Company received from the Trustee as net royalty, on account of its 13½ units, the sum of \$16,059.56, which amount the Company showed as an item of income in its return for the taxation period in question, but this complete return showed a net loss of \$7,350.12, and consequently it was claimed that there was no taxable income. The amount shown to be distributed to net royalty holders, other than the Company, was \$79,099.96, which amount the Minister contends was income in the hands of the appellant before the distribution thereof and, which it is claimed, should have been returned as income received by the Company along with the \$16,059.56. That is the genesis of the dispute here.

The net taxable income of the Company was assessed at \$52,762.02 by the Commissioner of Income Tax, but this amount was reached by including as income of the Company the sum of \$79,099.96 paid to other royalty certificate holders, leaving as net taxable income in the hands of the Company the said sum of \$52,720.02, after certain deductions made on account of management expenses, depreciation and depletion, and which I understand are not appealed from. It was this assessment of net taxable income that was sustained by the decision of the Minister, and from which decision this appeal was asserted. The Company claims that it is only the sum of \$16,059.56 that should enter into the computation of its taxable income,

and that there should not be included therein any of the sums received as net royalties by the other holders of royalty certificates, which sums, it is claimed, were never received, directly or indirectly, as net profit or gain by the Company. The Minister, in his decision affirming the assessment of the Commissioner, claimed, as he also did on this appeal, that all the net proceeds derived from the sale of production were received by the Company, directly or indirectly, as the owner thereof, prior to any payment over to the Trustee for distribution among certificate holders pursuant to the terms of the Trust Agreement, and that the same were therefore to be treated as income received by the Company and consequently liable to the corporation income tax imposed by the Income War Tax Act. It will be seen therefore that the question to be determined is one of principle and not of figures, and that is whether or not the net proceeds received by the holders of net royalty certificates other than the Company, constituted taxable income in the hands of the Company before distribution of the same was made to such holders. If the appellant's view be the correct one it must succeed in its appeal, and if not the assessment appealed from must stand.

Such are the principal facts of the case. The nature of the Trust Agreement is one calculated to raise debatable and difficult questions, and to create situations probably never contemplated by the framers of the Income War Tax Act. The general plan of financing disclosed here, by the sale of percentage interests in production, has long been known in many of the oil producing areas of the United States, with many variations, and many interesting questions have there arisen in connection with income tax cases, but for one reason or other I have been unable to derive any assistance therefrom in determining the issue here before me. One question which has arisen frequently in the United States is whether the proceeds received from the sale of royalty interests constitute income to the lessee. It would seem to be fairly well settled there that where amounts derived from the sale of royalty interests were consumed in drilling the particular well mentioned in the royalty certificates, or in some other document, such amounts did not constitute income to the owner of the lease, but any excess of such moneys paid to the owner

1939  
 B & B  
 ROYALTIES  
 v.  
 MINISTER  
 OF  
 NATIONAL  
 REVENUE.  
 Maclean J.

1939  
B & B  
ROYALTIES  
v.  
MINISTER  
OF  
NATIONAL  
REVENUE.  
Maclean J.

of the lease above the cost of the drilling of the well in question constituted income to the lessee. It has been held in several cases that where the taxpayer has been assessed on any moneys received from the sale of royalty interests, the burden was upon him of showing what part, if any, of moneys so received was expended in drilling the specified well or area, and lessees of oil lands have been held liable for the income tax on the total consideration received from the sale of royalty interests where they have failed to show that the same was consumed in drilling the well or area designated. That question however was not raised in this case and I assume the taxing authorities had been satisfied that the moneys received from the sale of royalty interest had been expended in drilling the well referred to in the Trust Agreement. I mention this point only for the purpose of illustrating one of the many difficulties that may arise in income tax cases, under this plan of financing the drilling of oil lands.

One question raised here was whether the assessment should not have been levied against the Company and the royalty certificate holders, as an "association," instead of against the Company alone. An "association," under the Income War Tax Act, is included in the definition of "person." It was submitted by Mr. Ford that if I were of the opinion that the Company and the owners of royalty interests should be assessed as an "association" that I should refer the assessment back to the Minister for further consideration and for formal amendment. Apparently, the assessment of the income in question, upon this basis was considered by the taxing authorities. I was told that if the assessment had thus been levied the total income tax recoverable would have been much higher than if levied against the Company alone, and in fact it was said that the tax, in that event would be quite onerous, and possibly that influenced the taxing authorities in refraining from making the assessment on that basis. I realize that very much can be said for the assessment being made against the Company and the owners of royalty interests, as an "association." However, it appears to me that the arrangement here lacks some of the usual and important characteristics of an "association." I have not been satisfied

that the assessment should have been made against the Company and the owners of royalty interests, as an "association"; at least I presently entertain serious doubts as to whether this could be done successfully. An interesting discussion as to what constitutes an "association," for income tax purposes, is to be found in the American case of *Monrovia Oil Co. v. The Commissioner* (1).

1939  
 B & B  
 ROYALTIES  
 v.  
 MINISTER  
 OF  
 NATIONAL  
 REVENUE.  
 Maclean J.

The important and difficult question here is the construction to be given the Trust Agreement. Did this agreement operate to divest the Company of its beneficial interest in the percentage of production therein mentioned, or in the proceeds of that production, or, is the agreement in substance but a contractual obligation assumed by the Company to pay to those who purchased royalty interests a certain proportion of the net income realized from the sale of oil recovered from a specified oil well? The former result would be an illustration of the alienation of production or its proceeds, and the latter an illustration of the mere application of income, and there is a distinction to be made between the two. The mere application of income in pursuance of an obligation under a contract does not affect the ownership of that income. If the agreement operated to divest the Company of its interest in 80 per cent of the production, then it was alienated, and the proceeds derived therefrom would not, I think, be income in the hands of the Company. In any event, as between the parties, there was an enforceable contract, that is to say, the Trustee could, I think, compel performance of the contract by the Company. The substance of the transaction was, I think, the irrevocable alienation, for a consideration paid, of a stated percentage of any production recovered, or the proceeds of that production when sold, less certain deductions. I think the agreement sought to put the ownership of a percentage of the oil produced in the Trustee on behalf of the purchasers of royalty interests, and the moment the oil was pumped to the surface the legal interest therein passed to the Trustee; prior to that the title to the oil in the ground would probably be in the Head Lessor. That was the construction given the agreement by the parties there-

(1) (1936) 83 Fed. R. (2d) 417.

1939  
 B & B  
 ROYALTIES  
 v.  
 MINISTER  
 OF  
 NATIONAL  
 REVENUE  
 Maclean J.

to, and in that way the agreement was worked out and implemented. The agreement was not attacked by the revenue authorities nor was it alleged to be a mere device to escape taxation. I think the agreement must be construed as meaning that the Company alienated its interest in that proportion of the production in question, and in the proceeds of such production. If that results in giving an advantage in taxation to the Company over another corporation which secures its working capital by the sale of its capital stock or its securities that would be a matter which concerns the legislature rather than the Courts.

The Income War Tax Act enacts that "for the purposes of this Act, 'income' means the annual net profits or gains . . . directly or indirectly received by a person . . . from any trade, manufacture or business . . ."

Can it be said that the Company received any "net profits or gains" from the percentage of production that was sold to others, the proceeds of which in point of fact it never received? I do not think one can so hold. The production in question may have been under the direction of the Company as operator of the undertaking, on behalf of all those holding royalty interests, but not as owner. The Company could not, I think, successfully assert that the proceeds derived from the sale of the production in question belonged to it, or that it was a profit or gain to which it was entitled. I do not see how it can be said that the net proceeds of production paid to holders of royalty interests was a net profit or gain to the Company, in the period in question. I am unable to satisfy myself that any other conclusion can be reached than that the appeal of the Company should be allowed, and with costs.

I perhaps should add a few words further. The Trust Agreement refers to certain taxes as being deductible items in calculating the net proceeds of production distributable among holders of royalty interests. I think this refers to provincial and municipal taxes, and it was not suggested by counsel for the Minister that this was intended to include the corporation income tax here in question.

*Judgment accordingly.*

BETWEEN:

JAMES SABISTON RANKIN .....SUPPLIANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

1937  
 {  
 Sept. 28.  
 —  
 1939  
 May 8.  
 —  
 Angers J.

*Crown—Petition of Right—The Militia Act, R S C , 1927, c. 132, secs. 30, 32, 64, 75 to 85 inclusive—Pay & Allowance Regulations, 1927, Articles 269 & 270—The Interpretation Act, R.S.C., 1927, c. 1, s. 16—Claim for military pay and allowances while temporarily engaged as a Departmental Solicitor and Deputy Judge Advocate General disallowed—Prerogative of the Crown superseded only by express enactment—Order in Council does not constitute a contract between the Crown and suppliant.*

Suppliant holds the rank of Colonel in the reserve of Non-Permanent Active Militia under the provisions of the Militia Act, R S C., 1927, c. 132. He was appointed temporary Junior Departmental Solicitor in the Department of National Defence and reported for duty on June 14, 1929. The appointment was for a period of six months, which term was extended from time to time, the last extension expiring on March 31, 1932, suppliant in the meantime having been promoted to the temporary position of Departmental Solicitor. By an Order in Council, dated November 27, 1930, suppliant was appointed Deputy Judge Advocate General and for a period of approximately one year fulfilled the two positions of Departmental Solicitor and Judge Advocate General. Suppliant's appointment as Deputy Judge Advocate General continued to March 31, 1934. The duties of the position of Departmental Solicitor and the qualifications required therefor as set out in the advertisement published by the Civil Service Commission were:

“Duties—To assist the Judge Advocate General in the legal work of his office, including advising in general law pertaining to all the Provinces of the Dominion and particularly Naval, Military and Air Force and Civil Aviation matters, especially in drafting, examining, interpreting and administering Naval, Military and Air Force law and regulations; conducting courses of instruction therein; also, when required, in important cases, to act as Counsel in Naval, Military and Air Force courts-martial, at important Courts of Inquiry and, if necessary, in Civil or Criminal Courts; and to perform other related work as required. Qualifications—Graduation from a recognized school of law; at least five (5) years of successful practice at the Bar; thorough knowledge of and practice in Civil and Criminal law; special knowledge of Military law, regulations and administration; military service, including, preferably, service in the Great War in a position of command, with experience in presiding at and conducting courts-martial; good judgment and ability to conduct courses of instruction and delivery of lectures, with wide experience in administration of Military law in all its branches; wide legal experience in counsel work before Civil Courts and Courts-martial and experience as President or Member of courts-martial.”

1939  
 ~~~~~  
 JAMES
 SABISTON
 RANKIN
 v.
 THE KING.
 ———
 Angers J.
 ———

Suppliant's claim against the respondent is for the pay and allowances of the rank of Colonel from November 27, 1930, to March 31, 1932, less civil emolument, and for pay and allowances of the rank of Colonel from April 1, 1932, to March 31, 1934.

Held: That the Order in Council of November 27, 1930, appointing suppliant Deputy Judge Advocate General, does not constitute a contract between His Majesty the King and the suppliant, all engagements between the Crown and those in the military service being voluntary only on the part of the Crown.

2. That the prerogative of the Crown can only be superseded by an express provision in a statute and not by implication.
3. That suppliant's appointment as Deputy Judge Advocate General was at best a bare military one, and no provision having been made for payment of a remuneration as required by s. 32 of the Militia Act suppliant has no recourse against the Crown.

PETITION OF RIGHT to recover from the Crown certain pay and allowances claimed by suppliant due him as a military officer while engaged in the service of the Crown as a Solicitor in the Department of National Defence and as Deputy Judge Advocate General.

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

The suppliant appeared in person.

C. P. Plaxton, K.C. for the respondent.

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

ANGERS J., now (May 8, 1939) delivered the following judgment:

The suppliant, by his petition of right, seeks to recover from His Majesty the King the sum of \$10,674.30.

The suppliant is a barrister and solicitor, having been admitted to the Bar of the Province of Saskatchewan several years ago, and he holds the rank of Colonel in the reserve of the Non-Permanent Active Militia under the provisions of the Militia Act, R.S.C., 1927, chapter 132.

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

The suppliant was appointed, on or about the 29th of April, 1929, temporary Junior Departmental Solicitor in the Department of National Defence for a period of six

months at a salary of \$2,640 per annum. The suppliant was informed of his appointment by letter of the Deputy Minister dated April 30, 1929, and was asked to report for duty at the earliest possible date. He reported on June 14, 1929. A notification of the suppliant's appointment was sent to the Department of National Defence by the Secretary of the Civil Service Commission on the 21st of June.

The employment of the suppliant as Junior Departmental Solicitor was extended for a period of six months from the 14th of December, 1929.

Following a memorandum from the Judge Advocate General to the Assistant Deputy Minister dated November 15, 1929, and a letter from the Deputy Minister to the Secretary of the Civil Service Commission dated December 6, 1929, recommending that the classification of the position assigned to the suppliant be changed from Junior Departmental Solicitor to Departmental Solicitor, the Civil Service Commission, on the 8th of March, 1930, promoted the suppliant to the status of Departmental Solicitor; he was appointed as such for a period of six months reckoning from the 14th of December, 1929, at a salary of \$3,240 a year.

The suppliant's employment as Departmental Solicitor was extended from time to time for periods of six months. The last extension covered by these certificates expired on December 14, 1931. The suppliant nevertheless continued to occupy the position of Departmental Solicitor. On February 4, 1932, an Order in Council was passed approving the minute of a meeting of the Treasury Board recommending that, in accordance with section 40 of the Civil Service Regulations, authority be granted for the continuance of the temporary position of Departmental Solicitor in the Department of National Defence until March 31, 1932, a copy of this Order in Council was filed as exhibit Q.

On the 27th of November, 1930, an Order in Council was adopted whereby the suppliant was appointed Deputy Judge Advocate General; the Order in Council, a certified copy whereof was filed as exhibit S, reads as follows:

The Committee of the Privy Council, on the recommendation of the Minister of National Defence, advise that Colonel James Sabiston Rankin, DSO, V.D., at present employed in the Department of National

1939
 JAMES
 SABISTON
 RANKIN
 v.
 THE KING.
 Angers J.

1939

JAMES
SABISTON
RANKIN

v.
THE KING.

Angers J

Defence as the Departmental Solicitor in the Office of the Judge Advocate-General, be appointed Deputy Judge Advocate-General, it being desirable that there be a Deputy of the Judge Advocate-General to act for him on the occasions when he is absent from Ottawa.

The reason of the suppliant's appointment as Deputy Judge Advocate General was that the Judge Advocate General, Colonel Orde, had to go to England. He went to the Imperial Defence College where he stayed for a period of approximately one year. During that time the suppliant fulfilled the two positions of Departmental Solicitor and Judge Advocate General.

Is the suppliant entitled to receive the pay and allowances of the rank of Colonel from the 27th of November, 1930, date of his appointment as Deputy Judge Advocate General, to the 31st of March, 1932, date of the expiry of the last extension of his temporary employment as Departmental Solicitor in virtue of the Order in Council, exhibit Q, less his civil emolument as Departmental Solicitor for the same period which he declared he was willing to forego? Is the suppliant further entitled to receive the pay and allowances of the rank of Colonel from the 1st of April, 1932, to the 31st of March, 1934, balance of the alleged duration of his appointment as Deputy Judge Advocate General?

Those are the two questions which I have to determine. If the first is answered in the negative, the second of course lapses *ipso facto*.

It was urged by the suppliant that his appointment as Deputy Judge Advocate General was a military one; that he could not be appointed to that position under the provisions of the Civil Service Act which only covers civil appointments. The suppliant relied on section 19 of the Act which reads as follows:

Save as otherwise provided in this Act or in any regulation made hereunder, neither the Governor in Council nor any minister, officer of the Crown, board or commission, shall have power to appoint or promote any employee to a position in the civil service.

It is evident that, if the provisions of section 19 are strictly complied with, as I assume they are, the appointments to positions in the Civil Service are made exclusively by the Civil Service Commission.

As previously stated, the suppliant was appointed Deputy Judge Advocate General by an Order in Council passed on

the 27th of November, 1930. It seems to me convenient to look a little more closely at the circumstances surrounding his appointment.

On October 10, 1930, the Judge Advocate General wrote a memorandum for the Deputy Minister, a copy whereof was filed as exhibit A, in which he said (*inter alia*):

1939
 JAMES
 SABISTON
 RANKIN
 v.
 THE KING.
 Angers J.

As, by reason of my attendance at the Imperial Defence College, I shall be absent from Canada for a considerable period, it is essential that there be some person at Headquarters with power to perform those duties of Judge Advocate-General which, by Statute and Regulation, are required to be performed by that Official, *persona designata*. Colonel Rankin, the Departmental Solicitor in my Office, is qualified to perform these duties and as I will, during my absence, continue to hold my appointment which, therefore, will not lapse, it would, in my opinion, be more regular to have Colonel Rankin appointed Deputy Judge Advocate-General rather than detailed to perform the duties of Judge Advocate-General. Such an appointment must, so far as I can ascertain, be authorized by the Governor in Council and, to that end, I am attaching hereto a draft submission.

While this appointment will not, in itself, carry with it any extra emoluments, I would respectfully bring to your attention the fact that Colonel Rankin has, so far, not received any permanent appointment to the Civil Service which, if it had been made some time ago, would have enabled him to have qualified for a statutory increase in salary. Moreover, this salary which he is receiving as a temporary employee is in the lowest grade authorized for a Departmental Solicitor, namely, \$3,260 per annum, which is considerably less than that paid to Departmental Solicitors of other Departments performing duties no less onerous and important. He has been put to extremely heavy expense in moving his family from Regina to Ottawa, and if it would be at all possible to do something whereby his emoluments can be increased, I would recommend accordingly . . .

On December 2, 1930, the Deputy Minister of National Defence prepared a memorandum for the Minister, of which I deem it expedient to quote the first paragraph:

During Colonel Orde's absence from Headquarters next year while attending Defence College in London, Colonel Rankin will be in charge of the office of the Judge Advocate-General. This will entail more important work and larger responsibility on his part, and it seems reasonable that he should receive financial recognition. I therefore concur in the proposal that the Department ask the Civil Service Commission for a temporary certificate for Colonel Rankin as Senior Advisory Counsel at \$4,200 per annum.

It would be understood that at the expiration of the year Colonel Rankin would revert to the position and salary of Departmental Solicitor . . .

It bears at the bottom the note "Not approved by the Minister," with the date December 3, 1930, and the signature of the Deputy Minister.

1939
 JAMES
 SABISTON
 RANKIN
 v.
 THE KING.
 Angers J.

On December 19, 1930, the Judge Advocate General wrote to the Deputy Minister attaching to his letter a memorandum of the same date received from the suppliant.

After stating in his letter that he appreciates that it is not possible at the present time to do anything to improve Rankin's status, financially or otherwise, but that such an opportunity may occur during the next year, Colonel Orde adds:

In the event of such an opportunity occurring, my absence from Ottawa during the next year will, of course, preclude me from directly making any representations to you on Colonel Rankin's behalf, and I am writing you now, forwarding Colonel Rankin's Memorandum mentioned, so that there may be on record an intimation of my own views in the matter

The question as to whether Colonel Rankin should have Military status is a matter of opinion but so far as his emoluments are concerned, whether they be paid by reference to Military or Civilian status, I consider that they should certainly be not less than those received by other Officials of the Department performing work of no greater importance and requiring no greater training than that done by Colonel Rankin

In his memorandum to the Judge Advocate General the suppliant submits the reasons why his appointment to the position of Deputy Judge Advocate General ought to be considered as a military appointment and why, in consequence, his remuneration ought to be on the same basis as that of a G.S.O. or Lieutenant-Colonel. This memorandum is quite lengthy and I do not think that it would serve any useful purpose to quote it, in whole or in part.

On January 15, 1931, the Adjutant General prepared a memorandum for the Deputy Minister; it contains, among others, the following statements:

The marginally named officer (Colonel Rankin) will be called upon to carry out the onerous duties of Judge Advocate General during the absence of Colonel R. J. Orde, which condition will continue for more than a year, and it may be your desire that he should receive a higher rate of pay and allowances during this period, commensurate with the additional duties he is performing.

In this event, it is suggested that, as it is not possible to increase his pay in the Civil Service during the period in question, that his temporary appointment be suspended until the return of Colonel Orde and that he be appointed temporarily during this period as an officer of the N.P.A.M. with pay and allowances of such rank as may be selected.

This could be accomplished by his employment as an officer of the N.P.A.M., with the pay and allowances of a Lieut.-Colonel, under the provisions of Article 269, Pay and Allowance Regulations, 1927.

At the bottom of this memorandum appear the following words: "Seen by Minister who does not wish to take action," followed by the signature of the Deputy Minister and the date (20/1/31).

It is clearly established that the suppliant fulfilled the duties of Departmental Solicitor and of Judge Advocate General satisfactorily. To do this he had to work overtime. The Deputy Minister of National Defence, the Adjutant General, the Judge Advocate General (Colonel Orde), the Financial Superintendent all agreed that Rankin should, during the absence of Colonel Orde, receive more adequate remuneration for his services; the only one who disagreed was the Minister; notwithstanding the suppliant's repeated endeavours to obtain an adjustment of his emoluments, the Minister persistently refused to take action. I do not think, in the circumstances, that the suppliant has any recourse against the Crown.

The only thing he could do, when he was offered the position of Deputy Judge Advocate General without any emolument was to decline to accept it; in doing this however he would likely have exposed his chances of obtaining an extension of his temporary appointment as Departmental Solicitor.

If the suppliant has any claim it must be founded upon a contract or upon statutory provisions or regulations having statutory force.

After giving the matter my best consideration, I must say that I fail to see how the Order in Council of the 27th of November, 1930 (exhibit S) can be considered as constituting a contract between His Majesty the King and the suppliant; all engagements between the Crown and those in the military service are voluntary only on the part of the Crown: *Leaman v. The King* (1); *Mitchell v. The Queen* (2); *Dunn v. The Queen* (3); *DeDohsé v. The Queen* (4); *Hales v. The King* (5); *Denning v. Secretary of State for India in Council* (6); *Grant v. Secretary of State for India in Council* (7); *Bacon v. The King* (8); *Kidd v. The King* (9).

(1) (1920) 3 KB 663.

(2) (1896) 1 QB 121.

(3) (1896) 1 QB 116

(4) (1886) 3 T.L.R. 114

(5) (1918) 34 T.L.R. 341 and 589.

(6) (1920) 37 T.L.R. 138

(7) (1876) 2 CPD 445

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

(9) (1924) Ex C.R. 29

1939
 JAMES
 SABISTON
 RANKIN
 v.
 THE KING.
 Angers J.

1939
 JAMES
 SABISTON
 RANKIN
 v.
 THE KING.
 Angers J.

Reference may also be had beneficially to Halsbury's Laws of England, 2nd ed., vol. 6, p. 487, para. 601; Robertson's Civil Proceedings by and against the Crown, pp. 355 *et seq.*

Has the suppliant a claim under statutory provisions or under regulations having statutory force? The suppliant invokes section 63 of the Militia Act; it is worded as follows:

The Militia or any part thereof, or any officer or man thereof, may be called out for any military purpose other than drill or training, at such times and in such maner as is prescribed.

Section 64 and sections 75 to 85 of the Act contain the only provisions concerning the calling out of the Militia or any part thereof.

Section 64, dealing with active service, reads thus:

The Governor in Council may place the Militia, or any part thereof, on active service anywhere in Canada, and also beyond Canada, for the defence thereof, at any time when it appears advisable so to do by reason of emergency.

Sections 75 to 85 inclusive concern the calling out of the Militia in aid of the civil power.

I do not think that the sections above mentioned have any application to the question at issue.

It was further submitted by the suppliant that the Crown's prerogative had, in the present instance, been overridden by statute; in support of this contention the suppliant relied particularly on section 49 of the Act, which reads thus:

When on active service, during the period of annual drill and training, and when otherwise on duty, the pay and allowances of officers and men of the Active Militia, other than the Permanent Force, shall be at such rates as may be prescribed by the Governor in Council.

And the suppliant invokes article 269 of the Pay and Allowance Regulations, 1927. It seems to me apposite to quote paragraphs (a) and (b) and part of paragraph (c) of article 269:

269. (a) Officers and soldiers of the Non-Permanent Active Militia detailed temporarily for full time duty, under arrangements authorized by the Minister, will receive pay of their ranks, under the provisions of Part XI of these regulations, for the days actually employed.

(b) Such Officers and soldiers who can continue to reside at their usual place of residence will not be entitled to receive allowances in addition to the pay issuable

(c) If their duties preclude them from residing at their usual place of residence, in addition to pay, allowances will be issuable as for Officers or soldiers of the Permanent Force, at the rates pertaining to the rank for which pay is being drawn.

1939
 JAMES
 SABISTON
 RANKIN
 v.
 THE KING.
 Angers J.

Article 270 enacts that "in cases where the duty may not be full time the proportion of the rates of Pay and Allowances to be paid will be as directed by the Minister according to the circumstances of each case."

It would require explicit language to supersede the prerogative of the Crown. Section 16 of the Interpretation Act (R.S.C., 1927, chap. 1) says:

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

Speaking of the Crown's prerogatives and the influence of statutes thereon, Maxwell, in *The Interpretation of Statutes*, 8th edition, page 120, says:

On, probably, similar grounds rests the rule commonly stated in the form that the Crown is not bound by a statute unless named in it. It has been said that the law is *prima facie* presumed to be made for subjects only. At all events, the Crown is not reached except by express words or by necessary implication in any case where it would be ousted of an existing prerogative or interest. It is presumed that the Legislature does not intend to deprive the Crown of any prerogative, right or property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible. Where, therefore, the language of the statute is general, and in its wide and natural sense would divest or take away any prerogative or right from the Crown, it is construed so as to exclude that effect.

According to section 16, the Crown cannot be ousted of a prerogative by mere implication; an express provision is required: *Crombie v. The King* (1); *Re W.* (2); *Rex v. Rhodes* (3); *Théberge v. Landry* (4).

In order to bring himself under the provisions of articles 269 and 270 of the Pay and Allowance Regulations the suppliant should have proved that he had been detailed temporarily for military duty. This he has not done; he did not produce any militia order, which is the method by which the Minister of National Defence may call out an officer of the Non-Permanent Active Militia on military duty.

It was contended by suppliant that the appointment made by the Order in Council of November 27, 1930

(1) (1922) 52 O.L.R. 72

(2) (1925) 56 O.L.R. 611.

(3) (1934) O.R. 44, 48.

(4) (1876) 2 A.C. 102, 106

1939
 JAMES
 SABISTON
 RANKIN
 v.
 THE KING.
 ———
 Angers J.
 ———

(exhibit S) was one made under the authority of section 30 of the Militia Act, which is in the following terms:

The Governor in Council may establish a general staff, headquarters staff, and district staff, and may appoint a chief of the general staff, and such officers to the respective staffs as are deemed necessary, and shall define their duties and authority.

When the establishment provided for in section 30 is amended, it is customary to announce the amendment in the General Orders published in the *Canada Gazette*, which apparently was not done in the present instance.

Moreover, if the suppliant's appointment were equivalent to an appointment to the headquarters staff, his pay and allowance should have been fixed by the Governor in Council as required by section 32 of the Act, which says:

The pay and allowances of the officers of the general staff, headquarters staff and district staff, including officers seconded for duty in the public service of Canada, shall be fixed by the Governor in Council.

There is nothing in the evidence to show that this was ever done.

If, as submitted by the suppliant, his appointment as Deputy Judge Advocate General were a military one, it was a bare appointment and no provision was made for the payment of a remuneration; the suppliant, in the circumstances, has no recourse against the respondent: see *Tucker v. The King* (1).

After a minute perusal of the evidence and a careful study of the law and authorities, I have come to the conclusion that the suppliant has no recourse against the respondent. I must say that I have reached this conclusion somewhat reluctantly, because the suppliant fulfilled concurrently the two positions of a Departmental Solicitor and of Judge Advocate General and did it in a satisfactory manner; in order to do so, he had occasionally to work overtime. I think that, in the circumstances, he deserved a more substantial remuneration than the emoluments allotted to a Departmental Solicitor. Be that as it may, I have no other alternative but to decide that the suppliant is not entitled to any part of the relief sought by his petition. The petition is accordingly dismissed with costs which are hereby fixed at \$100.

Judgment accordingly.

BETWEEN:

THE FEDERAL DISTRICT COM-
MISSION, on the Information of PLAINTIFF;
the Attorney-General of Canada..]

1939
Nov. 13
—
1940
Jan 31
—

AND

MARY LEAHY ET AL.....DEFENDANTS.

Expropriation—Value of property expropriated—Effect of standing timber on value of land expropriated—Value of land at date of expropriation not affected by the use to which it is to be put.—Evidence.

Plaintiff expropriated certain lands in the County of Gatineau, Quebec, for a public work known as the Federal District Commission Gatineau Park. The lands expropriated were unoccupied mountainous wood lots, unimproved and unsuitable for agricultural purposes. The case reported and four others were tried together before this Court in order to have established the value of the expropriated lands.

Held: That the probability of any of the lands taken being utilized for building or residential purposes is too remote and speculative to have any effect on their present market value.

- 2 That it is the market value of the land, as land, that is to be ascertained or estimated in fixing the compensation to be awarded, and if the land expropriated contains stone, gravel, growing crops, or timber, and they belong to the soil and are capable of being converted into a merchantable product their existence as part of the realty may be taken into consideration in determining the compensation so far as they affect the market value of the land, and there can be no recovery for standing timber, for example, valued separately as a merchantable product, and as an item additional to the value of the land
- 3 That it is the value of the land as it stood at the date of expropriation that is to be established, unaffected by the laying out or construction of the public work on behalf of which the power of expropriation was invoked.
4. That evidence of offers to purchase lands which have been expropriated is always open to suspicion, easily fabricated and generally unsatisfactory, and in most cases should be rejected entirely, unless made by some person qualified to testify concerning land values, who has made an offer to purchase the lands in question, and states his reasons for making the offer and the grounds upon which he arrived at the price offered
- 5 That evidence of the amount at which property is assessed for taxation purposes, given by a municipal officer, not an assessor, is utterly valueless and should always be rejected.

INFORMATION by the Crown to have certain property expropriated in the County of Gatineau, Quebec, for a public park, valued by the Court.

1939
 FEDERAL
 DISTRICT
 COMMISSION
 v.
 MARY LEAHY
 ET AL.
 Maclean J.

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

A. G. McDougall, K.C. and Paul Ste. Marie for plaintiff.

J. N. Beauchamp, K.C. and C. H. Dowd for defendants.

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

THE PRESIDENT, now (January 31, 1940) delivered the following judgment:

This is an expropriation proceeding taken on behalf of the Federal District Commission, hereinafter called "the Commission," and relates to lands taken under the provisions and authority of the Federal District Commission Act, and the Expropriation Act, for the purposes of the public work of Canada known as the Federal District Commission Gatineau Park, hereafter referred to as "the Gatineau Park." The lands are situated in the Township of Hull, in the County of Gatineau, in the Province of Quebec. In the carrying out of this public work the Commission, through voluntary sale, has acquired title to a considerable number of different tracts of land, and the Commission proposes to acquire title to additional tracts of land, by treaty with the owners, or, by expropriation proceedings, in order to come into possession of such an area of contiguous lands as the Commission deems desirable for the completion of the Gatineau Park, and that fact may lend some importance to the amount of compensation to be awarded in this and four other cases, heard at the same time.

This expropriation proceeding is one of five heard at the same time, and it was agreed that the evidence heard in this case would be evidence in the other four cases, so far as the same might be applicable, and my recollection is that in the end it came to be agreed that the evidence heard in any one case would be evidence in any of the others, so far as the same might have application. It will be convenient therefore in this case first to discuss and consider such matters as are common to all the five cases and this will enable me to dispose of the remaining four cases in comparatively brief terms; it will be understood therefore that much that I say in this case will be

applicable also to the other four cases. The defendants in the other four cases are respectively Frank Mulvihill, Peter S. Daly, Joseph Daly, and Owen O'Rielly, and if I should have occasion herein to refer to the lands taken from any one of those defendants it will be by reference to the name of the owner. It may be convenient also at times to refer to the case immediately before me as "the Leahy case."

I might first direct myself to some general observations applicable to the lands taken in each of the five cases. These different parcels of land are located between what is known locally as Meach Lake and the village of Kingsmere, in the Laurentian Hills, some twelve or thirteen miles from the city of Ottawa, in the Province of Ontario, and the city of Hull, in the Province of Quebec. That description of the location of the different parcels of land taken may be rather inexact but it will be sufficient for all practical purposes. All the lands taken are unoccupied, unimproved, and unsuitable for agricultural purposes. In two of the five cases, I think, there was the suggestion that some small portions or patches of such lands had at one time been under cultivation; if that be correct such cultivated portions have long since reverted to wild lands and that of itself would, I think, be rather decisive evidence against placing the same in the category of agricultural lands. I may therefore say that none of the five expropriated parcels has any present or prospective market value for agricultural purposes, and at any rate there was no evidence produced that would support such a claim. In two cases particularly some evidence was given to the effect that the lands there involved, or portions of them, were available and adaptable for building or residential purposes, a more valuable use than that to which they had been devoted before being expropriated, and it was claimed that some allowance should be made for such potentialities. I may at once dispose of that point though I shall have occasion later on to refer to the evidence presented in support of such a claim, in one of the cases. In my opinion, the suggested probability of any of the lands taken being utilized for building or residential purposes, of any kind, is too remote and speculative to have any perceptible effect upon their present market value and must therefore be excluded from consideration. In any

1939
 FEDERAL
 DISTRICT
 COMMISSION
 v.
 MARY LEAHY
 ET AL.
 Maclean J.

1939
 FEDERAL
 DISTRICT
 COMMISSION
 v.
 MARY LEAHY
 ET AL.
 Maclean J.

event the evidence directed to this point was not of the character or weight required in the circumstances here to sustain such a claim. The five different parcels of land are located in what may be said to be a mountainous area, and generally they have the same physical characteristics. They were referred to throughout as "wood lots," they are locally known as such, and in the past they have been dealt in as such and nothing else, so far as I was able to observe. I think it is to be inferred from the evidence that the market value of wood lots in the area in question was controlled largely by the quantity and value of the standing wood thereon, and this will enter very prominently into the issue of the market value of each of the several parcels of land expropriated.

During the course of the hearings it at times appeared to me to look as if it were timber or wood that was expropriated, and not lands. The evidence led on behalf of the Commission was directed almost entirely to the value of the merchantable wood standing on the lands, while that on behalf of the several defendants was directed to the market value of the land as land, a value of so much per acre, and then to the market value of the standing timber or wood thereon, and to this evidence I shall return later on. Now this leads me to remark that it is the market value of the land as land that is to be ascertained or estimated in fixing the compensation to be awarded in each case. If lands expropriated contain, for example, stone, gravel, growing crops, or timber, and they belong to the soil and are capable of being converted into a merchantable product, their existence as part of the realty may be taken into consideration in determining the compensation so far as they affect the market value of the land, but the market value of the land as land remains the test, and there can be no recovery, for example, for standing timber, valued separately as a merchantable product, and as an item additional to the value of the land. That seems to be a well established principle and it would seem to be perfectly sound. In the cases before me, it was specific parcels of lands that were taken; it was that to which the Commission acquired title, and it is for the taking of such lands that compensation in some amount must be awarded the owners. It is the value of the land as it stood at the date of expropriation that is to be estab-

lished, unaffected by the laying out or construction of the public work on behalf of which the power of expropriation was invoked.

As a rule there will always be found one difficulty or another in determining the compensation which should be awarded a proprietor whose lands have been taken from him, even if the amount involved is not large. And the cases now before me offer no exception to that rule. It has often been said that the measure of compensation is the fair market value of the land, and that the fair market value is that amount of money which a purchaser willing but not obliged to buy the property, would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the land was adapted and might in reason be applied. It has also often been said that the market value of the land shall be taken to be the amount which the land if sold on the open market by a willing seller might be expected to realize. There is not in general any market for land in the sense in which one speaks of a market for shares, or a market for commodities. The value of shares or commodities can be readily ascertained by the prices being obtained for similar articles in the market. The market value of a piece of real estate is not ordinarily so easy of ascertainment, and this is partially attributable to the fact that no two tracts of land are ever exactly alike, and the price of real estate is largely influenced by the necessities of the seller and the requirements of the purchaser, and the use to which the land has been or is intended to be put. In the case of land, its value in general can be measured by a consideration of the prices that have been obtained in the past for land of a similar quality and in similar locations, and that, I think, is what is meant in general when reference is made to "the market value" of a piece of real estate. But it does not always happen that previous transactions in similar lands afford much real assistance, and, I think, this might be expected of lands of the type with which we are here concerned. In fixing the compensation, consideration must be given to the value of the lands taken to the owner, and it is the value of the property at the date of expropriation that is to be ascertained, and not its future value. Further, the land is not to be valued merely by reference to the use to which it was being put

1939

FEDERAL
DISTRICT
COMMISSIONv.
MARY LEAHY
ET AL.

Maclean J.

1939
 FEDERAL
 DISTRICT
 COMMISSION
 v.
 MARY LEAHY
 ET AL.
 Maclean J.

at the time at which its value has to be determined, but also by reference to any and all uses to which it is reasonably adapted and might with reasonable probability be applied. Such are the principal considerations to be observed in ascertaining the market value of lands compulsorily taken.

I next wish to refer to certain portions of the evidence, which, I think, must be disregarded, or excluded from consideration altogether, upon one ground or another, and the first I shall make reference to is the following. A municipal officer, not an assessor, was called to state the amount of the assessment levied against each of the five properties taken by the Commission. It is obvious that this kind of evidence is utterly valueless and should always be rejected, and such is my practice, but I find that such evidence appears in the record here. The reason why that evidence should be excluded is that it cannot be used by the expropriating party as an implied admission by the owner that his land was not worth more than the assessment, for no inference can fairly be drawn against an owner of land from his failure to protest that the valuation put upon it by the assessors was too low. It is notorious that land in most sections of the country is not assessed at its full market value. If the assessors themselves were skilled and experienced in real estate values, and were called as witnesses to explain the basis upon which their assessments were made, that is what proportion of the market value was represented by the assessment, some assistance might be derived from their evidence and, I think, it would be admissible. For the same reason the expropriating body might call the same skilled experienced assessors, to show by how much the value represented by their assessment exceeded the market value of the property, and it is well known that instances of this are frequently found to-day, in some cities particularly. I propose therefore to disregard entirely the evidence relating to the assessments levied against each of the five properties.

The next piece of evidence to which I wish to make reference is applicable to one case only, the O'Reilly case, but I may be pardoned for discussing the same here, while considering other portions of the evidence common to all the cases. In that case it was claimed that the lands

taken were adaptable for building purposes, and particularly as a site on which to establish a sanatorium or health resort of some nature. To support this claim a young lady, who at one time performed clerical services for Mr. O'Reilly when he was carrying on some wood-cutting operations on his expropriated property, was called as a witness, and she testified that in July, 1937, she offered in writing to purchase the lands of O'Reilly for the particular purpose which I have just mentioned, and to pay therefor the sum of \$3,000, and the letter was put in evidence, and, I think, without objection. The offer was never accepted, and as Mr. O'Reilly was not called as a witness at the trial, no explanation was given as to why the offer was never accepted, or why it was refused if such were the case. I suspect that Mr. O'Reilly never treated the offer seriously, and probably regarded the price offered as excessive for a property for which he paid but \$575 in 1934, and after having in the meanwhile cut and sold the greater part of the wood that was on the land when he purchased it. The offer, I think, was one that was not enforceable had it been accepted just immediately prior to the expropriation, which was in November, 1938, some fifteen months after the offer was made, that is, if the party making the offer refused to complete the transaction. In many jurisdictions evidence of offers for the purchase of lands is not permissible in expropriation proceedings. They usually cast no light upon the question of value, and the party making the offer might be incapable of having any knowledge of the value of the land, for the purpose which he or she had in mind, or for any other purpose. Evidence of offers to purchase lands which have been expropriated are always open to suspicion, easy of fabrication and generally unsatisfactory, and probably in most cases should be rejected entirely. It has been held in some jurisdictions that offers to purchase the lands in question, made in good faith, within a reasonable time, and with the intention and ability to carry out the transaction if the offer were accepted, are admissible as independent evidence of value. If a person qualified to speak about land values, and who has made an offer to purchase the lands in question, appears in court and testifies as to his reasons for making the offer, the grounds upon which he reached the price offered, it probably would be another

1939

FEDERAL
DISTRICT
COMMISSION

v.

MARY LEAHY

ET AL.

Maclean J.

1939
 FEDERAL
 DISTRICT
 COMMISSION
 v.
 MARY LEAHY
 ET AL.
 Maclean J.

thing. At any rate, I attach no weight whatever to the offer made in the way of establishing the market value of the lands of O'Reilly, for any purpose, and I heard no evidence which would encourage me to think that the young lady who made the offer was qualified to speak as to the market value of those lands. I therefore exclude from consideration the evidence of this offer, in determining the value of those particular lands.

Another point which I might here mention was raised in connection with four of the five cases. It was urged upon me that where the occupation of the owner of an expropriated wood lot was that of a farmer, that the wood lot should be treated as an adjunct of his farm, even though located some miles distant, on the ground that it was a source of wood supply for the general purposes of the farmer-owner and therefore constituted a special element for consideration in computing the market value of the wood lot. And evidence was given to the effect that in four cases the defendants were farmers by occupation. I am not quite sure whether or not it was the submission of counsel for the Commission that this proposition was in principle wholly untenable, but it was at least contended by them that it should not apply in the case where the farmer-owner had not in fact cut any wood from his wood lot for many years prior to its expropriation, which was the fact in the Leahy case, and that it should not apply in the case where the farmer-owner made a practice of cutting merchantable wood from his wood lot, for sale in the market. In the way this matter was put to me it would seem to ask me to support the principle that if a farmer owned a wood lot and used it as a source of wood supply for his own consumption only that this added something to the value of the wood lot, but if he used the wood lot as a source of wood supply, not for his own consumption but for sale in the market, or, if he did not use it at all for a substantial period prior to its expropriation, for any purpose, no additional value accrued to the wood lot by reason of it being owned by a farmer. I think to state the proposition in that way is to reveal its inherent fallacy, because, if a sound one, it would require, in an expropriation proceeding, evidence showing for what purpose a farmer acquired his wood lot, and what use he made of it, and so on, which would appear to me quite imprac-

tical. It would be more perplexing still in the case where the farmer-owner used his wood lot as a source of wood supply for his own consumption, and concurrently for other purposes. I do not see how such a principle could be safely applied in cases of this kind, and if attempted it would likely lead to curious and doubtful results. If a farmer had an appreciable quantity of standing timber or wood on a portion of his farm, that would constitute a very important element for consideration in ascertaining the market value of his farm lands, were they expropriated. A wood lot owned by a farmer, separated considerably from his farm lands, might be of substantial value to him, but I doubt if it can be said to add to the market value of his farm. The farm, I think, must be considered as one property, the wood lot as another. I think that the wood lots expropriated by the Commission must be valued as something apart from farm lands, if the owner happens also to own and occupy farm lands, and as a separate parcel of land, and upon the considerations applicable to the wood lot alone. I am not disposed to accept the principle advanced although conceivably, in a special state of facts, a wood lot separated from farm lands, might be treated as a working adjunct of a farm, and its expropriation might conceivably reduce considerably the value of the farm lands and therefore be a cause of damage to the owner of the farm lands, but in the state of facts disclosed in the cases before me I do not think this can be considered. The general principle that the value to the owner of the lands taken, is an element always to be considered, is, I think, a safer rule to follow than that which requires one to distinguish between the case where the farmer-owner uses his wood lot entirely for his own purposes, and the case where the farmer-owner uses his wood lot as a source of wood supply which he proposes to sell, and does sell, in the market.

Evidence was given as to the prices paid by the owners of four out of the five parcels of land expropriated, and also as to the prices paid at voluntary sales of land said to be similar to those expropriated by the Commission, and I wish to refer briefly and generally to this evidence. When a parcel of land is taken by expropriation proceedings the price which the owner paid for it when he acquired it is generally regarded as a very important piece of evidence

1939

FEDERAL
DISTRICT
COMMISSIONv
MARY LEAHY
ET AL.Maclean J.

1939
 FEDERAL
 DISTRICT
 COMMISSION
 v.
 MARY LEAHY
 ET AL.
 Maclean J.

in determining its present value, and is generally held admissible either as independent evidence of value, or to rebut the owner's contention that his property was now worth a larger sum, providing the sale was fairly recent in point of time, was a voluntary transaction between competent parties, and providing no change in conditions or marked fluctuations in value have since occurred. A price paid under such conditions is a circumstance which a prospective purchaser would no doubt consider in determining what he himself should pay for the property. Such evidence, however, is not conclusive but it is one point to be considered with all the other evidence. When I come to deal specifically with the matter of the amount of compensation to be allowed in each of the four cases referred to I shall state just what that evidence was. Considerable evidence was given as to the prices paid for what was alleged to be similar lands, within the same general area as the expropriated lands, or in neighbouring areas. Evidence as to the price paid at a voluntary sale for lands claimed to be similar to those expropriated is ordinarily admissible and frequently will have considerable probative value, if a reasonable similarity between the lands can be shown to have existed. I have no doubt but that the lands referred to had much the same characteristics as those taken by the Commission, but as the market value of such lands, and likewise those taken by the Commission, depends, it is agreed, very largely upon the value which the merchantable wood standing thereon gives to the land, the character and quality of the wood, the size and contour of the lands, their accessibility, and so on, I find it difficult upon the evidence before me, to make any close comparison between the wood lots involved in voluntary transactions and those taken by the Commission. I think it may be inferred that the transactions in lands to which I was referred related to wood lots, and that they were bought and sold as such, and that the price paid for the same was largely determined by the stumpage value of the merchantable wood thereon. It will be obvious therefore that if a transaction in a wood lot takes place upon such a basis, and the quantity of merchantable timber or wood standing upon the lands is the important element considered by the prospective purchaser and determines ultimately the price he will pay for the same, the

price paid cannot well be taken to be very decisive of the value of another wood lot, unless it were shown clearly by the evidence that the lands were very similar in almost every respect. The price paid for one wood lot in the territory in question may not be of great assistance in the case of another wood lot, of the same area, because of diversities as to quantity, variety, quality and value of the wood thereon, and other possible diversities. Therefore, as the market value of the several parcels of lands taken here would, at the time of expropriation, be influenced by the value of the merchantable wood on the same, the evidence given at the trial in respect of each wood lot in question is, I think, on the whole to be preferred to that relating to the prices paid for other lots, at other times, and at other places, and therefore I do not propose to enter into any detailed discussion of the evidence given concerning the sales of lands said to be similar to the lands expropriated by the Commission. But that does not mean that I propose to disregard that evidence entirely because it is of some general assistance. It gives one a general idea of the general character and value of wood lots in the territory in question, the basis upon which the values of such wood lots in the open market have been established, and the stumpage value of standing wood of certain varieties at the time of the transaction.

Before discussing in some detail the evidence presented in the particular case before me a few observations might properly be made explanatory of the general character of the evidence submitted in all the cases, on behalf of the parties thereto. The witnesses called on behalf of each defendant to establish the market value of the lands taken spoke of the same as being worth so much per acre, and then they valued separately the wood on the land, and the total was claimed to represent the market value of the lands in each case. In some cases additional values were claimed on the ground of the special adaptability of the lands for purposes other than that for which they had been used, but those claims I have already disposed of. As I have already stated it is the land that is to be valued, but the wood may give a value to the land. It was the land and not the wood that was expropriated. The defendants cannot get the market value of their lands, and in

1939
 FEDERAL
 DISTRICT
 COMMIS-
 SION
 v.
 MARY LEAHY
 ET AL.
 Maclean J.

1939
 FEDERAL
 DISTRICT
 COMMIS-
 SION
 v.
 MARY LEAHY
 ET AL.
 Maclean J.

addition thereto the market value of the standing wood. While the evidence of the defendants was given that appearance, and the amounts claimed would rather indicate that, yet, I think, the intention was to establish a figure that, in the minds of the defendants, represented the market value of the lands and everything that went with them. The evidence tendered on behalf of the Commission was put in another form. The witnesses for the Commission sought to establish the market value of the lands by estimating the quantity of the standing merchantable wood, and valuing the same at what they claimed to be the stumpage rates current in or about the territory in which the lands lie, and that, they said, would represent the market value of the land; and they testified that the land with the merchantable wood removed would have no market value at all, and would not be saleable. They did not include in their estimates of quantities any standing trees less than four inches in diameter which, they stated, if cut would have no realizable value because unmarketable, nor would they add anything to the market value of the lands if for sale in the open market. The mere valuation of the merchantable wood on a piece of land would not, I think, be a proper principle upon which to proceed to ascertain the value of the lands, and such values could not be regarded as conclusive of the value of the land, unless it were shown that the lands would have no market value at all if the marketable wood were once removed. It was stated by the witnesses for the Commission that "wood lots" in the area in question, and in contiguous areas, were always bought and sold on the basis of the estimated stumpage value of the merchantable timber and wood thereon, and that such estimates determined the market value of lands of that character. Now, that was the general character of the evidence given on behalf of the Commission, that was its method of approach to the question of the market value of these lands, and that will explain why so much emphasis was placed upon the standing wood on the lands, and so little upon the lands as lands; the purpose however was made clear.

I may now proceed to a consideration of the case immediately before me, which involves land containing fifty acres more or less, inherited by Mary Leahy the wife of

Michael McCaffery, and Margaret Leahy the wife of Richard Mulvihill, the respective husbands being farmers. There have been no transactions in these lands for many years, and there was no evidence as to the price paid by the owner through whom the defendants came into possession of the same. The amount of compensation claimed by the defendants at the trial was \$8,260 while the amount tendered by the Commission was \$800. The land is of the general character I have earlier described, that is to say, it is a wood lot and substantially nothing else, but no wood has been cut or removed from the property in recent years. Mr. McCuaig, the chief witness for the defendant, estimated that the land contained about 100,000 feet, board measure, of merchantable standing timber which he valued at \$13 per thousand feet, altogether \$1,300; 1,200 cords of hardwood of a good quality which he valued at \$4 per cord, a total of \$4,800; and 280 cords of mixed wood, of a lower grade, which he valued at \$2 per cord, amounting to \$560. In addition to this he gave a value of \$15 per acre to forty acres of the whole parcel of land, and \$100 per acre to ten acres which surround the greater portion of a small lake within the lands, this value being claimed on the ground that the same was suitable for residential purposes, but I have already expressed the opinion that there was no evidence to support such a claim. The total value given to the lands by Mr. McCuaig was \$8,260. The evidence submitted on behalf of the owners, I think, so much exaggerated the value of the lands that its usefulness is almost entirely lost, a practice not uncommon with expert witnesses but nevertheless regrettable because in the result it renders little assistance to the Court in determining the value of the property in controversy. A witness called on behalf of the Commission, Mr. McKeagg, carefully examined the lands in question and he estimated there were standing on the same about 14,000 feet, board measure, of merchantable timber, which he valued at \$10 per thousand feet on the stump. He estimated that there were in addition 550 cords of hardwood of a good quality, the stumpage value of which he estimated at \$1.25 per cord, and 200 cords of mixed wood, of a lower grade, which he valued at 75 cents per cord, making altogether a total value of \$975 for all the merchantable wood on the land

1939
 FEDERAL
 DISTRICT
 COMMISSION
 v.
 MARY LEAHY
 ET AL.
 Maclean J.
 —

1939
 FEDERAL
 DISTRICT
 COMMIS-
 SION
 v.
 MARY LEAHY
 ET AL.
 Maclean J.

at the time of the expropriation. Mr. McKeagg impressed me as being a very competent and independent witness, and by experience highly qualified to speak of wood lot values, and the stumpage values of merchantable wood that might be found thereon. His evidence was, in my opinion, free from advocacy which is so frequently the great defect of opinion witnesses, and he would have no motive for depressing the value of these lands. Mr. McKeagg is in no way attached to the Commission, and his evidence as to values was a little higher in all cases but one than that stated by other witnesses called on behalf of the Commission. I think the evidence of Mr. McKeagg may be accepted as approximating fairly well the quantity and quality of the merchantable wood on the lands, and the stumpage values of the same current in the market at the date of expropriation, which, in his opinion, was the only thing that gave any value at all to the lands. He gave no value to wood that he considered not merchantable, wood that was less than four inches in diameter, and certain other woods, which, he stated, could not be profitably marketed. If certain wood found on a lot of land at the date of expropriation is not merchantable and imparts no value to the land at that date, then it might be argued, and with some force, that the non-merchantable wood should not be considered in ascertaining the present value of the land, on the principle that it is the value of the lands at the date of expropriation that is to be determined, and not their value at a future date. But that view of the matter fails to take into consideration other factors that I do not think can be entirely excluded from consideration.

While the value of the merchantable wood, on what is usually known as a wood lot, is of course an important consideration in determining the market value, yet, I think, it is not conclusive of the value of the lands, though in the practical sense it may be in most cases. It is possible that some persons, other than those who acquire wood lands for the purpose of cutting and removing the merchantable wood therefrom, might consider that the land had a value in excess of that represented by the stumpage value of the standing merchantable wood, and that some wood not merchantable in the open market for certain purposes had a value for other purposes, for example, the

purposes of the owner. Wood that was not merchantable in the market because of its size, quality, or immaturity, or something else, might be utilized with complete satisfaction for the purposes of the owner, and that, I think, cannot be disregarded in estimating the value of lands taken from the owner. Estimating the quantity, quality and value, of the standing wood on a piece of land may be desirable and necessary from the viewpoint of a prospective purchaser who has in contemplation the acquisition of lands for the purpose of getting title to the merchantable wood thereon, and it may be the major factor in ascertaining the value of wood lands generally, and in some cases it may very well approximate the fair market value of the lands and their value to the owner, but that method of valuing lands might not be applicable in all cases, and it might work an injustice in some cases. The principle which I am discussing may be of little importance in this case, or in the other four cases, but I do not wish to be understood as acceding to the principle that the market stumpage value of merchantable wood on a piece of land is conclusive of the fair market value of the land itself, or that it is a principle to be followed generally in estimating the value of lands compulsorily taken from the owner.

I have taken into consideration the extent and physical characteristics of the lands in question, their accessibility, the fact that the lands had not been cut upon in recent years and that they contained a substantial quantity of marketable wood, the fact that portions of the land are not of the same value as other portions, and I have taken into consideration the value of any wood growing on the land which might not fall into the category of "merchantable wood" but which might have a use and value to the owners, for a variety of purposes. I have taken into consideration all these elements and I have concluded to fix the compensation at \$1,150, which amount, I think, would fairly represent the market value of the property at the date of expropriation. I therefore find the defendants entitled to compensation in the sum mentioned, with interest from the date of expropriation and their cost of this proceeding, and an order will issue in the form usual in such cases.

1939
 FEDERAL
 DISTRICT
 COMMISSION

v.
 MARY LEAHY
 ET AL.

Maclean J.

Judgment accordingly.

1939

BETWEEN:

Oct. 18-20,
23-27.

DOMINION TEXTILE COMPANY }
LIMITED

APPELLANT;

1940

May 13.

AND

THE MINISTER OF NATIONAL }
REVENUE

RESPONDENT.

*Revenue—The Business Profits War Tax Act, 1916, 6-7 Geo. V, Chap. 11—
An Act to revive and amend The Business Profits War Tax Act, 1916,
1 Geo. VI, Chap. 19—The Income War Tax Act, R.S.C. 1927, Chap. 97
—Valuation of capital stock of company under the provisions of The
Business Profits War Tax Act, 1916—Statute not retroactive unless
expressly so provided—Appeals allowed.*

Section 3 of The Business Profits War Tax Act, 1916, imposed a tax upon the profits earned in any business, owned by an incorporated company, in excess of 7 per cent per annum upon the capital employed in such business. The first accounting period thereunder began on January 1, 1915. S. 3 ceased to be in force after December 31, 1920.

S. 7 of the Act also provided: (ss. 1) "For the purpose of this Act the capital employed in the business of an incorporated company . . . shall be the amount paid up on its capital stock: (ss. 3) . . . the amount paid up on the capital stock of a company shall be the amount paid up in cash. Where stock was issued before the 1st day of January, 1915, for any consideration other than cash, the fair value of such stock on such date shall be deemed to be the amount paid up on such stock . . . In estimating the value of stock issued for any consideration other than cash, regard shall be had to the value of the assets, real and personal, movable and immovable, and to the liabilities of the company at the date as of which such value is to be determined. In no case shall the value of the stock be fixed at an amount exceeding the par value of such stock: (ss. 4) For the purposes of this Act, the actual unimpaired reserve, rest or accumulated profits, held at the commencement of an accounting period by an incorporated company shall be included as part of its capital as long as it is held and used by the company as capital, and dividends paid during an accounting period shall be considered as a reduction of unimpaired reserve, rest or accumulated profits." S. 13, ss 3 of the Act as amended by Chap. 34 of the Statutes of Canada for the year 1923 reads as follows: "Any person liable to pay the tax shall continue to be so liable and in case any person so liable shall fail to make a return as required by this Act, or shall make an incorrect or false return, and does not pay the tax in whole or in part, the Minister may at any time assess such person for the tax, or such portion thereof as he may be liable to pay, and may prescribe the term within which any appeals may be made under the provisions of this Act from the assessment or from the decision of the Board."

Appellant company was incorporated in 1905. The capital stock of appellant company was issued for a consideration other than cash. It was assessed for business profits tax for the years 1915 to 1919, both inclusive, and for income tax for the years 1920 to 1934, both

inclusive. These taxes were paid by appellant. The company was further assessed in 1937, for the years mentioned, under the authority of Chap 19 of the statutes of Canada for the year 1937, by which The Business Profits War Tax Act, 1916, and all amendments thereto, were revived and the provisions of The Income War Tax Act, R.S.C. 1927, Chap. 97, relating to appeals from assessments thereunder and the procedure connected therewith were made to apply *mutatis mutandis* to and in respect of appeals from assessments made under The Business Profits War Tax Act, 1916, and to the hearing and determination of such appeals. These assessments were confirmed by the Minister of National Revenue from whose decision the company appealed to this Court.

1940
 DOMINION
 TEXTILE CO.
 LTD.
 v.
 MINISTER OF
 NATIONAL
 REVENUE.

The Court found that the fair value of the common shares of the company on January 1, 1915, was their par value; that there should be considered as part of the company's capital for the purposes of The Business Profits War Tax Act, 1916, the sum of \$829,379 65 to the credit of profit and loss account on March 31, 1914, together with \$500,000 put to reserve prior to March 31, 1914, and the further sum of \$759,822 79 which was an additional reserve created by reason of the readjustment of inventory values made by the Department of National Revenue in its 1937 assessments, and now the subject of agreement between the parties; that the sum of \$500,000 put to reserve by the company in the 1919 taxation period as a protection against inventory losses due to an expected decline in the price of raw cotton and which operated as a reduction in the net profits for that period, had been considered and allowed by the taxing authorities and could not now be disturbed.

Held: That the value of the stock issued for a consideration other than cash should be estimated in a practical manner, with due regard to all the circumstances attending its issue, and on a basis not unfair, and perhaps even generous, to the taxpayer.

2. That where common shares issued as fully paid up are supported by net assets approximating their par value and have paid substantial dividends for eight consecutive years, at the same time leaving a substantial sum to the credit of profit and loss, such shares should be valued at their par value for the purpose of ascertaining the amount of capital employed in a business, under the provisions of The Business Profits War Tax Act, 1916.
3. That The Business Profits War Tax Act, 1916, as revived, has no retroactive effect.
4. That since the company made no inaccurate or false return and had fully paid any tax assessed upon it during any of the taxation periods in question, The Business Profits War Tax Act, 1916, s. 13 (3), did not authorize the assessments made by the Minister in 1937 pursuant to the provisions of an Act to revive and amend The Business Profits War Tax Act, 1916, being Chap. 19 of the Statutes of Canada for the year 1937.

APPEALS under the provisions of The Income War Tax Act and of an Act to revive and amend The Business Profits War Tax Act, 1916, from the decision of the Minister of National Revenue.

1940
 DOMINION
 TEXTILE CO
 LTD.
 v.
 MINISTER OF
 NATIONAL
 REVENUE.

The appeals were heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

W. N. Tilley, K.C. and C. G. Heward, K.C. for appellant.

L. M. Gowin, K.C., B. Bourdon, K.C. and W. S. Fisher for respondent.

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

THE PRESIDENT, now (May 13, 1940) delivered the following judgment:

These are appeals, consolidated, from decisions of the Minister of National Revenue affirming assessments made in 1937 upon the Dominion Textile Company Ltd., hereafter to be referred to as "the Company," under The Business Profits War Tax Act, 1916 (hereafter to be referred to as "the Business Profits Act"), for the years 1915 to 1919, both inclusive, and under The Income War Tax Act for the years 1920 to 1934, both inclusive. The Company had been assessed for the business profits tax and the income tax for the years just mentioned; the said assessments for such taxes were in due course paid by the Company; the assessments herein appealed from were in the nature of revisions of those assessments and it will be convenient to refer to them as such even if that be not strictly accurate. The revision of the assessments for the business profits tax purport to have been made under the authority of Chap. 19 of the Statutes of Canada for the year 1937, entitled "An Act to revive and amend The Business Profits War Tax Act, 1916" (hereafter to be referred to as "The 1937 Act"), and the Business Profits Act, and the revision of the assessments for the income tax purport to have been made under the provisions of The Income War Tax Act.

Generally, it is the contention of the Company that it had been already assessed for the business profits tax and the income tax for the respective periods mentioned; that the said taxes were in due course paid and the receipt therefor acknowledged on behalf of the Minister of National Revenue (hereafter to be referred to as "the Minister"); and that there were no grounds of fact or law

for the revision of the assessments for the business profits tax made upon the Company because that tax had already been assessed in conformity with the statute and paid. It is also the contention of the Company that if the Minister is authorized to open up any assessments made under the taxing statutes mentioned and which assessments of the tax had been paid, the Company is, of right, entitled to raise any question of fact or law relative to such assessments, and that does not appear to be contested.

I might observe that the result of the revision of the assessment made in each of the twenty accounting periods mentioned was that in nine accounting periods the Company's assessment was reduced below the amount of the original assessment, and in the remaining eleven periods it was increased.

The inventories of the Company, a manufacturer of textiles, normally consisted of three classes, namely: raw cotton and other raw materials, goods manufactured and goods in process of manufacture, and stores and supplies. The officers of the Minister in revising the assessments in controversy departed from the method pursued by the Company throughout the years in question in valuing its inventories, and they valued such inventories, including goods in process of manufacture, on the basis of the lower of cost or market. The Company, in respect of its raw cotton inventories, followed the method which it had pursued prior to the introduction of the Business Profits Act in 1916, but, as I understand it, a different method was followed in respect of goods in process of manufacture, and, I think, goods manufactured. It is not necessary now to describe the method pursued by the Company in respect of the valuation of its inventories, and I would infer that it makes little difference in practice what reasonable method is adopted provided consistency is observed in the application of the method. Accordingly, the Company's method of valuing its inventories being varied by the Minister in the course of revising the assessments for each of the accounting periods in question, the amount of the capital employed by the Company in its business, the annual profits earned by it, and ultimately the amount of the tax assessed against the Company, would be varied up or down by this change in the method of inventory

1940
 DOMINION
 TEXTILE CO.
 LTD.
 v.
 MINISTER OF
 NATIONAL
 REVENUE.
 Maclean J.

1940
 DOMINION
 TEXTILE CO.
 LTD.
 v.
 MINISTER OF
 NATIONAL
 REVENUE.
 Maclean J.

valuation. The correctness of the basis employed by the Minister in the revaluation of the Company's inventories, the Company in its notice of dissatisfaction contested, and this issue threatened a protracted inquiry upon the appeals. At an early stage in the hearing of the appeals the parties very properly attempted to agree upon some basis for the valuation of all the Company's inventories, including goods in process of manufacture, for the whole period from March 31, 1915, to March 31, 1934, and in the end an agreement was reached and the same was committed to writing, and it is as follows:

With the approval of the Court, the parties herem agree as follows:

(1) That for the whole period comprising the Appellant's financial years ending March 31st, 1915, to March 31st, 1934, both inclusive, all Inventories of the Appellant, including goods in process, be valued at the lower of cost or market and that, in relation to such inventories, the Respondent's figures as to the market price per pound and the cost price per pound (as shown in column headed "Average Inventory price as adjusted by Dept." in Exhibit No. 1 filed with the Answer of the Respondent) be adopted, the whole without prejudice to and under reserve of all the other contentions of the parties, whether of fact or of law, including but without limiting the generality of the foregoing, the contentions of the parties in regard to the invested capital of the Appellant and the contentions of the parties in regard to the amount of \$500,000 for 1919 mentioned in par. 40 of the Answer of the Respondent.

(2) That if the result of the valuation of the inventories on the foregoing basis and of the adjudication of the Court upon the other contentions of fact and of law of the parties is that, in respect of the whole period under review, the Appellant owes any balance of taxes to the Crown, the Appellant will pay such balance forthwith after such valuation and adjudication, and if the result is a credit in the Appellant's favour the amount of that credit will be credited against Income Taxes for years subsequent to 1934. Should any amount be thus found due by the Appellant, it will bear interest at five per cent per annum from August 6th, 1937.

(3) The parties agree that the quantities or volumes of raw cotton, dealt with in the assessments before the Court, include the quantities or volumes mentioned in Exhibit "A," attached hereto and do not include the quantities or volumes referred to in the next succeeding paragraph.

(4) That the quantities of raw cotton in public warehouses in 1927, 1929, 1930, 1931, 1932 and 1934 are not included in the inventories referred to in the immediately preceding paragraph.

It will be seen from this agreement that the inventories of the Company, including goods in process, from March, 1915, to March, 1934, both inclusive, are to be valued at the lower of cost or market, but without prejudice to all the other contentions raised by the parties, whether of

fact or of law, including the contentions of the parties in regard to the invested capital of the Company, and in regard to the amount of \$500,000 mentioned in paragraph 40 of the Answer of the Respondent. I was led to expect that the parties would be able to agree in the result of the valuation of the inventories upon the basis indicated in the agreement, and there should be no reason for their not being able to do so; however, in the event of the parties failing to agree in the result of a revaluation of the inventories of the Company, on the basis provided by the agreement, I now direct a Reference to the Registrar for that purpose, and the matter of costs of that Reference will be reserved pending the Report of the Registrar. That, for the present at least, will dispose of that issue.

The other questions of fact or law to be decided here have reference to (1) the amount of capital employed by the Company in its business, including unimpaired reserves, rest, or accumulated profits, under the Business Profits Act, (2) whether an amount of \$500,000, put to reserve by the Company in the accounting period of 1919, in view of anticipated losses in raw cotton inventories, was considered and allowed by the taxing officers of the Minister for taxation purposes in the assessment for that period under the Business Profits Act, and if so whether or not that allowance may now be disturbed, and (3) whether the 1937 Act, and the Business Profits Act which the former purports to revive, authorize a reconsideration and revision of any assessment levied against and paid by the Company under the Business Profits Act, in the periods from 1915 to 1919 inclusive. Should I find that the assessments for the business profits tax made upon the Company, for the periods mentioned, cannot be opened up and fresh assessments made, then the questions raised for determination and which I have just above numbered (1) and (2) will disappear, but that will not disturb the results deriving from the revaluation of the inventories under the agreement mentioned. However, I propose discussing and pronouncing upon the first two points, and in the order stated, regardless of the construction to be put upon the 1937 Act and the Business Profits Act, the third point. In the event of an appeal I think it is desirable that I pursue such a course.

1940
 DOMINION
 TEXTILE Co.
 LTD.
 v.
 MINISTER OF
 NATIONAL
 REVENUE.
 Maclean J.

1940
DOMINION
TEXTILE Co.
LTD.
v.
MINISTER OF
NATIONAL
REVENUE.
Maclean J.

It will be desirable to refer to the origin and early history of the Company and it will be convenient to do so at this stage. This is of importance because the favourable development of the financial position of the Company from its inception in 1905 down to January 1, 1915,—the latter an important date, as will later appear—enters into one or more of the issues here to be decided. This requires a reference to four textile companies, operating, I understand, chiefly in the Province of Quebec, the control of which concerns was acquired by the Company in 1905 in the manner I am about to relate. Late in 1904 a group of men formed a syndicate for the purpose of making an offer to the shareholders of the four textile companies to purchase their shares in the capital stock of such companies. These four companies were the Dominion Cotton Mills Company Ltd., the Merchants Cotton Company Ltd., the Montmorency Cotton Mills Company Ltd., and the Colonial Bleaching & Cotton Company Ltd. The Syndicate deposited with The Royal Trust Company the sum of \$1,000,000 as evidence of good faith and ability to implement the terms of the offer about to be made. The offer of the Syndicate, made early in 1905, through the agency of the Royal Trust Company, was to purchase the said shares at a stated percentage of their par value, which varied according to the company to which the offer applied, paying for the same in the bonds and preference shares of a new company to be formed, in designated proportions. It was also a term of the offer that the Syndicate would purchase for cash, at their par value, preference shares of the Company to be formed in the total amount of \$500,000, and would also pay to the new company the sum of \$500,000, both of which sums were to be paid out of the \$1,000,000 deposited with the Royal Trust Company. In due course the offer was submitted to the shareholders and the Syndicate acquired a majority of the shares in each of the four companies, or the right to acquire the same, and a new company was formed under the name of the Dominion Textile Company Ltd., the Company herein.

The Syndicate then offered to sell to the Company 24,467 shares of the capital stock of the Dominion Cotton Mills Company Ltd., out of a total issue of 30,336 shares;

14,118 shares of the capital stock of the Merchants Cotton Company Ltd., out of a total issue of 15,000 shares; 9,693 shares of the capital stock of the Montmorency Cotton Mills Company Ltd., out of a total issue of 10,000 shares; and 2,368 shares of the capital stock of the Colonial Bleaching and Printing Company Ltd., out of a total issue of 3,000 shares, all the shares of the said four companies being of the par value of \$100 each, and further to pay to the Company the sum of \$500,000 in cash; in consideration therefor the Company was required to issue, allot and deliver to the Syndicate, or its nominees, 12,222 fully paid-up and non-assessable preference shares of the Company of the par value of \$100 each (in addition to the 5,000 preference shares which the Syndicate was to purchase and pay for in cash, \$500,000), \$2,759,000 of the Company's six per cent twenty-year bonds, and 50,000 of the Company's fully paid-up and non-assessable common shares. The offer of the Syndicate was accepted and in due course carried out. Apparently the \$500,000 which the Syndicate agreed to pay to the Company was treated as part of the consideration for the 50,000 common shares of the Company to be allotted and delivered to the Syndicate. It was so treated in the accounting of the Company, and so described to me by counsel on the hearing of the appeals. Whether that view is in conformity with the agreement between the Syndicate and the Company is doubtful, but that is of little consequence, because, in any event, the Syndicate was to receive, in addition to the bonds and preference shares mentioned, the Company's total issue of common shares, fully paid up and non-assessable, in consideration for the shares in the four old companies to be sold and transferred to the Company, and the total issue of the Company's common shares was transferred to the Syndicate or its nominees.

When the agreement between the Syndicate and the Company had been fully consummated the shareholders of the old companies held the bulk of the Company's senior securities, and the members of the Syndicate all the shares of its capital stock. Thereafter the Company acquired from time to time the balance of the outstanding shares of the four textile companies. Complete ownership of all the shares of the Montmorency Cotton Mills Com-

1940
 DOMINION
 TEXTILE Co.
 LTD.
 v.
 MINISTER OF
 NATIONAL
 REVENUE.
 Maclean J.

1940
 ~~~~~  
 DOMINION  
 TEXTILE Co.  
 LTD.  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE.  
 \_\_\_\_\_  
 Maclean J.  
 \_\_\_\_\_

pany Ltd., and the Colonial Bleaching & Printing Company Ltd. was acquired by March 31, 1906, of the Merchants Cotton Company Ltd. by December 31, 1912, and of the Dominion Cotton Mills Company Ltd. by December 22, 1916. By January 1, 1915, the Company had acquired 98 per cent of the issued shares of the Dominion Cotton Mills Company Ltd., and the remaining two per cent was acquired by December 22, 1916.

It was a term of the agreement between the Syndicate and the Company that if the former transferred to the latter a larger amount of the shares in each or any of the four textile companies than that stipulated in the offer of the Syndicate, the Syndicate was entitled to receive an additional amount of the bonds and preferred stock of the Company, proportionate to the additional number of shares so transferred by the Syndicate. As the complete ownership of the shares of each of the four old companies was acquired, the assets and liabilities were taken into the accounts of the Dominion Textile Company Ltd. at the amounts in which they were formerly carried in the accounts of the subsidiary company.

From an exhibit put in evidence on behalf of the Minister it would appear that in 1904 the financial position of the four textile companies mentioned was not very satisfactory. While the four companies showed a combined surplus of \$932,831.72, and a combined net worth of capital and surplus amounting to \$6,770,631.72, yet the net working capital position showed a deficit of some \$108,000, they were each heavily indebted to the banks, and apparently an attempt to bring in fresh capital had proven unsuccessful. The earnings and dividend record of the four companies was not an encouraging one. The Dominion Cotton Mills Company had paid no dividend since 1902, the Merchants Cotton Company none for several years, the Montmorency Cotton Company only one payment of 1 per cent since 1901, and the Colonial Bleaching & Printing Company only one payment of 6 per cent since its incorporation in 1899. During the calendar year 1904 the Dominion Cotton Mills Company had operated for ten months of its fiscal year, as I understand it, at a loss of \$164,000 in round figures; the Merchants Cotton Company at a loss of \$277,000 during twelve months of



operation; the Montmorency Cotton Company at a loss of \$148,000 during five months' operation; and the Colonial Bleaching & Printing Company at a profit of \$477 during a period of nine months' operation. As of March 31, 1905, the combined fixed assets of the four companies were carried in the several balance sheets at \$10,892,706.17, their combined bonded indebtedness was \$4,013,660, and their combined issued capital stock was \$5,837,800.

The Company, having acquired the control of each of the four old companies, through a holding of a majority of shares in each of them, went into operation in April, 1905. It had control of over \$10,000,000 worth of land, buildings and machinery, other assets in a substantial amount, and it had in its treasury a working capital of \$1,000,000 in cash received from the Syndicate; that is to say, \$500,000 from the sale to the Syndicate of 5,000 preference shares, and \$500,000 paid the Company in cash by the Syndicate for the consideration I have already mentioned and explained.

For the fiscal year ending March 31, 1915, the nearest accounting period to January 1, 1915, when it became necessary to estimate the value of the shares of the capital stock of the Company under the provisions of The Business Profits Act, as I shall later explain, the balance sheet of the Company showed the total assets at \$15,276,538.84, which included \$10,775,941.40 for "land, buildings, machinery, stock of the Dominion Cotton Mills Company, and good will"; \$2,295,801.40 for raw cotton, stock manufactured and in process of manufacture, and \$2,239,795.80 in open accounts, cash on hand and supplies, etc., and there was to the credit of profit and loss account \$881,926.30, after payment of interest on bonds, dividends on preference stock, and a dividend of six per cent on the common stock. The Company at that date being in possession of but 98 per cent of the capital stock of the Dominion Cotton Mills Company, a minority interest of two per cent having refused to exchange their shares of the capital stock of that corporation for the securities of the Company, the Company was obliged to put through an arrangement whereby it leased the mills of the Dominion Cotton Mills Company for operating purposes, until such time as all the shares therein were surrendered. It was for this reason

1940  
 DOMINION  
 TEXTILE Co.  
 LTD.  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE.  
 Maclean J.

1940  
DOMINION  
TEXTILE CO.  
LTD.  
v.  
MINISTER OF  
NATIONAL  
REVENUE.  
Maclean J.

that the Company's balance sheet for that year was obliged to reflect this situation by including with land, buildings and machinery, the shares of the capital stock of the Dominion Cotton Mills Company acquired and held by it on the asset side of the balance sheet. The evidence would seem to indicate that the Company gave a book value of approximately \$2,228,000 to "good will." At this time the outstanding bond issue of the Company (including a bond issue of the Montmorency Cotton Mills Company) was \$3,697,775, and its issue of preferred stock was \$1,925,975.

The principal issues to be decided here arise under the provisions of the Business Profits Act. It will be necessary now to refer to the material provisions of that Act which imposed a tax upon the profits earned in any business, in excess of seven per cent per annum upon the capital employed in that business. While the Business Profits Act was enacted in May of 1916 the first accounting period thereunder began on January 1, 1915. Section 3 provided that:

There shall be levied and paid to His Majesty a tax of twenty-five per centum of the amount by which the profits earned in any business exceeded, in the case of a business owned by an incorporated company, the rate of seven per centum per annum, and, in the case of a business owned by any other person, the rate of ten per centum per annum upon the capital employed in such business. Such tax shall be levied against and paid by the person owning such business for each and every accounting period ending after the thirty-first day of December, one thousand nine hundred and fourteen.

Sec. 3 was amended by Chap 6 of the Statutes of Canada, 1917, so as to provide that where the profits exceeded fifteen per centum per annum, the tax was to be fifty per centum with respect to all profits in excess of the said fifteen per centum but not exceeding twenty per centum per annum, and where the profits exceeded twenty per centum per annum the tax was to be seventy-five per centum with respect to all profits in excess of the said twenty per centum. Sec. 3 of the Act ceased to be in force on December 31, 1920, and to this I shall have occasion to refer later.

Sec. 7 relates to the matter of capital and reserves and s.s. (1), (3) and (4) are of importance here, and, as amended, by Chapter 6 of the Statutes of Canada, 1917, and Chap. 10 of the Statutes of Canada, 1918, read thus:

1. For the purpose of this Act the capital employed in the business of an incorporated company having its head office or other principal place of business in Canada shall be the amount paid up on its capital stock.

\* \* \* \*

3. For the purposes of this Act the amount paid up on the capital stock of a company shall be the amount paid up in cash. Where stock was issued before the first day of January, one thousand nine hundred and fifteen for any consideration other than cash, the fair value of such stock on such date shall be deemed to be the amount paid up on such stock; and where stock has been issued since the said first day of January for any consideration other than cash, the fair value of the stock at the date of its issue shall be deemed to be the amount paid up on such stock. In estimating the value of stock issued for any consideration other than cash, regard shall be had to the value of the assets, real and personal, movable and immovable, and to the liabilities of the Company at the date as of which such value is to be determined. In no case shall the value of the stock be fixed at an amount exceeding the par value of such stock.

4. For the purposes of this Act, the actual unimpaired reserve, rest or accumulated profits, held at the commencement of an accounting period by an incorporated company, shall be included as part of its capital as long as it is held and used by the company as capital, and dividends paid during an accounting period shall be considered as a reduction of unimpaired reserve, rest or accumulated profits.

Sec. 7, as amended, makes it clear that "the actual unimpaired reserve, rest or accumulated profits, held at the commencement of an accounting period \* \* \*" shall be included as part of the capital of an incorporated company as long as it is held and used by the company as capital, but any dividend paid during an accounting period shall be considered as a reduction of unimpaired reserve, rest or accumulated profits. This section required, it will be observed, that the common shares of the Company be valued as of January 1, 1915, the beginning of the first accounting period under the Business Profits Act, because such shares were issued for a consideration other than cash. That valuation was necessary in order to determine precisely the amount of capital employed in the business of the Company.

Sec. 10 of the Act required every person liable to taxation thereunder to make a return, on or before the first day of July in each year, to the Minister, in the form prescribed, for each accounting period for which he was liable to taxation. Sec. 11 empowered the Minister to require a further return, or additional information, or the production of account books, invoices, statements, etc., if he so desired. Sec. 13 required the Minister, on or before

1940  
 DOMINION  
 TEXTILE Co.  
 LTD.  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE.  
 Maclean J.

1940  
 DOMINION  
 TEXTILE CO.  
 LTD.  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE.  
 Maclean J.

the first day of September in each year to determine the amount payable for the tax, and to send by registered mail a notice of assessment to the taxpayer notifying him of the amount payable for the tax. Sec. 13 (3) as originally enacted provided that "any person liable to pay the tax shall continue to be so liable for the period of three years from the time at which such tax would have been payable." This subsection as amended by Chap. 34 of the Statutes of Canada, 1923, reads as follows:

Any person liable to pay the tax shall continue to be so liable and in case any person so liable shall fail to make a return as required by this Act, or shall make an incorrect or false return, and does not pay the tax in whole or in part, the Minister may at any time assess such person for the tax, or such portion thereof as he may be liable to pay, and may prescribe the time within which any appeals may be made under the provisions of this Act from the assessment or from the decision of the Board.

Sec. 9 of the Act provided that the Governor in Council might appoint a Board of Referees, and s. 15 provided that this Board should act as a Court of Revision, and should hear and determine any appeal made by a taxpayer under the Act. Sec. 16 provided that:

Any person objecting to the amount at which he is assessed, or as having been wrongfully assessed, may, personally or by his agent, within twenty days after the date of mailing of the notice of assessment, as provided in section thirteen of this Act, give notice in writing to the Minister in form K of the schedule to this Act that he considers himself aggrieved for either of the causes aforesaid, otherwise such person's right to appeal shall cease and the assessment made shall stand and be valid and binding upon all parties concerned notwithstanding any defect, error or omission that may have been made therein, or in any proceeding required by this Act or any regulation hereunder: Provided, however, that the Minister, either before or after the expiry of the said twenty days, may give a taxpayer further time in which to appeal.

No appeals, during the accounting periods in question, were made by the Company.

One of the questions to be decided here relates to the matter of the amount of capital employed by the Company in its business at the beginning of each accounting period during which the Business Profits Act was in force, and particularly at the beginning of the first accounting period, March 31, 1914, to March 31, 1915. If this is correctly determined as of the beginning of the first accounting period, no difficulty should arise in the following periods as any alterations would involve only subtractions for deductions in the capital employed, or additions on account of sur-

pluses earned and reinvested in the business, less of course any dividends paid out of such surpluses. The determination of the quantum of capital employed in a business, under the Business Profits Act, was always of the greatest importance to the taxpayer because it was to his interest that the capital employed should be computed as high as possible, for the reason that the capital employed was exempt from the business profits tax to the extent of seven per cent thereon, annually. In computing the capital employed by the Company for the first accounting period, from March 31, 1914, to March 31, 1915, it became necessary under the provisions of the Business Profits Act, to estimate the fair value of the shares of the Company's common stock as of January 1, 1915, because they had been issued in 1905 for a consideration other than cash. It was also necessary to ascertain the amount of any "actual unimpaired reserve, rest or accumulated profits" reinvested in the business because, under s. 7 (4) of the Act, the same was to be included as part of the Company's capital. And it is the question of the quantum of capital employed by the Company in its business, in its first accounting period, that I am about to discuss, and this involves a consideration of (1) the fair value of the Company's issued common stock (there being no question as to the preference stock), the shares of which the Company claims should be valued at par, and (2) the quantum of actual unimpaired reserves and accumulated profits used in the Company's business, all as of the beginning of its first accounting period. The amount of the unimpaired reserves and accumulated profits, the Company claims, should include the surplus to the credit of the profit and loss account on March 31, 1914, which, it is claimed, was in the sum of \$829,379.65: the amount of \$500,000 put to a special reserve, "raw cotton reserves," some years prior to the introduction of the Business Profits Act; and the sum of \$759,822.79 which emerges as an addition to the Company's inventory values as of March 31, 1914, resulting from the revaluation of such inventories on the basis now set forth in the agreement between the parties, which addition would increase the amount of the unimpaired accumulated profits employed as capital in the business for the accounting period ending March 31, 1915, and which inventory readjustment is to be found in the Minis-

1940

DOMINION  
TEXTILE Co.  
LTD.v.  
MINISTER OF  
NATIONAL  
REVENUE.

Maclean J.

1940  
 DOMINION  
 TEXTILE CO.  
 LTD.  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE.  
 Maclean J.

ter's assessment made in 1937, in practically the same amount as that claimed by the Company. Now, all these items are to be considered in ascertaining the quantum of capital employed in the first accounting period, and the Company claims that these amounts should now be allowed if the assessments made upon it throughout the years mentioned, and paid, are to be opened up and readjusted. When the Company filed its first return, for the period ending March 31, 1915, under the Business Profits Act, it showed, in the form prescribed, its paid-up capital stock to be as follows: preferred stock \$1,925,975, common stock \$5,000,000, and it returned its unimpaired reserve, rest or accumulated profits at \$1,381,926.30, making a total of \$8,307,901.30 for its paid-up capital stock and its unimpaired reserves and accumulated profits. It will be seen therefore that the Company then valued its shares of common stock at par, \$100 each. When the Company was assessed for this period the paid-up capital stock was computed at \$5,675,975, this sum being reached by valuing the issued preference shares at par, and the common shares at \$75 per share, and at that it apparently remained until the assessment made in 1937. Notwithstanding that the Business Profits Act plainly enacted that the unimpaired accumulated profits should be included as part of the Company's capital, this seems to have been entirely disregarded by the taxing authorities when the assessment for the 1915 period came to be made. Any conjecture as to why this was permitted to occur without serious controversy would be unprofitable. So therefore there is now to be considered whether the value of the shares of the Company's common stock should be increased to their par value as claimed, and whether the surplus account, the raw cotton reserve, and the additional reserve created by the inventory adjustments, should be included in the unimpaired accumulated profits and therefore included as part of the Company's capital, all as of the beginning of the first accounting period, April 1, 1914.

I come now to the question as to what was the fair value to be given the fifty thousand common shares of the Company as of January 1, 1915. As already stated, the fair value of the common shares was estimated—arbitrarily, I think, in the first assessment at \$75 per share, the difference between that amount and the par value being \$1,250,000,

which represents the amount in dispute in respect of this point. The Act provided that the fair value of any issued capital stock, on January 1, 1915, should be deemed to be the amount paid up on such stock, if the same had been issued for a consideration other than cash, before that date. In estimating the value of capital stock issued for a consideration other than cash, the Act provided that regard should be had "to the value of the assets, real and personal, movable and immovable, and to the liabilities of the Company," but that would not exclude any other consideration properly applicable to that valuation. The Company was required to state separately in its return, the amount of its unimpaired reserves and accumulated profits, which it did, as I have already stated. All that the first assessment reveals is that the value of the capital stock was fixed at \$5,675,975, which amount was made up by valuing the preference shares then issued at par, and the common shares at \$75 per share. There is nothing to indicate therein that in reaching the value of the capital stock for taxation purposes the amount of any unimpaired accumulated profits was considered at all.

1940  
 DOMINION  
 TEXTILE CO.  
 LTD.  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE.  
 Maclean J.

It was the contention of the Company that on the basis of net asset value, including a certain allowance for goodwill, and a 98 per cent interest in the capital stock of the Dominion Cotton Mills Company, less the bonded indebtedness, all other liabilities, and the preference shares, the fair value of the common shares of the Company, on January 1, 1915, would be their par value, \$100 per share, beyond which they could not be valued. The Company's valuation of its common shares, on this basis, was put before me in the form following, and as of January 1, 1915:

|                                                                                                                                          |                |
|------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| Fixed assets and shares in the Dominion Cotton Mills Ld. (representing substantially the mills and equipment owned by that Company)..... | \$8,547,773 00 |
| Goodwill .....                                                                                                                           | 2,228,168 00   |
| Other assets, including inventories valued at not more than market value.....                                                            | 5,787,943 00   |
| <hr/>                                                                                                                                    |                |
| Gross assets .....                                                                                                                       | 16,563,884 00  |
| Deduct, liabilities .....                                                                                                                | 7,468,637 00   |
| <hr/>                                                                                                                                    |                |
| Net assets .....                                                                                                                         | 9,095,247 00   |
| Deduct, preferred shares .....                                                                                                           | 1,925,975 00   |
| <hr/>                                                                                                                                    |                |
| Net value common shares.....                                                                                                             | 7,169,272 00   |
| Net value per share.....                                                                                                                 | 143 40         |

1940  
 DOMINION  
 TEXTILE Co.  
 LTD.  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE.  
 Maclean J.

I might add that early in 1915 the fixed assets of the four textile companies ultimately acquired were appraised at \$10,872,133.68 by the Canadian Appraisal Company, and this included only lands, buildings, machinery and mill equipment, allowance being made for depreciation and obsolescence, but nothing for goodwill.

It was also the submission of the Company, that, on the basis of net asset value, but excluding any allowance for the intangible asset of goodwill, which would amount to about \$44 per share, the common shares would have a value only slightly below par, about \$99 per share. I refrain from engaging in a discussion of "goodwill," always difficult of valuation, particularly where there was no specific sale and purchase of "goodwill." In this case goodwill arises from a voluntary writing up of its capital by the Company above the amount which it gave for the assets acquired. However, I am far from saying that the capital assets of the Company were not of a greater value on January 1, 1915, than when they were acquired from the four old textile companies, including the 98 per cent interest acquired in the capital stock of the Dominion Cotton Mills Company at that date, but in my view of the matter it is not necessary to attach any definite value to any "goodwill," in disposing of the point presently under discussion.

It will be proper to look at the dividend record of the common stock of the company. The first common stock dividend was paid in the fiscal year ended March 31, 1908, being at the rate of five per cent. This rate remained in effect for the succeeding four years. In 1913 the common dividend was increased to 5½ per cent, and to 6 per cent in 1914 where it remained during the war years. Interest payments on the bonds and preferred stock were met during the first and subsequent years. In all the years, practically from the beginning of the Company's career, substantial amounts of surplus earnings were held and used in the business to build up reserves, the Company observing the practice of most industrial managements in paying out in dividends only a part of earnings realized, and reinvesting the balance in the expansion or improvements of productive facilities, or for other purposes of the Company. The common shares were quoted on the Montreal



Stock Exchange where they were listed, at an average price of \$82.75 throughout the year 1913 and quotations reached as high as \$89.50 per share in one week of that year. In the year 1914, from January 1 to July 28, the average quotation was \$76.75. On the latter date the Montreal Stock Exchange closed for business and did not reopen until January 25, 1915. It is possible, if not probable, that the war would have a disturbing effect on the market quotations of many listed shares, including that of the Company. In any event stock exchange quotations would not necessarily afford a reliable index of the fair value of the common stock of the Company, as of January 1, 1915.

In my opinion the fair value of the common shares on January 1, 1915, was their par value. The fact that substantial dividends were paid on such shares for the fiscal years 1908 to 1915, both inclusive, is, I think, alone pretty conclusive of the matter, and the net annual earnings were not only ample to pay such dividends but they were sufficient to enable the Company to add substantially to the credit of the profit and loss account, each year. It was not, I think, intended by the Act that the estimated fair value of the common shares should be determined on any narrow basis, or that the same should be ascertained by a meticulous appraisal of gross and net assets. That stock was issued as fully paid up, for what the Syndicate would at the time probably regard as a substantial consideration, in a transaction that could not be said to have been fictitious. I would interpret the Act as meaning that the value of the stock issued for a consideration other than cash should be estimated in a practical manner, with due regard to all the circumstances attending its issue, and on a basis not unfair, and perhaps even generous, to the taxpayer. If common shares issued as fully paid up are supported by net assets approximating their par value, and they have paid substantial dividends for eight consecutive years and at the same time leaving a substantial sum to the credit of profit and loss, as was the case here, that would appear to me to afford ample ground for valuing such shares at their par value for the purpose of ascertaining the amount of capital employed in a business, under the provisions of the taxing statute in question. My conclusion is that the common shares of the Company should

1940

DOMINION  
TEXTILE Co.  
LTD.

v.

MINISTER OF  
NATIONAL  
REVENUE.

Maclean J.

1940  
 DOMINION  
 TEXTILE Co.  
 LTD.  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE.  
 Maclean J.

have been valued at par from the beginning of the first accounting period and onwards, under the Business Profits Act.

The other three amounts which I have already mentioned as being claimed by the Company as proper additions to its "unimpaired reserve, rest or accumulated profits," as from the beginning of the first accounting period under the Business Profits Act, and therefore to "be included as part of its capital" under s. 7 (4) of the Business Profits Act for the same period, may, I think, be disposed of in brief terms. The Company contends that if the original assessments made upon it under the Business Profits Act may now be reopened and revised at all, then these amounts are now properly open for adjudication, and I see no successful answer to that contention. First, as to the amount of \$829,379.65. That amount was the balance at the credit of the audited and verified profit and loss account on March 31, 1914, and as such it appears in the annual statement of the Company for the year ending March 31, 1915, but the same was not included as capital in the first accounting period, in either the original or the revised assessment. There is no suggestion that this amount did not represent unimpaired accumulated profits used in the business. I cannot perceive of any sound reason why this amount should not have been included in the computation of the Company's capital, in the accounting period beginning March 31, 1914, and ending March 31, 1915. The Act, in the plainest terms possible, directs that this should be done, and I think it must now be done. And the same thing is to be said regarding the second amount of \$500,000, an amount put to a special reserve apparently some years before the Business Profits Act was enacted. It was an unimpaired reserve, and it was not suggested that at the beginning of the first accounting period and onwards that this amount was not used in the business of the Company; that amount must now, I think, be included as part of the capital of the Company, as at the beginning of the first accounting period, for the purposes of the Business Profits Act.

There is left, then, for consideration the third amount, approximately \$759,822.79. The Minister having adjusted, in the 1937 assessments, the amount allowed as capital

employed by the Company in the original assessment under the Business Profits Act, by adding approximately the sum just mentioned to the inventory values in the first accounting period, and which amount had its genesis in the adoption of the method of valuing the inventories now embodied in the agreement between the parties, it is now claimed that this amount must be included in the capital employed in all the accounting periods under the Business Profits Act. The effect of the stipulated method of valuing the inventories of the Company did, it is agreed, result in an addition to the unimpaired accumulated profits of the Company, as at the beginning of the first accounting period under the Business Profits Act, and it is claimed that this amount must now be considered as part of the Company's capital for the purposes of that Act, and with that I agree.

The three amounts mentioned must therefore, in my opinion, be considered as part of the capital of the Company for the purposes of the Business Profits Act, and these amounts cannot be extinguished or diminished by apportioning any of them, or portions of them, towards the valuation of the preference or common shares, as is suggested to have been done in the second and subsequent assessments under the Business Profits Act; this, in my opinion, could only be done in contravention of the express terms of the Act. There is no suggestion of this having been done in the first assessment, and it may in fact be said that it was not done. The first and last amounts above mentioned may not be strictly accurate though the first would not appear to be open to question; the last-mentioned amount closely approximates the amount mentioned in the assessment of 1937 as being in addition to the inventory values in consequence of the new method adopted for valuing the same. In any event there would not appear to be any reason why the parties should fail to agree upon the figures of the last amount, and the first as well if it should be in dispute. Should the parties fail to agree upon those two amounts they will be treated as falling within the Reference to the Registrar already mentioned, and what I there said as to costs will apply to those matters.

There is another important question for decision. For the accounting period of 1919, under the Business Profits

1940  
 DOMINION  
 TEXTILE Co.  
 LTD.  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE.  
 Maclean J.

1940  
DOMINION  
TEXTILE CO.  
LTD  
v.  
MINISTER OF  
NATIONAL  
REVENUE.  
Maclean J.

Act, the Company put to reserve out of profits the sum of \$500,000, referred to as a raw cotton reserve, in view of apprehended inventory losses chiefly in the next accounting period, and this was an addition to the raw cotton reserve of \$500,000 which I have already mentioned and discussed. It is not, of course, contended that the Company might not do this. It is always recognized that a prudent commercial man may put part of his profits made in one year to reserve, and carry forward that reserve to the next year, in order to provide against an expected or inevitable loss which he foresees will fall upon his business during the next year. The process is a familiar one. In practice, a raw cotton reserve, or any reserve, would be set up by a process of deduction from the inventory values, which would be reflected in the net profits for the accounting period concerned, the same being diminished by the amount put to reserve, but if that reserve were held and used in the business it would form part of the unimpaired reserves or accumulated profits under the Business Profits Act, and would for taxation purposes be considered as part of capital employed in the business. The immediate reason for putting to reserve the amount mentioned here was the imminence and almost certainty of a decline in the Company's raw cotton inventory values in 1920, the year in which the Company would normally make its return for the accounting period of 1919, under the Business Profits Act. I do not doubt that the Company was right in considering that a very substantial loss was inevitable in its cotton inventories in 1920. The price of raw cotton was as high as 42 cents per pound in April, 1920, and soon thereafter deflation set in and by the month of November of the same year it had fallen to about 17 cents. This alone involved an inventory loss of about two and a half million dollars to the Company. In April, 1919, the Company commenced reducing the selling price of its manufactured goods, and it also felt obliged to reduce the invoice prices of goods already sold and delivered, and, I think, the prices of goods under contract for future delivery. This was necessitated by the disturbed state of the raw cotton market. In point of fact this severe decline in cotton inventory values occurred before the Company had been assessed in 1920 for the 1919 period, but after

it had made its return for the 1919 period. Now the problem here is whether this reserve, made in view of apprehended future losses but which had not been suffered in the 1919 accounting period, can be claimed by way of a deduction in profits for the 1919 period.

The Company now claims that the amount of this reserve was upon consideration allowed as a deduction in net profits for the 1919 accounting period and is reflected in the assessment made for that period, and that as the tax was paid on the basis of this assessment it cannot now be disturbed. When the Company made its return for the 1919 period its balance sheet for the same period accompanied the return as was required, but not what is called its "trading account." In the preceding accounting periods it was the practice of the taxing authorities to request of the Company its trading account, some time after the receipt of its return and before proceeding to make the assessment; and the officers of the Company were aware that this would be required of them for the 1919 period, and, as expected, a request was made for the trading account early in November, 1920. With this furnished the taxing authorities would then have before them the Company's return, its balance sheet, and its trading account, for the 1919 period. The Company asserts that the amount in question put to reserve was orally explained to the Minister's principal taxing officers; that an examination of the balance sheet and the trading account would disclose it; that it was by the taxing officers considered and in due course allowed; that the computation of the assessment for the 1919 period included the allowance of this reserve made by the process of a reduction in inventory values and consequently by a deduction in profits for the same amount; that the tax was fully paid shortly after notification of the assessment, and that no question was ever raised concerning the basis of this assessment until 1937, seventeen years thereafter. The Company therefore claims that the assessment was made after a compliance with all the requirements of the statute on its part, after a full disclosure of all the relevant facts concerning the Company's computation of net profits for the 1919 period, and that the same is now binding upon all the parties concerned and is not now open to review.

1940  
DOMINION  
TEXTILE CO.  
LTD.  
v.  
MINISTER OF  
NATIONAL  
REVENUE.  
Maclean J.

1940  
 DOMINION  
 TEXTILE Co.  
 LTD.  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE.  
 Maclean J.

It is claimed on behalf of the Minister that the amount in question put to reserve was without the knowledge of the Minister's taxing officers, without disclosure being made to them, and that the same was not knowingly allowed in calculating the assessment; and for such reasons it is claimed that the revision of the original assessment made in 1937 was authorized by the Business Profits Act, and that it properly excluded the allowance of this reserve. This issue would seem to be largely a question of fact, and the facts must therefore be carefully examined.

The Company's balance sheet for the 1919 period would not by itself disclose that \$500,000 had been put to reserve but an examination of that balance sheet along with the trading account for the same period, as seems to have been the usual practice, would do so. The trading account is a document showing on one side the stock of raw material and manufactured goods on hand at the beginning of any period, the additions thereto during the same period, and the working expenses for the whole of the period; on the other side of the trading account there will be shown the amount of goods and merchandise sold during the period, and the amount of raw material, and goods manufactured or in process of manufacture, on hand at the end of the period. At the top of the left-hand side of the trading account in question is to be found the value of the stock of raw cotton and goods manufactured or in process of manufacture, on hand at the beginning of the accounting period, and the working expenses of the period. On the right-hand side of the trading account is to be found the value of goods and merchandise sold during the period, and the value of the stock of raw cotton, and goods manufactured or in process of manufacture, on hand at the close of the accounting period. The difference between both sides of the trading account would indicate the profits for the 1919 accounting period. On the right-hand side of the trading account we find the stock of raw cotton on hand at the end of the period to be valued at \$2,807,754.79. When we turn to the balance sheet for that period we find the raw cotton was valued at \$1,807,754.79, precisely \$1,000,000 less than the value stated in the trading account.

This would show that the raw cotton inventory had been reduced by \$1,000,000, that is, by the addition of the new reserve of \$500,000 to the old reserve of \$500,000 which was set aside sometime prior to 1916, making altogether a raw cotton reserve of \$1,000,000. This addition to the raw cotton reserve would, I think, be obvious to any person conversant with such matters, and who would be obliged to make an examination of the balance sheet and trading account in the course of making the assessment in question. It is difficult to believe that such a person could fail to observe this.

I should point out that the Company in its tax return for 1919 was claiming as a working expense the sum of \$400,000 expended in the reconstruction of a dam at one of the Company's mills, at Magog, P.Q., which had been swept away or damaged, and also a reduction in its raw cotton inventory values in the sum of \$439,943, which amount was based on a reduction of 4 cents per pound in the value of raw cotton on hand, as a provision against possible shrinkage in values. The Company was therefore at this time making three different claims for consideration by the taxing authorities,—that is to say, the addition of \$500,000 to the raw cotton reserve, an allowance of \$400,000 for expenses incurred in the restoration of the Magog Dam, and a reduction in its raw cotton inventories in the sum of \$439,943, in making the assessment against the Company for the 1919 accounting period.

The Company's officers were of the view that it would be necessary for some one to appear before the taxing officers, on behalf of the Company, in order to explain and support the three different matters or claims referred to, and accordingly its General Manager, Mr. Daniels, and its Secretary, Mr. Webb, proceeded to Ottawa in November, 1920. The Company claims that a conference then took place between the Minister's senior taxing officers and those two officers of the Company, and it claims that these three matters were subjects of discussion between such parties, but without any final conclusion then being reached. Within a few days after such conference the Company was notified in writing of the assessment for the 1919 period. The assessment allowed a portion of the

1940

DOMINION  
TEXTILE CO.  
LTD.

v.

MINISTER OF  
NATIONAL  
REVENUE.

Maclelean J.

1940  
DOMINION  
TEXTILE CO.  
LTD.  
v.  
MINISTER OF  
NATIONAL  
REVENUE.  
Maclean J.

claim in respect of the Magog Dam expenditures; it disallowed the item of \$439,000 in respect of the reduction in raw cotton inventories, and apparently assented to the action of the Company in putting to reserve the amount of \$500,000, which had the effect of reducing the net profits for the 1919 period by that amount. The Company accepted the assessment; at least it did not appeal therefrom, and within a week or so the Company paid the amount assessed, and there the matter stood unquestioned until 1937.

There is some evidence upon this point which must be referred to. When Mr. Daniels and Mr. Webb proceeded to Ottawa for the purpose mentioned they took along with them the trading account for 1919, which had been a little earlier requested by the taxing authorities, and without which an assessment could hardly be made, and they then interviewed Mr. Breadner, the Commissioner of Taxation, and Mr. McLaughlin, the Chief Auditor of Taxation. Mr. Breadner and Mr. Daniels are now both deceased, but Mr. Webb appeared as a witness upon the hearing of the appeal, and he testified that he discussed the matter of the expenditures made in connection with the Magog Dam with Mr. McLaughlin alone, and that the latter agreed to a certain disposition of this item, subject however to the approval of Mr. Breadner. Mr. Webb stated that with the Magog Dam item tentatively disposed of, he and Mr. McLaughlin proceeded to the office of Mr. Breadner where they found Mr. Daniels discussing with Mr. Breadner the matter of the \$500,000 reserve, and the item of \$439,000 pertaining to the reduction of 4 cents per pound in the raw cotton inventories. Mr. Webb testified that he heard Mr. Daniels discussing those two items with Mr. Breadner, and that Mr. Breadner in the end promised consideration would be given the same, and so these matters stood over for further consideration. I unreservedly accept the evidence of Mr. Webb, and I might add that he, having taken pension some years ago, is no longer Secretary of the Company. In the end, as I have already stated, when the assessment was made the item of \$439,000 was not allowed. The Magog Dam item was allowed to the extent of \$200,000, it being agreed that a further amount would be



allowed in the next accounting period, and no restoration of the \$500,000 reserve to the Company's assets, or its net profits, for the purposes of taxation, was made or in any way suggested. The Company accepted the assessment to mean that the amount of \$500,000 put to reserve had, for taxation purposes, the approval of Mr. Breadner.

In the Company's trading account for 1919, which was left with Mr. Breadner or Mr. McLaughlin on the occasion referred to, there is to be found the notation in pencil: "Carried on Balance Sheet at \$1,807,754.79," and this notation was directed to those figures in the trading account which state the value of the stock of raw cotton on hand at the end of the 1919 period, namely, \$2,807,754.79. There is also the notation: "Increase is caused by addition Cotton Reserve \$1,000,000," which would clearly indicate that the raw cotton reserve had been increased to \$1,000,000, and this would mean that the raw cotton on hand at the end of the period was carried on the balance sheet at \$1,000,000 less than in the trading account; the word "increase" in this notation would indicate that there was an addition of \$500,000 to the old raw cotton reserve. These notations, whoever made them, clearly show that the author was aware of the existence of a raw cotton reserve account, and the addition of \$500,000 to it in the 1919 period, making altogether \$1,000,000. Mr. Tilley contended that these notations were made by Mr. McLaughlin when the assessment for the 1919 period was under preparation, and that the same appeared to be in the handwriting of Mr. McLaughlin. Mr. Sharp, presently Assistant Chief Auditor, thought that these notations were made by him at the time the assessment revisions of 1937 were being considered, which, of course, is quite possible. If these notations were made by Mr. McLaughlin then the contention made on behalf of the Minister that the existence of the reserve in question was unknown to the taxing officers, or that it was ever brought to their attention, would, in my opinion, fall to the ground.

I cannot say that the notations on the 1919 trading account were made by Mr. McLaughlin, in view of the evidence of Mr. Sharp. I cannot form any opinion worth while from a comparison of the handwriting of Mr.

1940  
 DOMINION  
 TEXTILE Co.  
 LTD.  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE.  
 Maclean J.

1940  
DOMINION  
TEXTILE Co.  
LTD.  
v.  
MINISTER OF  
NATIONAL  
REVENUE.  
Maclean J.

McLaughlin and that of Mr. Sharp, such as there is before me. Mr. McLaughlin was not called at the hearing of this appeal, and while he was then no longer in the service of the National Revenue Department, yet he was available to the Minister as a witness. Mr. Tilley openly called my attention to the fact that Mr. McLaughlin was present in Court during the hearing of the appeal, and this remark was not at the time controverted by counsel for the Minister. In the circumstances, I think, Mr. McLaughlin should have been called on behalf of the Minister; he was the only person alive, with the exception of Mr. Webb, who would likely know whether Mr. Breadner had been informed of the reserve in question in the manner related by Mr. Webb, and whether or not Mr. Breadner had considered the same and had directed that it was to enter into the computation of the Company's net profits, for taxation purposes, in the period in question. It is of some significance that on the trading account for the preceding accounting period, 1918, we find the notation, "\$500,000 carried as a secret reserve since prior to taxation period," under which appear the initials of Mr. McLaughlin; this notation would go to show that Mr. McLaughlin was aware of the existence of the old raw cotton reserve in the accounting of the Company, and this he would no doubt ascertain by examining together the trading account and the balance sheet for that period, and he would no doubt then also learn that the balance sheet would show that the raw cotton inventories were carried at \$500,000 below the value stated in the trading account. I think it is therefore not unfair to assume that Mr. McLaughlin would not, in 1919, fail to see that this reserve account had been increased by \$500,000, by the familiar process, when the assessment for the 1919 period was being made. And the evidence would go to show that Mr. McLaughlin would become aware of this addition to the raw cotton reserve account through Mr. Daniels' discussion of the matter with Mr. Breadner; I cannot but believe that he knew it was the subject of discussion between Mr. Breadner and Mr. Daniels, and he would know of Mr. Breadner's final decision in the matter.

On the ground of probability there is, I think, some support for the claim that the amount of the reserve in

question was brought to the attention of the taxing officers for consideration, and that a decision for allowance or disallowance was expected. When the Company made its return in June of 1920, its officers had, as I have already stated, very strong grounds for apprehending a very substantial decline in the value of cotton stocks on hand, and they would, I think, be amply justified in regarding such a decline as inevitable. That would be the situation then confronting most all other large business concerns in Canada, and there is evidence to show that the creation of reserves from profits was then being allowed business concerns by the taxing authorities just to meet that situation, but apparently this was officially approved for taxation purposes only in cases where the reserve was set up in the accounting period in which the inventory losses were actually sustained. In the circumstances it would be probable, and not unexpected, that the Company would make an effort to minimize the effect of its apprehended inventory losses in the manner it did. Moreover, the Company, and other commercial concerns, had reasons for hoping that the Business Profits Act would not remain in force after the accounting period of 1919, and that there would be no further opportunity of putting to reserve out of profits any amount to mitigate the anticipated future losses. The 1919 accounting period was in fact the last under which the Company was taxed under the Business Profits Act, because thereafter its assessment under the Income War Tax Act exceeded any tax exigible under the Business Profits Act, and therefore it was the Income War Tax Act that applied to the 1920 and subsequent accounting periods.

I therefore feel bound to hold upon the material before me that the matter of the reserve in question was brought to the attention of the taxing officers, by officers of the Company, and particularly was it brought to the attention of Mr. Breadner by Mr. Daniels, before the assessment for the 1919 period was made, on the occasion mentioned by Mr. Webb. I have no doubt that if this matter were given favourable consideration by Mr. Breadner the same would be communicated to Mr. McLaughlin before the assessment was made, and that both Mr. Breadner and Mr. McLaughlin would at once realize that to allow this

1940  
 DOMINION  
 TEXTILE CO.  
 LTD.  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE.  
 Maclean J.

1940  
 DOMINION  
 TEXTILE Co.  
 LTD.  
 v  
 MINISTER OF  
 NATIONAL  
 REVENUE.  
 Maclean J.

reserve, for taxation purposes, would involve a corresponding reduction in inventory values, and in the net profits, for the 1919 period. I think it must be assumed that Mr. Breadner decided to allow the amount of this reserve to enter into the Company's computation of profits for the 1919 period, as a provision against anticipated losses in inventories, though not then actually incurred, and which anticipated losses Mr. Breadner would then view as inevitable. Had the amount put to reserve in this period been unknown to Mr. Breadner and his assistants, and had not been put before Mr. Breadner for consideration, it is possible that I would feel obliged to reach another conclusion upon this point, on the ground that the reserve was set up in view of an apprehended future loss which the Company had not actually suffered in the accounting period in which the amount was put to reserve out of profits. The amount of the reserve having been allowed for taxation purposes, and so understood by the Company, as I hold, and the assessed tax having been paid, I think the assessment must now stand and cannot be disturbed. That is my conclusion upon this point.

The final point upon which I am required to make a pronouncement is whether or not the Business Profits Act, as revived, empowered the Minister to reassess the Company for the several accounting periods for which it had already been assessed under that Act. If I conclude that there were no grounds for so doing, then, what I have hitherto said need no longer be considered, except as to any findings of fact which are relevant to the point I am about to discuss. If the assessments made prior to the enactment of the 1937 Act, are not open to review at the instance of the Minister, they are not open to review at the instance of the Company because it never appealed therefrom within the time and in the manner prescribed by the Business Profits Act. This refers only to the assessments made under the Business Profits Act, and would not disturb the terms of the agreement entered into between the parties in respect of the revaluation of inventories, or its intended consequences.

Section 1 of the Act of 1937, entitled "An Act to revive and amend The Business Profits War Tax Act, 1916," reads as follows:

1 Notwithstanding the provisions of sections two and five of chapter sixty-five of the statutes of 1924, entitled "An Act respecting the Revised Statutes of Canada," and the inclusion in Schedule A to the certified printed roll of the Revised Statutes of Canada, 1927, of The Business Profits War Tax Act, 1916, and of the amendments thereto, the said The Business Profits War Tax Act, 1916, and all amendments thereto, are hereby revived and shall have the same force and effect to all intents as if the said Revised Statutes of Canada, 1927, had not come into force and taken effect as law; and all proceedings, transactions, matters or things, had, done, made or completed, or purporting to have been had, done, made or completed under and in accordance with the provisions of The Business Profits War Tax Act, 1916, and the amendments thereto, on or after the first day of February, one thousand nine hundred and twenty-eight, are hereby validated.

1940  
 DOMINION  
 TEXTILE Co.  
 LTD.  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE.  
 Maclean J.

Section 2 of this Act repeals the provisions of the Business Profits Act relating to the procedure for appeals from assessments made thereunder, and s. 3 provides for the substitution therefor of certain provisions of the Income War Tax Act, and s. 4 of the 1937 Act provides that sections two and three thereof shall be applicable to all appeals under the Business Profits Act then pending or thereafter instituted. It will be observed therefore that the 1937 Act purports merely to revive the Business Profits Act and to provide a new procedure for appeals from assessments made under that Act, and nothing else. It creates no new duties, obligations or liabilities, so far as the taxpayer is concerned, nor does it deprive him of any legal rights subsisting or acquired under the Business Profits Act, prior to its revival. In other words, the Business Profits Act as revived has no retroactive effect, and could have none unless it contained express words or there were the plainest implication to that effect.

Sec. 1 of the 1937 Act, I might observe, seems to suggest that it was the enactment of the Revised Statutes of Canada, 1927, that terminated the useful life of the Business Profits Act. It seems to me that this result was effected by the enactment of Chap. 10 of the Statutes of Canada, 1924, which provided that s. 3 of the Business Profits Act should not continue in force after December 31, 1920. In the Revised Statutes of Canada, 1927, at the beginning of Volume 5, will be found a table, Appendix 1, giving the "history and disposal" of Acts enacted between 1906 and 1927, and there the Business Profits Tax Act, 1916, is described as "spent," which means that

1940  
 DOMINION  
 TEXTILE CO  
 LTD.  
 v  
 MINISTER OF  
 NATIONAL  
 REVENUE  
 Maclean J.

it had become "obsolete," and "obsolete" is a term applied to laws which have lost their efficacy without being repealed. Therefore it appears to me that if the Act were "spent" it was by reason of Chap. 10 of the Statutes of Canada, 1924, and not because of the Table or Appendix referred to, which was something introduced into the Revised Statutes of Canada, 1927, for historical purposes, and I assume for the sake of convenience as well. However, this is not of any practical importance.

Sec. 1 of the 1937 Act provides that "the Business Profits War Tax Act, 1916, and all amendments thereto, are hereby revived and shall have the same force and effect to all intents as if the said Revised Statutes of Canada, 1927, had not come into force and taken effect as law." One of the amendments to that Act was that enacted by Chap. 10 of the Statutes of Canada, 1924, and s. 1 thereof is as follows:

1. The Business Profits War Tax Act, 1916, and amendments, shall be construed and have effect and be deemed to have had effect since its enactment, without lapse or interruption, as if section twenty-six when first enacted had provided as follows:—

"The provisions of section three of this Act shall not continue in force after the thirty-first day of December, one thousand nine hundred and twenty";

and anything enacted inconsistent therewith shall be deemed to have been superseded, amended or repealed, as the circumstances may require, and all taxes, interest and penalties payable under the said Act and amendments shall remain a tax owing to His Majesty until fully paid and satisfied.

It would appear therefore that while the Business Profits Act was revived, so also was the amendment just recited, the result apparently being that s. 3 of the Act is not now in force. On its face, the 1937 Act has every appearance of a legislative lapse, and the Business Profits Act would seem to be still "spent" and inoperable for taxation purposes as from December 31, 1920. However, it may be that the amendment mentioned is still effective and that s. 3 of the Act is to be regarded as in force, but only in respect of persons who were liable to pay the tax prior to December 31, 1920; this construction is perhaps possible. If by the Act of 1937 it were intended to revive the Business Profits Act and to make it effective as a taxing instrument from the date of its enactment and onwards,

without any limitation as to time, and that by implication the amendment mentioned stands repealed, then it would seem that we have the anomalous and confusing situation that there is presently in force the Business Profits Act and the Excess Profits Tax Act, enacted by Chap. 4 of the Statutes of Canada, 1939, which one can hardly imagine to have been contemplated. However, this point did not arise for discussion on the hearing of the appeal and therefore I have not had the benefit of the views of counsel thereon. I do not intend therefore making any definite pronouncement upon the point, and in my view of the case it is not necessary to do so.

1940  
 DOMINION  
 TEXTILE CO.  
 LTD.  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE.  
 Maclean J.

The only provision of the Business Profits Act, and all amendments thereto, that purports to authorize the assessments here appealed from is, I think, to be found in s. 13 (3) of that Act, and it is the contention of the Company that upon the facts here disclosed this provision of the Act did not authorize, and does not sustain, the assessments in question, and that this alone is conclusive of the whole controversy here. Sec. 13, s.s. (3), as amended by Chap. 34 of the Statutes of Canada, 1923, reads thus:

Any person liable to pay the tax shall continue to be so liable, and in case any person shall fail to make a return as required by this Act, or shall make an incorrect or false return, and does not pay the tax in whole or in part, the Minister may at any time assess such person for the tax, or such portion thereof as he may be liable to pay . . .

This section originally provided that "any person liable to pay the tax shall continue to be liable for the period of three years from the time at which such tax would have been payable." The limitation of three years was repealed by Chap. 34 of the Statutes of Canada, 1923, and this repeal was made retroactive. But the section as amended still authorizes the Minister, in certain events to assess any person liable for the tax, and in such cases he might prescribe the time within which any appeal might be made from that assessment. The section provides that "in case any person so liable (for the tax) shall fail to make a return as required by this Act, or shall make an incorrect or false return, and does not pay the tax in whole or in part, the Minister may at any time assess such person for the tax, or for such portion thereof as he may be liable to pay . . ." Those words are, I think, to be

1940  
 DOMINION  
 TEXTILE Co.  
 LTD.  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE.  
 Maclean J.

construed as meaning that if a person liable for the tax has made the return that was required of him by the Act, and that such return was not inaccurate or false, and that he had paid fully the tax assessed upon him, the liability for the tax ceased and the Minister was not empowered to open up or review such assessment.

It is quite clear that it was under the words of s. 13, s.s. (3), of the Business Profits Act just referred to that the assessments in question were made. The decision of the Minister states that the Company filed returns for the several taxation periods under the Business Profits Act, but that following an investigation additional taxes were found owing by the Company for the same taxation periods. The assessments in question must therefore have been made upon the Company on the ground that it had not wholly paid the taxes for which it was assessed or liable under the Business Profits Act, or, that it had made inaccurate or false returns for the taxable periods under that Act. Those grounds must therefore be established or the assessments in question must fail and the Company's appeals succeed.

The Company, I find upon the evidence, made its return for each accounting period under the Business Profits Act and this is admitted; it did not make any incorrect or false return, and there is no evidence to support the suggestion that it concealed any facts that should have been disclosed relative to its profits, or its liability for the business profits tax, in any taxation period; it was assessed for the tax in each of such periods upon the basis of its returns duly made, and the facts known or made known to the taxing authorities; and it fully paid the taxes assessed upon it for each of such taxation periods, and within the time prescribed by the Act. The Minister, I think, has failed to establish the grounds upon which the assessments in question were made, and the Company has satisfied me that it made no inaccurate or false return and that it fully paid any tax assessed upon it during any of the taxation periods in question, under the Business Profits Act.

I am of the opinion therefore, that upon the facts here disclosed s. 13 (3) of the Business Profits Act did not



authorize the assessments made by the Minister there-  
under in 1937. And that, I think, is conclusive of the  
matters here in dispute and arising under that Act. It is  
unnecessary, I think, to say anything concerning the income  
tax assessments in question into which there does not enter  
the matter of the capital employed by the Company in  
its business, or concerning the method employed by the  
Company in valuing its inventories as all debate on that  
point has been closed by the agreement entered into  
between the parties.

1940  
DOMINION  
TEXTILE CO.  
LTD.  
v.  
MINISTER OF  
NATIONAL  
REVENUE.  
Maclean J.

If I am correct in holding that upon the facts here  
disclosed there were no grounds for making the assess-  
ments here in question, under the Business Profits Act,  
then, as already stated, the conclusions earlier expressed  
upon the various other points argued on this appeal need  
no longer be considered, except to the extent already  
indicated, and for the reasons already mentioned. In case  
I have failed to appreciate accurately all the implications  
of the agreement entered into between the parties in  
respect of the valuation of the Company's inventories and  
have overlooked any point incidental to that agreement  
and upon which a pronouncement should be made, such  
matters are reserved until the settlement of the minutes  
of judgment, when they may be mentioned to me by  
counsel.

I reserve the matter of the costs of the appeals until  
the settlement of the minutes of judgment.

*Judgment accordingly.*

BETWEEN:

KELLOGG COMPANY OF CANADA }  
LIMITED ..... } APPELLANT;

AND

THE REGISTRAR OF TRADE }  
MARKS ..... } RESPONDENT.

1939  
Mar. 17.  
Apr. 13.

*Trade Mark—Appeal from the Registrar of Trade Marks allowed—  
Unfair Competition Act, 22-23 Geo. V, c. 38, s. 26 (1) (c)—Trade  
Mark "Gro-Pup" as applied to dog food neither descriptive nor  
misdescriptive.*

1939  
 KELLOGG Co.  
 OF CANADA  
 LTD.  
 v.  
 REGISTRAR OF  
 TRADE  
 MARKS.

*Held:* That the word "Gro-Pup" is not descriptive or misdescriptive of the article to which it is to be applied, namely, dog food, within the meaning of s. 26 (1) (c) of the Unfair Competition Act, 22-23 Geo. V, c. 38, and is registrable as a trade mark.

APPEAL by Kellogg Company of Canada Limited from the refusal of the Registrar of Trade Marks to register the word mark "Gro-Pup" in connection with the sale of dog food.

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

*R. S. Smart, K.C.* for appellant.

*W. P. J. O'Meara, K.C.* for respondent.

The facts are stated in the reasons for judgment.

ANGERS J., now (April 13, 1939) delivered the following judgment:

This is an appeal from the refusal of the Registrar of Trade Marks dated February 4, 1939, to register a trade mark consisting of the word "Gro-Pup" as applied to dog food.

The application for this trade mark, bearing Serial No. 173,938, was filed on August 18, 1938.

The application contains, among others, the following statements:

2. The mark of which registration is desired is a word mark consisting of the following letters in the following grouping, namely:—

GRO-PUP

3. The applicant has used the said mark since the 6th day of August, 1938, on wares ordinarily and commercially described by the applicant as dog food, for the purpose of indicating that such wares were sold by the applicant. Such use has been principally in the Dominion of Canada.

4. In addition to wares of the kind described the applicant is commercially concerned with wares ordinarily and commercially described as all kinds of food products.

On January 11, 1939, the Registrar wrote to the applicant's solicitors as follows:

This application is considered confusingly similar to the following registration:

192-42202 Specific Trade Mark applied to Poultry Feed. Consists of the word "GROWENA" Registered by Ralston Purina Company, of St. Louis, Missouri, U.S.A., on 27th August, 1927.

The word "GRO-PUP" is considered clearly descriptive or mis-descriptive of the character or quality of the wares in association with which it is used.

In view of the provisions of Sections 26 (1) (c) and 26 (1) (f) of the Unfair Competition Act, your client's application, copy enclosed, does not appear to be registrable.

On January 17, 1939, applicant's solicitors wrote to the Registrar requesting reconsideration of the application; their letter reads in part as follows:

The word "GRO-PUP" is neither descriptive nor misdescriptive of the character or quality of the wares, namely, dog food. The mark is a fanciful mark which suggests, perhaps, that if a dog eats the particular dog food of the trade mark user it will grow \* \* \*

With respect to the citation it is submitted that there is no similarity between the words "GRO-PUP" and "GROWENA." The first syllable, it is true, is the same in each but the mark must be considered as a whole and we do not think that anyone would confuse "GRO-PUP" with "GROWENA." Furthermore the wares are different, one being for poultry feed, which is gram, and the other being for dog food, which is usually made of some kind of meat, perhaps ground up with ground up bone and flour.

On February 4, 1939, the Registrar replied to applicant's solicitors stating (*inter alia*):

The trade mark disclosed in this application is a mis-spelling or phonetic equivalent of the words "GROW PUP" and is, therefore, not registrable in view of the provisions of Section 26 (1) (c) of the Unfair Competition Act. Your client's application, copy enclosed, is refused.

The Registrar evidently abandoned the objection raised in his letter of the 11th of January regarding the alleged similarity between the words "Growena" and "Gro-Pup."

I think he was right in acting thus: there is no similarity between the two words, save for the first syllable, and the mark must be considered as a whole; moreover they apply to different wares. Had not the Registrar waived this objection, a notice of the appeal would have had to be given to the owner of the mark "Growena" in compliance with subsection (2) of section 51 of the Unfair Competition Act, 1932 (22-23 Geo. V, Chap. 38).

The initial clause of subsection (1) of section 26 of the Unfair Competition Act, 1932, and paragraph (c) thereof, upon which the Registrar relied to refuse to register the trade mark in question, read thus:

26. (1) Subject as otherwise provided in this Act, a word mark shall be registrable if it

1939  
 KELLOGG Co.  
 OF CANADA  
 LTD.  
 v.  
 REGISTRAR OF  
 TRADE  
 MARKS.  
 Angers J.

1939  
 ~~~~~  
 KELLOGG Co.
 OF CANADA
 LTD.

(c) is not, to an English or French-speaking person, clearly descriptive or misdescriptive of the character or quality of the wares in connection with which it is proposed to be used, or of the conditions of, or the persons employed in, their production, or of their place of origin.

v.
 REGISTRAR OF
 TRADE
 MARKS.
 ———
 Angers J.

Is the word "Gro-Pup" descriptive or misdescriptive of the character or quality of the wares, namely, dog food, in connection with which it is intended to be used? After giving the matter my best consideration and examining carefully the authorities referred to by counsel as well as others not cited, I have reached the conclusion that the word "Gro-Pup" is not descriptive and that its registration as a trade mark is not excluded by subsection (1) (c) of section 26.

Counsel for appellant relied particularly on the following decisions: *Bale and Church Ltd. v. Sutton Parsons & Sutton et al.* (1) and *Davis et al. v. Sussex Rubber Co. Ltd.* (2).

The facts in the latter case were briefly these. The plaintiff Davis had since 1919 used the word "Ustikon" as a trade mark in connection with rubber soles for boots and shoes and in 1924 and 1925 respectively had obtained registration of the words "Davis Ustikon" and "Ustikon" in part B of the register of trade marks. Sussex Rubber Company Limited adopted as a mark the word "Justickon." Davis took an action to restrain Sussex Rubber Company Limited from infringing and passing off. The defendant moved to rectify the register by expunging Davis' trade marks. It was contended on behalf of Sussex Rubber Company Limited that there were two kinds of rubber soles, viz. those which "you nail on" and those which "you stick on"; that Davis' marks were applied to the last-mentioned kind of soles, that they were a mere misspelling and that they were descriptive of the goods; that the word "Ustikon" was incapable of being distinctive and that the word "Justickon" was not liable to be confused with the word "Ustikon."

The case was heard before Russell J. (later Lord Russell), who held that, in considering whether a mark registered in part B was adapted to distinguish the goods of the owner of the mark, the onus of proving the negative lay on the defendant; that the fact that a word was descriptive did

not necessarily prevent it from being distinctive; that the evidence showed that the word "Ustikon" was distinctive of Davis' goods; and that the word "Justickon" so closely resembled the word "Ustikon" as to cause a likelihood of deception.

It seems apposite to cite a passage from the notes of Mr. Justice Russell (p. 417):

Now is the word "Ustakon" descriptive of the goods to which it applies? In one sense, yes. The evidence shows that in this particular trade or in this particular line of goods there are two classes of rubber soles, one class being soles which you nail on, the other class being soles that you stick on, and what the defendants say is this: This is a purely descriptive word, "Ustakon," it merely says that the soles in question belong to the class which you stick on; that is the way it is put. As I read the authorities which have been cited, the matter stands in this way. A word which is so descriptive as that it could not acquire a secondary meaning and become distinctive ought not to be on the Register, and it makes no difference whether the mark in question is the word or phrase correctly spelt or, as in the present case, fantastically spelt, because marks such as these appeal at least as much to the ear as to the eye. As I read the authorities this is also true, that since the Act of 1905 the mere fact that a word is descriptive or has a descriptive flavour, does not necessarily prevent that word being distinctive of somebody's goods. That appears to me to be the plain result of the language used by Lord Justice Fletcher Moulton in the *Orlwoola* and *Perfection* cases reported in 26 Reports of Patent Cases * * *

The learned Judge then quotes certain extracts from the judgment of Lord Justice Fletcher Moulton and concludes thus (p. 418):

It appears to me it is impossible to establish at the present day that because a word is descriptive or has a descriptive flavour it is not also distinctive of somebody's goods and is not properly registrable as a trade mark.

The defendants appealed; the appeal was dismissed.

Reference may be had with benefit to the observations of the Master of the Rolls, Lord Hanworth, at page 423 of the report and to those of Lawrence L.J. at page 427.

In *Bale and Church Ltd. v. Sutton Parsons & Sutton et al.* the trade marks of the plaintiffs and the defendants respectively consisted of the words "Kleenoff" and "Kleenup," both used in connection with cleaners for cooking stoves.

The plaintiffs who had sold their product under the name "Kleenoff" for a number of years, on the first of October, 1929, registered the word as a trade mark in part B of the register under section 2 of the Trade Marks Act, 1919. The defendants had recently put on the market

1939
 KELLOGG Co.
 OF CANADA
 LTD.
 v.
 REGISTRAR OF
 TRADE
 MARKS.
 Angers J.

1939
 KELLOGG CO.
 OF CANADA
 LTD.
 v.
 REGISTRAR OF
 TRADE
 MARKS.
 Angers J.

a product under the name "Kleenup," which was at first advertised as a hand cleaner but was subsequently recommended for cleaning cookers. The plaintiffs brought an action against the defendants seeking to restrain them from infringing the trade mark and passing off.

The trial judge, Clauson J., held (*inter alia*): (1) that the defendants had failed to establish the special defence, to wit that the word "Kleenup" was not calculated to deceive under section 4 of the Trade Marks Act, 1919, and (2) that they had infringed the plaintiffs' trade mark.

The defendants appealed; the judgment was affirmed.

I may perhaps quote an excerpt from the notes of Maugham L.J., who dealt with the question of descriptiveness (p. 143, in fine):

There is a third point which Mr. Shelley took, which I will say a word about, and that is this. The marks which may be registered under Part B often, perhaps more often than not, will include descriptive marks, and he has argued that the element of descriptiveness contained in a mark makes the test of infringement far more stringent than in the case where the mark is registered either under Part A, or in a case where the marks have not got a descriptive element. With regard to that, I think there are some observations which were made by Lord Justice Fletcher Moulton in the celebrated *Perfection* case, which is to be found reported in 26 Reports of Patent Cases, at page 837. The remarks were cited by Lord Russell, then Mr. Justice Russell, in the *Ustikon* case, which is reported in 44 Reports of Patent Cases, page 412, at page 417. Those remarks seem to me to be very apposite in dealing with this particular question.

Maugham L.J. then quotes two passages from Lord Justice Fletcher Moulton's observations cited by Mr. Justice Russell and adds (p. 144):

Then Mr. Justice Russell adds for himself that it appeared to him that it was "impossible to establish at the present day that because a word is descriptive or has a descriptive flavour it is not also distinctive of somebody's goods and is not properly registrable as a trade mark" In the present case my view is that the test of infringement where the trade mark has a descriptive element is the same as the test where it has no descriptive element, except so far as the descriptive element is itself common to the trade. That, of course, you have to consider; but apart from that, the test of infringement is, I think, the same.

It seems to me convenient to cite an extract from the observations of Lord Justice Fletcher Moulton in the "Perfection" and "Orlwoola" cases concerning descriptiveness and distinctiveness, referred to or quoted in part in *Davis et al. v. Sussex Rubber Company Ltd.* and *Bale and Church Ltd. v. Sutton Parsons et al.* (1).

Much of the argument before us on the part of the opponents and the Board of Trade was based on an assumption that there is a natural and innate antagonism between distinctive and descriptive as applied to words, and that if you can show that a word is descriptive you have proved that it cannot be distinctive. To my mind this is a fallacy. Descriptive names may be distinctive, and vice versa. No class of words are more directly and intentionally distinctive than proper names, and yet originally they were usually, if not invariably, descriptive in all languages * * * There is therefore no natural or necessary incompatibility between distinctiveness and descriptiveness in the case of words used as Trade Marks. The notion that there is such an incompatibility is confined to lawyers, and is, in my opinion, due to the influence of the earlier Trade Marks Acts. By those Acts, which are now repealed, the fact that words were descriptive of the goods was fatal to their registration as Trade Marks, and thus becoming in the eye of the law distinctive of the goods of a particular maker. But the question whether a word is or is capable of becoming distinctive of the goods of a particular maker is a question of fact, and is not determined by its being or not being descriptive. The law has never refused to recognize that this is the case, or to give protection to descriptive Trade Marks when once duly established in fact, although—except in the case of old marks—they refused registration, and left the owners to obtain protection in another form of action. This is now changed, and under the provisions of the present Act the Court clearly has power to allow descriptive words to be registered, if a case on the merits is proved before it sufficiently strong to induce it to do so.

Counsel for the Registrar relied on the following decisions: *Bowker Fertilizer Co. & Gunns Ltd.* (1); *In the Matter of an Application by the Hotpoint Electric Heating Co. for a Trade Mark* (2); *In the Matter of an Application by the Minnesota Mining & Manufacturing Co. for a Trade Mark* (3); *Kirstein Sons & Co. and Cohen Brothers Ltd.* (4).

In the case of *Bowker Fertilizer Co. and Gunns Ltd.*, it was held that "Sure-Crop" or "Shur-Crop" as applied to fertilizers are ordinary words descriptive of the quality of the article, incapable of acquiring a secondary meaning and not registrable as a trade mark.

In the case of the application by the *Hotpoint Electric Heating Co.*, it was held that the word "Hotpoint" had reference to the character of the goods but that it had become distinctive of the applicants' electrical appliances, other than irons, in respect of which registration had been sought; that the word was so descriptive of irons that, even if the applicants had not abandoned their application for these goods, it would have been difficult to contend

(1) (1916) 16 Ex. C.R. 520.

(2) (1921) 38 R.P.C. 63.

(3) (1924) 41 R.P.C. 237.

(4) (1907) 39 S.C.R. 286

1939
 KELLOGG Co.
 OF CANADA
 LTD.
 v.
 REGISTRAR OF
 TRADE
 MARKS.
 ———
 Angers J.

that the word had become distinctive; that the fact that there might be confusion in the minds of some people, who buy irons, was no ground for refusing to allow the registration of a mark which had become distinctive of the applicants' goods in respect of other appliances.

In the case of the application by Minnesota Mining and Manufacturing Co., it was held that the word "Wetordry," which the company was seeking to register in respect of abrasives, had reference to the character or quality of the goods, that there was no evidence before the Registrar that the mark was distinctive and that the Registrar was right in refusing the application.

In the case of *Kirstein Sons & Co. and Cohen Brothers Ltd.* the Supreme Court of Canada, affirming the judgment of the Court of Appeal of the Province of Ontario, held that the words "Shur-on" and "Staz-on" are not inventive words which could be used as trade marks but are merely corruptions of words descriptive of eyeglass frames to which they were intended to be applied.

The words "Shur-on," "Staz-on," "Hotpoint" and "Wetordry" are, in my opinion, essentially descriptive, having a direct reference to the character or quality of the articles to which they were applicable; and besides they are surely more definite than the word "Gro-Pup." On the other hand, I may say, with all due deference, that I would have felt inclined to say that the words "Sure-Crop" and "Shur-Crop" were not descriptive of the article to which they were intended to apply, but that they rather indicated the object or purpose thereof or else the result thereby obtainable.

Decisions which may be consulted with interest are: *In the Matter of an Application of The Eastman Photographic Materials Co. Ltd. for a Trade Mark* (1); *J. C. & J. Field Ltd. v. Wagel Syndicate Ltd.* (2); and *Linotype Company's Trade Mark* (3).

✓ As I have said, I do not think that the word "Gro-Pup" is descriptive of the article to which it is to be applied, namely, dog food; it is at the utmost suggestive of the

(1) (1898) 15 R.P.C. 476.

(2) (1900) 17 R.P.C. 266.

(3) (1900) 2 Ch. 238

result which it is liable to produce. The word, in my opinion, is registrable; the Registrar's decision refusing to register it is accordingly set aside.

1938
KELLOGG Co.
OF CANADA
LTD.
v.
REGISTRAR OF
TRADE
MARKS.
Angers J.

The parties agreed that there should be no order as to costs.

Appeal allowed.

BETWEEN:

DAME GRACE ELLIOTT, ET AL, EXECUTORS OF THE WILL OF JOSEPH CHARLES EMILE TRUDEAU (DECEASED) } APPELLANTS;

1938
Nov. 28.
1940
Feb. 26.

AND

THE MINISTER OF NATIONAL REVENUE } RESPONDENT.

Revenue—Income—Gift—Commission or fee—Payment for services or as part of purchase price—Income War Tax Act, R.S.C. 1927, c. 97, s. 3.

Appellants are the executors of the will of T., who died in 1935. T. owned the majority of the stock of a company which operated a chain of gasoline service stations. Harry Snyder Ltd., a wholesale gasoline company, entered into an agreement with T. whereby he undertook to deliver or cause to be delivered to it all the shares of the operating company. To complete his part of the agreement T. had to purchase the remaining outstanding shares of the company and these, together with his own, he sold to Harry Snyder Ltd., for the sum of \$1,150,000 of which S. received a commission of \$150,000. T. had wished to receive \$1,000,000 net for his stock in the operating company. Later he performed certain services for Harry Snyder Ltd, designed, or so stated to be, for the purpose of assisting that company to acquire all the outstanding shares of two gasoline companies T. accepted from Harry Snyder Ltd. cheques totalling \$25,000, which cheques had noted on them "Account of Services."

T's estate was assessed for income tax on this sum of \$25,000, which assessment was affirmed by the Minister of National Revenue, from which decision an appeal was taken to this Court. Appellants contended that the payment of \$25,000 to T. was by way of a supplement to the consideration paid to him for his stock in the operating company.

Held: That the \$25,000 payment was not part of the purchase price of T's stock but was a salary or commission for services rendered to Harry Snyder Ltd, and therefore income within the meaning of s 3 of the Income War Tax Act.

2 That the \$25,000 received by T. was not a gift within the meaning of s 3 (a) of the Act.

1940
 GRACE
 ELLIOTT
 ET AL
 v.
 MINISTER OF
 NATIONAL
 REVENUE.

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

The appeal was heard before the Honourable Mr. Justice Angers, at Montreal, P.Q.

J. G. Ahern, K.C. for appellants.

Angers J.

J. D. Kearney, K.C. and *J. R. Tolmie* for respondent.

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

ANGERS J., now (February 6, 1940) delivered the following judgment:

This is an appeal under sections 58 and following of the Income War Tax Act (R.S.C., 1927, chap. 97 and amendments) by Dame Grace Elliott, of the City of Outremont, Province of Quebec, widow of Joseph Charles Emile Trudeau, in his lifetime advocate of the same place, Hector H. Racine, merchant, and Georges Beauregard, notary, both of the City of Montreal, said province, acting in their quality of testamentary executors of the said late Joseph Charles Emile Trudeau, from the assessment made by the Commissioner of Income Tax on February 4, 1936, and affirmed by the Minister of National Revenue on April 26, 1938.

On or about April 29, 1933, the said Joseph Charles Emile Trudeau filed his income tax return for the taxation year 1932, showing a gross income of \$16,531.10 and a net taxable income of \$12,565.81 and paid a tax thereon of \$1,160.11.

On February 4, 1936, the Commissioner of Income Tax, pursuant to section 54 of the Act, sent to the taxpayer (then deceased) a notice of assessment adding to the gross income a sum of \$25,000, received by the taxpayer in the circumstances hereinafter related.

A notice of appeal, dated March 2, 1936, by the testamentary executors of the said Joseph Charles Emile Trudeau, was received by the Minister of National Revenue, as stated in the decision of the Minister. The notice of appeal formed part of the documents transmitted by the Minister to the Registrar of the Court and deposited in the record; this notice of appeal is not among the said

documents; an amended notice of appeal dated April 3, 1936, replaced it, which is included in the file received by the Registrar from the Minister.

On April 26, 1938, the Minister of National Revenue affirmed the assessment.

A notice of dissatisfaction dated May 4, 1938, was sent to the Minister. On June 7, 1938, the Minister sent his reply to the executors of the late Joseph Charles Emile Trudeau and to their solicitors confirming the assessment.

Pleadings were filed in compliance with an order of the 21st of September, 1938.

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

By a letter dated October 24, 1932, Joseph Charles Emile Trudeau agreed to cause to be delivered to Harry Snyder, Limited, of Montreal, or its nominee all of the class A no-par value shares of Automobile Owners' Association, Limited, excepting 1,300 so-called life member shares and all of the class B no-par value shares of the said company for the sum of \$1,150,000. This letter, filed as exhibit 2, contains, among others, the following stipulations which seem to me relevant to the question at issue:

I hereby agree to cause to be delivered to you or your nominees all of the Class B N.P.V. shares of the Automobile Owners' Association Limited, incorporated 1929 (hereinafter referred to as the "A.O.A."), and all of the Class A N.P.V. shares of the said Company, excepting 1,300 so-called life-member shares, upon payment of the sum of One Million One Hundred and Fifty Thousand Dollars (\$1,150,000).

Receipt is hereby acknowledged by me, on account of the purchase price above mentioned, of the sum of Fifty-seven Thousand Five Hundred Dollars (\$57,500), the balance of the said purchase price amounting to One Million Ninety-two Thousand Five Hundred Dollars (\$1,092,500) to be paid by you on or before 12 o'clock noon, on Thursday, November 3, 1932, and in consideration of the foregoing I hereby undertake to forthwith deliver to you or your nominees, good and marketable deeds of title as well as contracts, undertakings and other documents and papers appertaining to the assets of the A.O.A., and to give to you or your nominees access to any and all books of statements concerning the Company, and to permit you or your nominee to visit the premises and properties owned by the Company and to facilitate in every way a thorough inspection by you of the affairs of the Company.

I further undertake that upon payment by you of the balance of purchase price of One Million Ninety-two Thousand Five Hundred Dollars (\$1,092,500), I will deliver to you at your office all the Class A and Class B N.P.V. shares as hereinabove mentioned. . . . If at any time within six months from the date upon which payment

1940
GRACE
ELLIOTT
ET AL
v.
MINISTER OF
NATIONAL
REVENUE.
Angers J.

1940
 GRACE
 ELLIOTT
 ET AL
 v.
 MINISTER OF
 NATIONAL
 REVENUE.
 Angers J.

of the balance of the purchase price shall be paid, the Directors of the A.O.A. decide to redeem or otherwise purchase the whole or any part of the 1,300 Class A N.P.V. shares hereinabove referred to, I agree to pay to the A.O.A., for the said purpose, one-half of the redemption or purchase price of the said shares.

I hereby agree, upon payment of the balance of purchase price, to sign any and all contracts, transfers or other documents which you may consider necessary to give effect to the present undertaking.

Trudeau's offer was accepted by Harry Snyder, Limited, through Harry Snyder, its president, as appears by the subscription inserted at the bottom of the letter, exhibit 2.

On the same day Trudeau wrote to Harry Snyder the following letter (exhibit 3):

In connection with my letter to Harry Snyder Limited of even date regarding the purchase of all the shares of Automobile Owners' Association, Limited, I hereby agree to pay to you, out of the initial payment of Fifty-seven Thousand Five Hundred Dollars (\$57,500), if and when paid by Harry Snyder Limited, the sum of Twelve Thousand Five Hundred Dollars (\$12,500) for your services to date.

Should, for reasons mentioned in my letter of this date to Harry Snyder Limited, I be obliged to remit the first payment of Fifty-seven Thousand Five Hundred Dollars (\$57,500) it is understood that you will refund forthwith the Twelve Thousand Five Hundred Dollars (\$12,500) above mentioned to be paid to you for your services.

Should Harry Snyder Limited, or its assigns, pay me the balance of One Million Ninety-two Thousand Five Hundred Dollars (\$1,092,500) as mentioned in my letter to Harry Snyder Limited, I further agree to pay to you, as and when the said sum of One Million Ninety-two Thousand Five Hundred Dollars (\$1,092,500) is paid to me, an additional sum of One Hundred and Thirty-seven Thousand Five Hundred Dollars (\$137,500) as complete, full and final payment for all services rendered by you in connection with this matter.

This letter cancels my letter to you of August 5, 1932, and is in replacement thereof.

On the same day also, John M. Pritchard, who owned a certain number of shares of Automobile Owners' Association, Limited, wrote to Trudeau as follows (exhibit 6):

I hereby agree to deliver or cause to be delivered and transferred to you or your assigns or nominees all of the common and/or preferred shares appearing in my name in the Subscription Book of the Automobile Owners' Association (1929) for and in consideration of the sum of \$50,000, should you consummate your sale as outlined in letter of even date to Harry Snyder.

On November 3, 1932, Trudeau wrote to Harry Snyder, Limited, a letter of which the following passages are pertinent (exhibit 4):

In connection with my letter to you dated October 24, 1932, and which has been duly accepted by you, I hereby acknowledge to have

received payment of the sum of \$1,092,500 (One Million and Ninety-two Thousand Five Hundred Dollars), being the balance of purchase price mentioned in my letter of October 24 payable on all the Class "A" and Class "B" shares of Automobile Owners' Association Limited which you purchased from me.

As Mr. Snyder is aware, I am unable to-day to deliver the shares appearing in the Company's books in the name of John M. Pritchard and consisting of 625 Class "A" shares and 2,495 Class "B" shares. Mr. Pritchard has agreed in writing to deliver these shares to me but unfortunately he is in Toronto to-day and will not return to Montreal until to-morrow, but I will see to it, and Mr. Harry Snyder will assist me in this matter, that the shares in the name of Mr. Pritchard are delivered to you to-morrow.

The other shares which I undertook to deliver and consisting of 47,505 Class "B" shares and 11,875 Class "A" shares I herewith deliver to you.

Harry Snyder, president of Harry Snyder, Limited, called as witness on behalf of appellants, testified that Trudeau did not tell him that he wanted to get \$1,000,000 net for his shares of Automobile Owners' Association, Limited, and that, if he could not get it, he would not sell. Trudeau however stated that he would have to buy certain shares of the company in order to fulfil his agreement.

Snyder swore that he had not told Trudeau that he (Snyder) would see to it that Trudeau got back the \$50,000 which he would have to pay for the purchase of Pritchard's shares in Automobile Owners' Association, Limited.

According to witness, Trudeau never sent him any account for services rendered.

Sometime in October, 1932, Snyder met Joseph Elie, his sons and his solicitor at the Windsor Hotel in Montreal with regard to the acquisition of the shares of Lasalle Refinery, Limited; the price was discussed and an agreement was effected at the figure mentioned; this was the reason why Harry Snyder, Limited, paid \$10,000 to Trudeau.

As regards the purchase by Harry Snyder, Limited, of the shares of Excel Petroleum, Limited, Snyder's version is that Trudeau brought Alfred H. Paradis, the president of the company, from Victoriaville and introduced him to the witness. As a result of the latter's interview with Paradis, Harry Snyder, Limited, purchased the shares of Excel Petroleum, Limited, and paid \$15,000 to Trudeau in connection with this transaction.

1940
GRACE
ELLIOTT
ET AL
v.

MINISTER OF
NATIONAL
REVENUE.

Angers J.

1940
 GRACE
 ELLIOTT
 ET AL
 v.
 MINISTER OF
 NATIONAL
 REVENUE.
 Angers J.

Photostat copies of two cheques signed by Harry Snyder, Limited, per Harry Snyder, president, payable to the order of J. C. E. Trudeau, one dated December 6, 1932, for \$15,000 and the other dated December 23, 1932, for \$10,000, were filed as exhibits A and B. These cheques appear to have been endorsed by Trudeau and paid by the Royal Bank of Canada on which they were drawn. The first cheque bears above the words "To the Royal Bank of Canada, Montreal," printed at the bottom of the left side of the cheque the words "Account of services," and the second one bears in the same position the words "Balance due on account of services rendered in connection with acquisition of La Salle, et al."

The only fee to which Trudeau was entitled in respect of the acquisition by Harry Snyder, Limited, of the shares of Lasalle Refinery, Limited, and of Excel Petroleum, Limited, was, according to Snyder, the sum of \$25,000. Snyder declared that it was indifferent to him as well as to his company whether this sum of \$25,000 was considered as a fee in accordance with the explanations furnished by the witness or whether it was looked upon as a payment on account of the A.O.A. shares.

It was important for Harry Snyder, Limited, to have the co-operation of Trudeau and the company, being satisfied of his co-operation, paid him the sum of \$25,000.

Snyder was asked to file a copy of the Income Tax Return of Harry Snyder, Limited, for the year 1932, indicating the names, addresses and remuneration of its employees; it was marked as exhibit C. The name of J. C. E. Trudeau is mentioned in this return; opposite his name, in the column headed "Wages, salary, commission, bonus or other remuneration paid during the calendar year ended 31st December, 1937" (ought to be "1932"), under the subheading "Total," appears the sum "\$25,000." Snyder said that this sum had been paid to Trudeau as salary or commission. I do not think that this return could bind Trudeau; in my opinion it has no bearing on the present case; it merely shows how Harry Snyder, Limited, for its own purpose, treated this payment.

Joseph Elie, president of Lasalle Refinery, Limited, called as witness by appellants, said that his company sold

all its interests to Harry Snyder, Limited, in 1932. According to him the sale was not made through the agency of Trudeau. Counsel for respondent objected to this evidence as tending to contradict the allegation contained in paragraph 12 of the statement of claim; judgment on the objection was reserved; after giving the matter due consideration, I have reached the conclusion that the objection is unfounded.

Paradis, president of Excel Petroleum, Limited, heard on behalf of appellants, declared that Trudeau came to Victoriaville and asked him to see Snyder, which he did. According to the witness, that was all the conversation.

Raoul Leclerc, in 1932, was Trudeau's assistant and a director of A.O.A. He had knowledge of the dealings relative to the sale by Trudeau of his shares in the company. Trudeau told him that in virtue of his agreement with Harry Snyder, Limited, he was to get \$1,000,000. Trudeau added that he had to disburse \$50,000 to buy Pritchard's shares and that he had received \$25,000 on account thereof. Trudeau's only occupation in 1932 was the administration and management of the A.O.A.

Arthur Henry Rowland, inspector of Income Tax, Montreal Division, produced, as exhibit 1, a letter from Trudeau to him dated April 17, 1934, which reads in part as follows:

Preparing my 1933 income tax report reminds me of a fact which, I am told, should have been reported in my 1932 report.

Consequently, I wish to notify you that I have not reported an item of \$25,000 so-called commission received from Mr. Harry Snyder on or about the 3rd of November 1932.

As explained verbally, I was under the impression that it was part of another transaction, that is, the sale of my shares and interests in the Automobile Owners' Association Limited.

Recalled, the witness stated that he had checked his files and had found no record that Trudeau had made a return after April 29, 1933, showing the receipt of the sum of \$25,000.

Alfred Leroux, a clerk in the Office of the Peace in Montreal, was asked to file a copy of the information and complaint in a case of *The King v. J. C. E. Trudeau* (No. 15426) before the Court of Sessions of the Peace; it was marked as exhibit 5.

This information and complaint dated the 21st of September, 1934, laid by Sumner Ross Gordon, officer of the

1940
 GRACE
 ELLIOTT
 ET AL
 v.
 MINISTER OF
 NATIONAL
 REVENUE.
 Angers J.

1940
 GRACE
 ELLIOTT
 ET AL
 v.
 MINISTER OF
 NATIONAL
 REVENUE.
 Angers J.

Income Tax Division of the Department of National Revenue in Montreal, states (*inter alia*) that "on or about the 1st day of May, 1933, Joseph Charles Emile Trudeau, of the City of Outremont, District of Montreal, did a return of his income for and in respect of the year 1932 and did then, therein and thereby make a false statement in such return, in that the said Joseph Charles Emile Trudeau declared his income to be in the sum of \$16,531.10, whereas his income for the said year was in excess of the said sum of \$16,531.10 and was approximately in the sum of \$41,000, the whole contrary to the provisions of the Income War Tax Act and in particular Section 33, in that respect made and provided."

Annexed to the information and complaint and forming part of exhibit 5 is a procès-verbal showing that on the 28th of September Trudeau appeared and pleaded not guilty; that the trial, fixed for the 5th of October, was, after three adjournments, held on the 30th of October; that after the evidence had been completed counsel for the accused made a motion for non-suit and that the case was continued to the 16th of November for judgment; that on the last-mentioned date the complaint was dismissed. In cross-examination Leroux was asked to file the judgment, which he did (see exhibit D).

I must say that, in my opinion, the above information and complaint should never have been laid. Trudeau was obviously of the opinion that the amount of \$25,000 received from Harry Snyder, Limited, was a part of the purchase price of his interests in Automobile Owners' Association, Limited, inasmuch as he wanted to obtain \$1,000,000 net for them and was not disposed to sell them for less. Now the evidence discloses that he had to pay \$50,000 for the shares of John M. Pritchard in the A.O.A. and this left him with only \$950,000.

It is extremely unfortunate that the assessment was deferred so long and that the Court was thus deprived of Trudeau's version. The Department of National Revenue was aware of the receipt by the taxpayer of the sum of \$25,000 as early as April, 1934 (see letter, exhibit 1), if not earlier, and the notice of assessment was sent only on

February 4, 1936; it is difficult for me to understand why the Commissioner waited almost two years, until after Trudeau's death, to make this assessment.

Be that as it may, it is my duty to determine, with the evidence of record, if the sum of \$25,000 in question is income within the meaning of the Act and as such subject to income tax.

It was submitted on behalf of appellants that the sum of \$25,000 was capital and not income and as such was not taxable; subsidiarily that it constituted a gift and was under paragraph (a) of section 3 exempt from taxation. The relevant part of section 3 reads as follows:

For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be whether derived from sources within Canada or elsewhere; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source, including

(a) the income from but not the value of property acquired by gift, bequest, devise or descent;

It was urged by counsel for appellants that paragraphs 6 and 7 of the statement of defence contained an admission that Trudeau was to receive \$1,000,000 net for the shares of the A.O.A. and that, when Harry Snyder, Limited, refused to raise the price to \$1,200,000 so as to take care of the sum of \$50,000 which Trudeau had to pay for the purchase of Pritchard's shares, Harry Snyder agreed to make up the difference. According to counsel, the declaration made in Court by Snyder contradicting the admission contained in paragraphs 6 and 7 did not destroy it; in support of his contention counsel relied on article 1245 C.C. (Que.), which reads as follows:

A judicial admission is complete proof against the party making it. It cannot be revoked unless it is proved to have been made through an error of fact.

I agree with counsel's contention that an admission made in a pleading cannot be set aside by verbal testimony, unless it be proved that the same was made through an

1940
 GRACE
 ELLIOTT
 ET AL
 v.
 MINISTER OF
 NATIONAL
 REVENUE.
 Angers J.

1940
GRACE
ELLIOTT
ET AL
v.
MINISTER OF
NATIONAL
REVENUE.
Angers J.

error of fact. I must say however that I cannot see in paragraphs 6 and 7 an admission that Harry Snyder, Limited, agreed to give Trudeau a sum of \$50,000 to compensate him for the price he had to pay to Pritchard for his shares. The only admission I can find in these paragraphs is that Harry Snyder, Limited, through its president, Harry Snyder, proposed to Trudeau to pay him a sum of \$10,000 if he would act as its agent to facilitate the purchase of the shares of Excel Petroleum, Limited, and if, as a consequence, Harry Snyder, Limited, were able to buy the said shares at a satisfactory price and a further sum of \$15,000, if Trudeau would render the same assistance in acquiring the shares of Lasalle Refinery, Limited, and if Harry Snyder, Limited, as a result, were able to acquire them at a satisfactory price.

The allegations contained in paragraphs 6 and 7 imply that Trudeau did not wish to sell his interests in the A.O.A. for a price under \$1,000,000, but they do not imply that Harry Snyder, Limited, was to reimburse to Trudeau the sum of \$50,000 paid out for the acquisition of Pritchard's shares, so as to bring up the price to Trudeau for his interests in the A.O.A. to \$1,000,000 net.

With the evidence I have before me, it seems reasonable to believe that Harry Snyder, Limited, anxious to acquire all the shares of Automobile Owners' Association, Limited, was inclined to help Trudeau to get the sum of \$1,000,000 net for his interests therein, which he was apparently insistent on obtaining, and that, when it saw that the deal was liable to fall through on account of Trudeau having to pay \$50,000 to Pritchard, Harry Snyder, Limited, offered to Trudeau the opportunity of recouping a part of this disbursement by his assistance in acquiring the shares of Excel Petroleum, Limited, and of Lasalle Refinery, Limited. It is regrettable that the assessment was not made during the lifetime of Trudeau. His story might possibly have thrown a somewhat different light on the agreement made between him and Harry Snyder.

The statements relating to the sum of \$25,000 contained in the letter filed as appellants' exhibit 1, partly hereinabove reproduced, do not, in my judgment, constitute an admission that the sum of \$25,000 was a commission; it

is perhaps as true to say, on the other hand, that they are not equivalent to a formal denial. As already mentioned, Rowland declared that, having examined his files, he found no record that Trudeau had made a return after April 29, 1933, referring to the sum of \$25,000. It seems to me obvious that Trudeau considered this sum as forming part of the purchase price of his interests in the A.O.A. His testimony respecting this letter would certainly have been interesting.

1940
 GRACE
 ELLIOTT
 ET AL
 v.
 MINISTER OF
 NATIONAL
 REVENUE.
 Angers J.

I must say that I doubt very much the truth of Snyder's assertion that Trudeau did not tell him that he wanted to get \$1,000,000 net for his interests in the A.O.A. and that, if he did not get it, he would not sell. If Trudeau had not made this statement to Snyder, I fail to see why the latter should have offered to compensate him for the sum of \$50,000 which he would have to pay for Pritchard's shares. My impression is that Snyder, who was to receive a commission of \$150,000 out of the purchase price payable by Harry Snyder, Limited, thought advisable to share this commission with Trudeau so as to prevent the transaction from falling through.

There remains the other assertion by Snyder that he did not tell Trudeau that he would see to it that he got back the \$50,000 which he would have to disburse for Pritchard's shares. This assertion seems to me more likely than the former. Snyder may very well have intimated to Trudeau that he would give him a chance of regaining the whole or at least a part of the sum of \$50,000 expended for the purchase of Pritchard's shares. When Harry Snyder, Limited, decided to acquire the business of Lasalle Refinery, Limited, and of Excel Petroleum, Limited, Snyder saw an opportunity of enabling Trudeau to recoup a part of his disbursement and charged him with the task of interviewing Elie and Paradis, respectively president of Lasalle Refinery, Limited, and Excel Petroleum, Limited, and letting them know that Harry Snyder, Limited, wished to buy the business of their companies and was well able to pay for the same.

As previously mentioned, Paradis declared that Trudeau came to Victoriaville on one occasion and asked him to see Snyder, which he did; according to the witness, that was all the conversation.

1940
 GRACE
 ELLIOTT
 ET AL.
 v.
 MINISTER OF
 NATIONAL
 REVENUE.
 Angers J.

Elie, on the other hand, testified that the sale of the shares of Lasalle Refinery, Limited, was not made through the medium of Trudeau. It looks to me as if Trudeau's intervention, in this case as well as in the case of Paradis, merely consisted in telling Elie that Harry Snyder, Limited, wanted to acquire the business of Lasalle Refinery, Limited, and asking him to see Snyder.

In addition to the declaration by Snyder that he did not tell Trudeau that he would see to it that Trudeau got back the \$50,000 he would have to pay for Pritchard's shares, there are, in support of the respondent's contention that the sum of \$25,000 was a commission or salary for services rendered, the two cheques filed as exhibits A and B, one bearing the words "Account of services" and the other the words "Balance due on account of services rendered in connection with acquisition of La Salle, et al."

It is quite manifest that Trudeau did not exert himself nor spend much time in connection with the transactions in question. Snyder nevertheless considered it was important to have his co-operation as he had organized a company, namely, Automobile Owners' Association, Limited, of which there was no other similar to it. Snyder said he was satisfied with Trudeau's co-operation and he paid him \$25,000.

There is no doubt that Trudeau made a success of the A.O.A. and that his advice must have carried great weight with Elie and Paradis, who were in the same trade.

Trudeau accepted the two cheques without any protest regarding the notes "Account of services" and "Balance due on account of services, etc.," written thereon, at least as far as disclosed by the evidence of record, and endorsed and cashed them. Did he fail to see these notes or did he not grasp their meaning and import? The first hypothesis does not appear likely but the second one, to my mind, is not at all impossible. This is another point on which the testimony of Trudeau might have been of some assistance.

After carefully perusing and weighing the evidence adduced, examining the law and jurisprudence and considering the reasons for and against the respective contentions submitted by counsel, I have arrived at the conclusion, not unhesitatingly I must say, that the sum of

\$25,000 received by Trudeau from Harry Snyder, Limited, cannot be considered as forming part of the purchase price of Trudeau's interests in Automobile Owners' Association, Limited, and that it is not a gift within the meaning of paragraph (a) of section 3 of the Act; it was, as I think, a salary or commission paid to Trudeau for his services in connection with the acquisition by Harry Snyder, Limited, of the business of Lasalle Refinery, Limited, and of Excel Petroleum, Limited.

1940
GRACE
ELLIOTT
ET AL
v.
MINISTER OF
NATIONAL
REVENUE.
Angers J.

The following decisions may be consulted profitably: *Ryall v. Hoare* (1); *Martin and Lowry* (2); *Morrison v. Minister of Customs and Excise* (3); *Capital Trust Corporation Ltd., et al., and Minister of National Revenue* (4); *Cooper v. Stubbs* (5); *Shipway v. Skidmore* (6).

For the reasons hereinabove set forth, I believe that the sum of \$25,000 in question is taxable as income in virtue of section 3 of the Act. The appeal is accordingly dismissed, with costs against appellants.

Judgment accordingly.

BETWEEN:

RUTH McCORMICK CLAIMANT;

1939
June 14, 15.

AND

HIS MAJESTY THE KING..... RESPONDENT.

1940
May 22.

Revenue—Customs Act, R.S.C. 1927, c. 42, secs. 176, 193 (1) & 262—Seizures—Forfeiture—Use of automobile for transportation of contraband liquor—Question of ownership of automobile immaterial—Burden of proof.

An officer of the Royal Canadian Mounted Police seized an automobile at North Sydney, Cape Breton, NS, for an alleged infraction of the Customs Act, R.S.C. 1927, c. 42. At the trial respondent admitted that on the date of the seizure the claimant was the registered owner and in possession of the automobile. The Court found that the automobile had been used for the transportation of contraband liquor.

Held: That the question of ownership of the automobile is immaterial.

2. That pursuant to sec. 193 (1) of the Customs Act any vehicle which is used in the importation, removal or subsequent transportation of

- (1) (1923) 2 K.B 447, 454.
- (2) (1927) A.C. 312, 315.
- (3) (1928) Ex.C R 75, 78.
- (4) (1937) S.C.R. 192.
- (5) (1925) 2 K B. 753.
- (6) (1932) 16 T.C. 748.

1940
RUTH
McCORMICK
v.
THE KING.

any goods liable to forfeiture by any one, with or without the knowledge and consent of the owner, is liable to seizure and forfeiture. *Sandness v. The King* (1933) Ex.C.R. 78.

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

The action was heard before the Honourable Mr. Justice Angers, at Sydney, N.S.

C. M. Rosenblum for claimant.

A. O'Handley for respondent.

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

ANGERS J., now (May 22, 1940) delivered the following judgment:

The claimant, Ruth McCormick, wife of Bruno McCormick, residing at Sydney Mines, County of Cape Breton, Province of Nova Scotia, claims the return of a Buick Sedan automobile seized on November 4, 1938, at North Sydney, Cape Breton, by Sergeant Donald A. McKinnon of the Royal Canadian Mounted Police for alleged infraction of revenue laws of Canada.

The matter comes before this Court on a reference by the Minister of National Revenue under section 176 of the Customs Act (R.S.C. 1927, chap. 42, and amendments). By his decision the Minister declared the car forfeited.

[The learned Judge referred to the pleadings and after considering the evidence adduced at trial, continued.]

The seizure of the Buick Sedan automobile in question was made in virtue of the provisions of subsection (1) of section 193, which reads as follows:

193. (1) All vessels, with the guns, tackle, apparel and furniture thereof, and all vehicles, harness, tackle, horses and cattle made use of in the importation or unshipping or landing or removal or subsequent transportation of any goods liable to forfeiture under this Act, shall be seized and forfeited.

The only question arising for determination is whether the Buick Sedan automobile with which we are concerned was used to transport contraband liquor.

The evidence is conflicting and extremely unsatisfactory. The witnesses with the exception of Bateman and McKin-

non, and apparently Giroir, are smugglers and dealers in contraband liquor. Three of them, namely Daniel McCormick, Bruno McCormick and Murray, were arrested and convicted under the Customs Act or the Nova Scotia Liquor Control Act or both. Weatherby was committed to jail on three or four occasions for receiving stolen goods and he was sentenced to a term of two years in the penitentiary for an assault causing actual bodily harm. Apart from this, Weatherby, in his testimony, made two contradictory statements: in chief-examination he swore that he had paid \$1 to Giroir for a bottle of rum, whilst in cross-examination he emphatically denied having paid him for that bottle. I do not think that Weatherby's testimony is worthy of belief. At all events I feel disposed to accept his second statement denying the payment of the sum of \$1 to Giroir for the bottle of rum, which coincides with the latter's version. In support of the claimant's claim there remain the testimonies of Bruno McCormick, admittedly the real owner of the seized car, and Daniel McCormick, his brother and his partner in the liquor business. I am unable to put faith in the statements of these two witnesses. They are both interested in saving the car from forfeiture, if possible, and I feel prone to believe that they would not be reluctant to make the necessary statements, true or not, to attain their end.

For the respondent there are the testimonies of Sergeant McKinnon, Giroir and Murray.

As we have seen, McKinnon found one-quarter circular marks in the trunk of the Buick car which looked like marks made by a keg. In some places the floor was scraped and the marks were partly removed. Why should the owner of the car go to the trouble of erasing these marks, which did not in any way spoil the external aspect of the car since they were on the floor of the trunk, unless they were implicating and dangerous. However it may be, I would hesitate to condemn the car on this evidence alone. If the quarter circular marks were made by kegs or barrels there is nothing in the evidence to show that they were barrels or kegs of smuggled liquor. If evidence had been adduced to establish that liquor legally imported was not delivered in barrels or kegs of the size or shape of those whereof traces were found in the trunk of the car, the

1940
 RUTH
 MCCORMICK
 v.
 THE KING.
 Angers J.

1940
 RUTH
 McCORMICK
 v
 THE KING
 Angers J.

situation would be quite different. As it is, the evidence concerning the marks detected in the trunk of the car is not in itself complete and conclusive. There is however in support of the respondent's contention the fact that, of their own admission, Bruno and Daniel McCormick were at the time of the seizure and had for a long time previous been engaged in the contraband liquor trade. It is true that Bruno McCormick declared that he usually had two cars, a Buick and a Ford; that the Buick was used by his wife and himself for pleasure purposes and that the Ford was used for transporting liquor. But, when the Buick car was seized, the McCormicks were without their Ford car which had been seized and forfeited. Bruno McCormick stated that, when he was deprived of his Ford, he engaged a car for the transportation of the liquor, for which he paid at the rate of \$1 per barrel. If this were really a fact it seems to me that it should have been possible to adduce evidence corroborating Bruno McCormick's statement. This evidence is lacking and I must say that I have serious doubts as to the veracity of the latter's story regarding the hiring of a car for the transportation of his contraband liquor. Nevertheless, if there were no other proof, I would feel inclined to give to the claimant the benefit of the doubt, notwithstanding my personal impression that the Buick Sedan automobile, the recovery whereof is sought by the claimant, was used on various occasions after the seizure of the Ford car for the transportation of contraband liquor.

In addition to the marks found in the car by Sergeant McKinnon we have the evidence of Murray and Giroir.

Murray's testimony must be considered with great circumspection. He is a self-confessed dealer in smuggled liquor. He was convicted under the Customs Act. Besides this he was not on good terms with Bruno McCormick and was apparently anxious to retaliate for the seizure of his automobile due to the alleged information given to the Royal Canadian Mounted Police by Bruno McCormick; the letters filed as exhibits 2 and 3 show the spirit which actuated Murray. Be that as it may, Murray's statement that liquor was delivered to him from the Buick Sedan in question is corroborated by Giroir and I think that I must accept Murray's testimony on this point.

Coming now to the deposition of Giroir, I am inclined to believe that his testimony is more reliable than that of Bruno McCormick, Daniel McCormick, Weatherby and Murray. Although he accompanied Murray on two occasions when the latter had dealings with the McCormicks, he personally was not in the liquor business. The evidence does not disclose that he was ever convicted for violations of any of the provisions of the Customs Act or of the Nova Scotia Liquor Control Act. I have no reason to disbelieve him.

1940
RUTH
McCORMICK
v.
THE KING.
Angers J.

On the whole the weight of the evidence regarding the use of the Buick Sedan automobile in question for the transportation of contraband liquor seems to me favourable to the respondent's contention. It may be noted incidentally that under section 262 of the Customs Act the burden of proof laid upon the claimant.

The question of ownership of the automobile is immaterial. Section 193 of the Act is very broad in its terms and a vessel or a vehicle which is made use of in the importation, removal or subsequent transportation of any goods liable to forfeiture by anyone, with or without the knowledge and consent of the owner, is liable to seizure and forfeiture: see *Sandness v. The King* (1), particularly the authorities therein cited.

There will be judgment maintaining the Minister's decision, declaring the Buick Sedan automobile in question herein forfeited and dismissing the claimant's claim, with costs.

Judgment accordingly.

BETWEEN :

JOHN M. FUDGE CLAIMANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1939
June 8.
1940
Apr. 25.

Revenue—Seizure and forfeiture—Customs Act, R.S.C. 1927, c. 42, secs. 2, 151 & 208—Hovering vessel—"Officers"—Three-mile limit—Admissibility of admiralty charts and Light List Book—Pursuit beyond territorial limit—Seizure on high seas—Evidence—"Innocent passage"—Evidence of vessel's position—Mistake by master.

1940
 ~~~~~  
 JOHN M.  
 FUDGE  
 v.  
 THE KING.

Claimant's vessel the *Geneva Ethel*, registered at St. Johns, Newfoundland, was seized by the master of the Canadian revenue cutter *Laurier*, for alleged infraction of the revenue laws of Canada. The boat and liquor and cigarettes found thereon were declared forfeited. On the hearing of a reference by the Minister of National Revenue the Court found that the *Geneva Ethel* hovered in Canadian waters adjacent to Sylvester Point, on the north shore of Prince Edward Island, while having on board alcohol, liquors and cigarettes not included or described in the manifest of the vessel and, upon signals given by the revenue cutter *Laurier*, failed to come to a stop immediately but proceeded toward the high seas, where, after pursuit and shots from the cutter's gun, she hove to and was seized.

*Held:* That as the *Laurier* was equipped with modern nautical instruments the evidence of the officers on board her touching on the position of the *Geneva Ethel* is more trustworthy and reliable than the uncorroborated testimony of the owner and master of the *Geneva Ethel*, lacking the proper nautical instruments, having kept no record whatever of his course and speaking entirely from memory.

- 2 That admiralty charts prepared and published under governmental authority are admissible in evidence as public documents.
3. That the Light List Book published by the Department of Transport in 1937 showing the height of every lighthouse in Canada is admissible in evidence since it is a work made by officers of the Crown and it is presumed that they acted in accordance with their duty and have stated nothing in the survey contrary to the facts.
4. That the master and second officer of the revenue cutter *Laurier* are "officers" within the meaning of s. 2, ss. 1 (1) of the Customs Act, R.S.C. 1927, c. 42.
5. That the *Geneva Ethel*, having contraband goods on board, and having moved inside the three-mile zone by error, as alleged by her master, could not be considered as having made an "innocent passage" for which her master would not be responsible.
6. That since the *Geneva Ethel* was found violating the revenue laws of Canada within the three-mile limit she could be immediately pursued beyond the three-mile limit and lawfully seized on the high seas.

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

The action was heard before the Honourable Mr. Justice Angers, at Charlottetown, P.E.I.

*James J. Johnston, K.C.* for claimant.

*M. R. MacGuigan, K.C.* and *C. St. Clair Trainor* for respondent.

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

ANGERS J., now (April 25, 1940) delivered the following judgment:

The claimant, John M. Fudge, master mariner, of Belleoram, Newfoundland, claims the return of the vessel *Geneva Ethel* and of her equipment, cargo and stores seized on the 27th of August, 1937, at a point approximately three and a half miles off North Lake on the north shore of Prince Edward Island, in the Gulf of St. Lawrence, by Hubert W. Coffin, master of the Canadian revenue cutter *Laurier*, for alleged infraction of the revenue laws of Canada.

The matter comes before this Court on a reference by the Minister of National Revenue under section 176 of the Customs Act (R.S.C. 1927, chap. 42, and amendments). By his decision given on the 15th of March, 1938, the Minister declared the boat and the liquor and cigarettes found thereon forfeited.

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

The relevant provisions of section 151 of the Customs Act read as follows:

151. The provisions of this section shall extend to vessels hovering in Canadian waters, and in the case of any vessel registered in Canada, or of any unregistered vessel owned by a person resident or domiciled in Canada, or of any other vessels or class of vessels which the Governor in Council may specify or enumerate by proclamation shall also extend to vessels hovering in Canadian customs waters

2. Any vessel which has, in Canadian waters or, subject to the provisions of subsection one of this section, in Canadian customs waters,—

(a) hovered;

(d) failed to come to a stop in compliance with the provisions of subsection four of this section,

shall be presumed to be a hovering vessel and to have hovered, provided that such presumption may, save in cases provided for by paragraph (d) of this subsection, be rebutted by evidence establishing that the vessel was engaged in a legitimate occupation not connected, directly or indirectly, with the smuggling into Canada of dutiable or prohibited goods, or the breach of any laws or regulations in force in Canada.

3. If any hovering vessel is found or observed in Canadian waters or, subject to the provisions of subsection one of this section, in Canadian customs waters, any officer may go on board such vessel and examine her cargo and may also examine upon oath the master or person in command or any other person on board, touching the vessel, cargo and voyage, and may bring the vessel into port; . . .

4. Any vessel in Canadian waters or, subject to the provisions of subsection one of this section, in Canadian customs waters, shall proceed

1940

JOHN M.  
FUDGE  
v.  
THE KING.  
Angers J.

1940  
 JOHN M.  
 FUDGE  
 v.  
 THE KING.  
 Angers J.

to come to a stop when required so to do in the King's name by any officer or upon signal made by any vessel in the service of the government of Canada hoisting the pennant and ensign approved and appointed for the purpose by order of the Governor in Council

5 On any such vessel failing to proceed to come to a stop when required, the captain or master or other person in charge of any vessel in the service of the government of Canada may, after first causing a gun to be fired as a signal, fire at or into such vessel.

8. The evidence of such captain, master or other person that the vessel was within Canadian waters or Canadian customs waters shall be *prima facie* evidence of the fact.

9. Any officer may at any time go on board any vessel at any place in Canadian waters or, subject to the provisions of subsection one of this section, in Canadian customs waters, and examine the manifest and inspect, search and examine the vessel and every part thereof, and any person, trunk, package or cargo on board.

10. Any vessel which is a hovering vessel within the meaning of subsection two of this section may be seized and forfeited, together with all stores and cargo which were upon such vessel at the time of the hovering, . . .

12. The powers conferred by subsection three of this section on an officer, may be exercised, and the provisions of subsections four to eleven inclusive, of this section, shall be applicable to a hovering vessel, either at the place where the vessel is found or observed to be hovering, or, elsewhere after pursuit, either within or without Canadian waters or Canadian customs waters as the case may be, or in a Canadian port when such vessel subsequently enters a Canadian port.

The relevant provisions of section 208 read thus:

208. If, upon search by any officer under the authority of this Act, any prohibited or smuggled goods, or goods not included or described in the manifest of the vessel, or goods respecting which there has been any violation of any of the requirements of this Act, are found in any vessel of any description whatsoever, whether proceeding from places beyond or within the limits of Canada, such goods, and the vessel in which the same are found, together with all the sails, rigging, tackle, and all other appurtenances which belong to or are attached to such vessel shall be seized and forfeited. . . .

The expressions "officer," "Canadian waters" and "Canadian customs waters" are defined in paragraphs (1), (u) and (v) of subsection 1 of section 2 as follows:

(1) "Officer" means an officer of Customs and includes in the provisions of this Act which relate to preventive measures, officers, and non-commissioned officers of the Royal Canadian Mounted Police employed in the preventive services of Canada and the captain or master or other person in charge of any vessel in the preventive services of the Government of Canada;

(u) "Canadian waters" shall mean all territorial waters of Canada and all waters forming part of the territory of Canada, including the marginal sea within three marine miles of the base lines on the coast of Canada, determined in accordance with international law and practice; subject, however, to the following specific provisions:—

(i) Canadian waters shall not extend beyond the limits of exclusion recommended in the North Atlantic Fisheries Award, answer to question V, as set forth in the Schedule to this Act;

(v) "Canadian customs waters" shall mean the waters forming that part of the sea which is adjacent to and extends nine marine miles beyond Canadian waters.

The material part of the answer to question V in the North Atlantic Fisheries Award, mentioned in paragraph (u), is worded as follows:

In case of bays, the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast.

The case was submitted on the evidence adduced at the preliminary hearing before the magistrate and at the trial before the Honourable Mr. Justice Saunders of the Supreme Court of the Province of Prince Edward Island and a jury in the prosecution of His Majesty the King against John M. Fudge, the claimant herein, master, William Myalls, mate, Charles P. Blagdon, cook, and James Rose, sailor, all of the vessel *Geneva Ethel*, on a charge of having, on or about the 27th of August, 1937, in Canadian waters adjacent to the County of Kings, Province of Prince Edward Island, on board the said vessel 85 gallons of rum, 600 gallons of alcohol and other liquors not included in the manifest of the vessel, contrary to the provisions of section 208 of the Customs Act. I may state incidentally that the notes on the transcript of the evidence at the preliminary hearing are not mine.

On the 27th of August, 1937, about noon, the *Laurier* was on the north side of Prince Edward Island, near East Point, in an endeavour to locate the vessel *Geneva Ethel*, reported to be hovering off the coast. The *Laurier* was then cruising in a north northeasterly direction, when Robert MacNeill, second officer on board, sighted a vessel at a distance of about six miles. Wishing to intercept her, the *Laurier* altered her course to northwest. The *Laurier* passed this vessel, which turned out to be the *Geneva Ethel*, at a distance of between 50 and 100 yards. The *Geneva Ethel* at the time was stopped and two or three men of her crew were fishing; she was then approximately six miles off shore. The *Laurier* proceeded on her course in

1940  
 JOHN M.  
 FUDGE  
 v.  
 THE KING.  
 Angers J.

1940  
 JOHN M.  
 FUDGE  
 v.  
 THE KING.  
 Angers J.

the same direction. She kept a check on the *Geneva Ethel's* position by bearings; as the vessel appeared to be nearing the coast, the *Laurier* stopped. At the time the cutter was at a distance of about seven or eight miles from the schooner. The *Laurier* remained stopped for forty minutes. The *Geneva Ethel* was kept under observation; she could easily be distinguished by her tan sails. The course followed by the *Laurier* is shown on the chart exhibit B by a line in pencil, three small circles and the figures 80·7, 87 and 95 (the latter with the word "stop") and the position of the *Geneva Ethel*, when the *Laurier* passed her, is indicated with the schooner's name. When Coffin considered that the *Geneva Ethel* was within three miles from the coast, in order to ascertain her position he had the log set and the *Laurier* ran a southwesterly course towards Shipwreck Point for a distance of about six miles; the course pursued is indicated on the chart exhibit B by a line in pencil from the point marked "stop 95" to the one marked "log 101." A bearing of the *Geneva Ethel* was taken; the line of bearing placed the *Geneva Ethel* within three miles from the shore. The *Laurier* proceeded further until her echo sounding machine registered a depth of eleven fathoms, that is to the spot marked "log 104" on the chart exhibit B. At that point Shipwreck Point lighthouse bore from the *Laurier* southwest by west one-half west; the sextant was used and a vertical angle of the lighthouse was taken; the angle indicated was 21 minutes, which meant a distance of 2·3 miles from the *Laurier* to the lighthouse. The above data correspond with the entries in the cutter's log-book, an extract whereof was filed as exhibit K.

I do not deem it expedient to relate in detail the operation of the sextant explained at some length in the testimonies of Coffin and MacNeill. Both concluded that the *Geneva Ethel* was well within three miles from the coast; in fact between two and two and a half miles.

Stress was laid by counsel for claimant on the fact that the sextant was not properly checked before it was used on the occasion in question. The evidence shows that Coffin made one check, while MacNeill made three. It may be convenient to quote an extract from the version of each of these two witnesses in relation to the check of the sextant.

At page 83 MacNeill says:

Q. Before you took the vertical angle with the sextant, what was done?

A. It was checked for error.

Q. Checked for error?

A. Yes, sir.

Q. What checking was made?

A. Well, there were three common checks, one puts on the sextant; index error—

Mr. Johnston: Q. Is that on the log there?

A. It is not on the log, no. Sight error, perpendicularity.

Q. (Mr. Trainor): What check did you make?

A. Well, I put those three checks on the sextant and found it to be without error and I then took the observation of the light with the sextant.

Coffin's version on the subject is found at pages 61 (in fine) and 62:

Q. So then the proper thing would be to check all errors?

A. Oh, no, that has nothing to do with it.

Q. You take your chance, then?

A. You check your index error, if that is correct—

Q. Can you assert, then, there is only one error?

A. If you have an index error you check your sextant, then you use all other three.

Q. What does Skipper MacNeill mean by saying you checked all three errors?

A. I don't know; if you check one—then you need not check the other errors.

Q. If you check one error, then these four others you need not correct them at all?

A. Yes, if your index is correct.

From the evidence it appears that the important check is for "index error" and that check was made both by Coffin and MacNeill. Assuming it was necessary that the three checks be applied to ascertain that the sextant was in proper condition, MacNeill applied them and found the sextant to be without error. There being no evidence to the contrary, I must conclude that the sextant was correct.

It may be noted that, at the time the position of the *Geneva Ethel* was ascertained and found to be within three miles from the coast, she was still heading towards Prince Edward Island, thereby shortening the distance between her and the coast.

Against the evidence of Coffin and MacNeill with reference to the position of the *Geneva Ethel* from the time she started on a southeasterly course shortly after three o'clock to the time when she altered her direction to north

1940  
 JOHN M.  
 FUDGE  
 v.  
 THE KING.  
 Angers J.

1940  
 JOHN M.  
 FUDGE  
 v.  
 THE KING.  
 Angers J.

northeasterly presumably after noticing that the *Laurier* was heading towards her, we have the testimony of the claimant himself. This testimony or at least the part thereof referring to the movements and position of the *Geneva Ethel* between 1 and 4 o'clock on the 27th of August, 1937, is rather vague and indefinite; the witness was obviously reticent and evasive.

When the *Laurier* passed the schooner at about half-past twelve, the latter was, according to Fudge, at a distance of about eight miles from the coast.

Around one o'clock, the *Geneva Ethel* started to proceed in a southeasterly direction towards East Point; in the witness' opinion, she travelled for a distance of eight miles. The schooner stopped and her crew fished for a period of forty minutes. In Fudge's estimate the *Geneva Ethel* was then  $4\frac{1}{2}$  miles from the coast.

Fudge says that the weather commenced to get dark and squally—on this point his testimony is in conflict with that of MacNeill—and that a strong tide was running in to the southwest; the *Geneva Ethel* seemed to be going in towards the land and he told the crew to loosen the jibs and hoist them and he steered a course north north-east, as he did not want to get too close to the coast.

The *Geneva Ethel* was not anchored and she drifted towards the land with the tide and the wind. Fudge could not tell her exact position and his estimate would at the best be a mere conjecture.

On behalf of the respondent we have the evidence of men equipped with modern nautical instruments who were in a position to fix, if perhaps not exactly, at least with a sufficient degree of precision, the location of the *Geneva Ethel* after the *Laurier* had passed her and the schooner had proceeded on a southeasterly course; on the other side there is the uncorroborated testimony of the owner and master of the schooner, lacking the proper nautical instruments, having kept no record whatever of his course and speaking entirely from memory.

After carefully perusing the evidence, I feel disposed to accept that adduced on behalf of the Crown; it seems to me more trustworthy and more reliable.



The observations of Mr. Justice Nesbitt of the Supreme Court of Canada in the case of *The King v. The Vessel Kitty D.* (1) seem to me applicable to the present case:

I concur in the judgment of Mr. Justice Davies which I have read, and would only add that it appears to me the case is another illustration of the clash of scientific accuracy with human guesswork. Either ships can be and are run by the improvements of modern science so that a captain can tell where he is without the sun, or all our boasted advances are naught. If compasses and logs, etc., are to be defeated by the judgment or estimate or guess of interested fishermen, poaching is made easy.

The judgment of the Supreme Court of Canada was reversed by the Judicial Committee of the Privy Council (2) on a question of fact, but not against the principle laid down by Mr. Justice Nesbitt.

Objections were raised by counsel for claimant: 1st against the production and use of the chart filed as exhibit B; 2nd against the use by the master of the *Laurier* of the vessel's log-book to refresh his memory; the objections were dismissed by Mr. Justice Saunders and I may say, with deference, that in so doing I believe he was right.

In connection with the admissibility of admiralty charts prepared and published under governmental authority, see *Rex v. The Bellman* (3).

As regards the log-book the evidence shows that the entries were not made by Coffin, but that he was familiar with them, as he inspected the log-book three or four times a day; in this respect reference may be had to Halsbury's Laws of England, 2nd ed., vol. 13, p. 683, No. 752.

Counsel for claimant further objected to the use by the master of the *Laurier* of the Light List Book published by the Department of Transport in 1937 showing the height of every lighthouse in Canada and mentioning the height of Shipwreck Point lighthouse as being 86 feet, exactly the same figure as that appearing on the chart, exhibit B. The objection is, in my opinion, unfounded. This light list issued by the Department of Transport is a work made by officers of the Crown and it is presumed that they acted in accordance with their duty and have stated nothing in their survey contrary to the facts. This proposition was

1940  
JOHN M.  
FUDGE  
v.  
THE KING.  
Angers J.

(1) (1904) 34 S.C.R. 673, 697.

(2) (1905) 22 T.L.R. 191.

(3) (1938) 3 D.L.R. 548.

1940  
 JOHN M.  
 FUDGE  
 v.  
 THE KING.  
 Angers J.

laid down by Baxter, C.J., in *Rex v. Bellman (ubi supra)*, in which he cites a passage from the judgment of Parke, B., in the case of *Daniel v. Wilkin*; at page 552 Mr. Justice Baxter says:

*Daniel v. Wilkin*, 7 Ex. 429, at p. 437, 155 E.R. 1016, is on closer ground, for Parke, B., said that "The ground on which a survey made by officers of the Crown under a commission is received, is, that it is presumed that they acted in accordance with their public duty, and have stated nothing in their inquisition or survey which is contrary to the fact."

In the absence of evidence establishing that the height of 86 feet mentioned in the chart exhibit B as well as in the Light List Book of the Department of Transport is inexact, I believe that I am bound to accept it.

The evidence shows conclusively that the *Geneva Ethel* had on board, when she was seized, 600 gallons of alcohol, 8 kegs of rum of four gallons each, 123 gallons of assorted liquors in bottles consisting of rum, gin, brandy and whiskey, and 16 cartons of cigarettes, and that these goods were not included or described in the manifest; the value of these goods for duty purposes was \$774, to wit \$758 for the liquors and \$16 for the cigarettes.

The manifest, dated at Saint-Pierre, August 12, 1937, and bearing the signature of the claimant, contains under the heading "Nombre et espèces des colis et nature des marchandises" the following entry, "Sur lest et provisions de pêche et quarante quintaux morue." The proof discloses that this manifest was the one obtained by Fudge from the customs the last time he cleared from Saint-Pierre prior to the 27th of August when his schooner was seized. The previous manifest from Saint-Pierre, filed as exhibit F, bears date the 9th of July, 1937; the description of the cargo reads: "Sur lest et provisions de pêche"; Fudge declared that on that particular occasion he also had liquors on board but had not disclosed them in the manifest.

Fudge admitted that ten or twelve years ago he was caught with liquor on board his vessel, which he was taking to Newfoundland for election purposes, that he was brought before the Court, pleaded guilty and paid a fine. Asked if that were the only time he had ever had liquor within the three-mile limit of Prince Edward Island he

replied that this was the only time. To the question as to whether he had ever given liquor off his ship to any person belonging to Prince Edward Island, Fudge replied: "Not to my knowledge." Asked if he would remember, he answered in the negative.

The evidence establishes beyond doubt that the claimant was engaged in the trade of contraband liquor.

It is idle to say that Coffin and MacNeill were officers within the meaning of paragraph (1) of subsection 1 of section 2 of the Act. As such they had, under sections 143, 151 and 208, the power to go on board the *Geneva Ethel* for the purpose of examining her cargo and manifest and to seize her and her cargo and stores and bring her to port.

It was urged on behalf of claimant that the *Geneva Ethel* was seized at a distance of  $4\frac{1}{2}$  miles from the coast and not of  $3\frac{1}{2}$  miles as stated by the Crown's witnesses. The captain of the schooner fixed the distance by taking a sounding with a "jigger," which was filed as exhibit 2. According to Fudge the sounding gave a depth of 26 fathoms; he said that with the aid of a chart (exhibit 1) he was able to determine the exact place at which the *Geneva Ethel* was seized. I doubt very much whether a "jigger" with a weight of only a pound and an ounce could be useful for the purpose of taking a sounding in 26 fathoms of water from a vessel drifting on a strong tide; I am inclined to believe that a sounding taken in these conditions would not be very accurate. According to Coffin, whose evidence is uncontradicted, a sounding lead weighs from 7 to 12 pounds. However that may be, the question as to whether the *Geneva Ethel* stopped and was seized at  $3\frac{1}{2}$  or  $4\frac{1}{2}$  miles from the coast seems to me immaterial, as the proof does not disclose the distance covered by the schooner from the time she changed her course to north northeast to the time she stopped after the cutter had fired shots at her and Fudge realized that it would be dangerous to proceed further.

Counsel for claimant submitted that, if the *Geneva Ethel*, in the course of her legitimate employment, namely fishing, moved inside the three-mile zone by error and, without in the meanwhile committing an overt act against

1940  
 JOHN M.  
 FUDGE  
 v.  
 THE KING  
 Angers J.

1940  
 JOHN M.  
 FUDGE  
 v.  
 THE KING  
 Angers J.

the revenue laws of Canada, immediately proceeded outside, this would constitute an "innocent passage" for which her master would not incur any responsibility. I am unable to agree with this proposition, particularly in view of the fact that the schooner was hovering with liquor on board not described in the manifest: see *The Queen v. The Ship Beatrice* (1).

Contrary to the contention set forth by counsel for the claimant, I am of the opinion that the *Laurier* had the right to pursue the *Geneva Ethel* beyond the three-mile limit and search and seize her on the high seas: *The Ship North* and *The King* (2).

The certificate of registry of the *Geneva Ethel*, dated at St. Johns, Newfoundland, the 11th of March, 1935, gives the name of Jeremiah Petite, of English Harbour, Fortune Bay, Newfoundland, as owner of the vessel. A note signed by the collector of customs at Belleoram, Newfoundland, dated April 11, 1935, written on the back of the first page of the certificate exhibit C, certifies that John M. Fudge, the claimant herein, became on the said date master of the *Geneva Ethel*. Various receipts, bearing dates ranging from April to July, 1937, annexed to the certificate of registry (exhibit C), are all made to John M. Fudge as master of the *Geneva Ethel*.

A document entitled "Agreement and account of crew," dated May 14, 1937, concerning the *Geneva Ethel*, bears the signature of J. M. Fudge, as master.

After attentively reading and annotating the oral evidence and examining the exhibits and perusing with care the able and exhaustive argument of counsel, I am satisfied that on the 27th of August, 1937, in the afternoon, sometime between three and four o'clock, the *Geneva Ethel* hovered in Canadian waters, namely in waters adjacent to Sylvester Point, on the north shore of Prince Edward Island, while having on board alcohol, liquors and cigarettes not included or described in the manifest of the vessel and, upon signals to stop given by the revenue cutter *Laurier*—the evidence shows that all the signals required by section 151 were given—failed to come to a

(1) (1896) 5 Ex.C.R. 378.

(2) (1906) 37 S.C.R. 385.

stop immediately but proceeded toward the high seas, where, after pursuit and shots from the cutter's gun, she hove to and was seized.

1940  
JOHN M.  
FUDGE  
v.  
THE KING  
Angers J.

In the circumstances the only conclusion to which I can arrive is that the claimant's claim must be dismissed, the decision of the Minister maintained and the vessel *Geneva Ethel* and her equipment, cargo and stores declared forfeited in favour of the respondent.

The respondent will be entitled to his costs against the claimant.

*Judgment accordingly.*

BETWEEN :

HOCHELAGA SHIPPING AND TOW-  
ING COMPANY LIMITED.....}

SUPPLIANT;

1937  
June 10, 11  
& 15.  
1938  
Oct. 22.

AND

HIS MAJESTY THE KING..... RESPONDENT.

*Crown—Petition of Right—Public Work—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19 (c)—Damages—Loss of ship through collision with submerged part of a jetty constructed by the Crown—Negligence on part of officers or servants of the Crown—Contributory negligence on part of master of ship—Non-feasance or misfeasance—Trap—Damages limited to cost of repair of ship.*

In 1931, the Dominion Government undertook the construction of a jetty, projecting at right angles to the large Dominion Government break-water at Port Morien, N.S. The method of construction was crib-work made of logs and timber, with stones used as ballast. Before it was completed, a large part of the upper portion of the outward end broke away during a storm on September 9, 1932. This left the lower portion of the outer cribwork and its rock ballast remaining in position but entirely submerged. Under instructions of the assistant engineer in charge of the work for the Department of Public Works, the foreman in charge of the job squared off and sheeted the end of the portion of the jetty which remained in place and sawed the logs which emerged from the underportion of the part of the jetty washed away, leaving the understructure entirely submerged and invisible. No buoy or other warning sign was placed at or near the spot.

Suppliant's towboat *Ostrea*, engaged in salvage operations in Morien Bay, in the early morning of September 22, 1934, left her berth at Port Morien in good and seaworthy condition and while on her way out came into collision with the submerged portion of the jetty. The collision caused the *Ostrea* to spring a leak. She proceeded on her way for a distance of about 3½ miles when it became apparent to

1938  
 HOCHELAGA  
 SHIPPING  
 & TOWING  
 CO. LTD.  
 v.  
 THE KING.

those on board that she was filling with water. She was abandoned and a few minutes after she sank with her furnishings and salvage equipment.

Suppliant seeks to recover from His Majesty the King the value of the *Ostrea* and her salvage equipment.

*Held:* That the jetty is a public work within the meaning of s. 19 (c) of the Exchequer Court Act.

2. That the accident was due to the negligence of officers or servants of the Crown, namely, the district engineer and the assistant engineer under whose supervision the construction of the jetty and its reparation, after the top part of the outer end had been practically washed away, were effected, acting within the scope of their duties or employment on a public work.
3. That, after the accident, the master of the *Ostrea* was negligent in not taking the means of ascertaining the extent of the damage caused to his vessel by the collision, before proceeding to sea.
4. That the damage for which the respondent is responsible is limited to the cost of the repair of the vessel.

PETITION OF RIGHT to recover from the Crown the sum of \$22,016.50 for damages for the loss of suppliant's steamship and salvage equipment alleged to have been caused through the negligence of officers and servants of the Crown acting within the scope of their duties or employment on a public work.

The action was tried before the Honourable Mr. Justice Angers, at Halifax, N.S.

*L. A. Lovett, K.C.* and *W. C. MacDonald, K.C.* for suppliant.

*F. D. Smith, K.C.* and *J. G. Fogo, K.C.* for respondent.

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

ANGERS J., now (October 22, 1938) delivered the following judgment:

The suppliant, a body corporate, incorporated under the laws of the Province of Nova Scotia and having its head office in the City of Halifax, in the said province, by its petition of right, seeks to recover from His Majesty the King the sum of \$22,016.50 for the loss of the steamship *Ostrea* and her salvage equipment at Port Morien, N.S., on September 22, 1934.

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

The *Ostrea* was built at Sorel, Province of Quebec, by the Department of Marine and Fisheries in 1916. Her first port of registry was Ottawa.

The suppliant purchased the *Ostrea* from the Dominion Government in 1932; from that time the vessel was registered at Halifax, Nova Scotia.

John Simon, president of the suppliant company, testified that the latter paid \$200 for the ship; at the time of the purchase the hull and engines were practically all that was left.

The evidence shows that the suppliant had the *Ostrea* repaired and equipped at Charlottetown, P.E.I., and at Dartmouth, N.S., shortly after its acquisition.

The suppliant used the *Ostrea* for salvage operations.

The *Ostrea* left Halifax for Port Morien in July, 1934. According to the testimonies of the said John Simon, Leonard Williams, the master of the ship, William King, the mate, John L. Worthen, the engineer, the *Ostrea* was then in good and seaworthy condition.

On September 21, 1934, the *Ostrea* arrived at Port Morien to land upon the government wharf materials salvaged from the wreck of the steamship *Watford*.

The next morning the *Ostrea* left the wharf to continue its salvage operations on the said wreck. While passing at the end of the wharf, at a distance of five or six feet, she struck an obstruction. The collision caused the ship to spring a leak. The fact however was not noticed immediately and the *Ostrea* continued her way. A short time later she became difficult to steer and it was found that she was filling with water. As nothing could be done to save her, the crew got into a life-boat to save themselves. A few moments after the crew had left her, the *Ostrea* sank at a distance of about one-half mile east of the bell buoy in Morien Bay.

Is the respondent responsible for the loss of the *Ostrea*?

The case, in my opinion, is governed by subsection (c) of section 19 of the Exchequer Court Act:

1938

HOCHELAGA  
SHIPPING  
& TOWING  
Co. LTD.  
v  
THE KING.

Angers J.

1938  
 HOCHELAGA  
 SHIPPING  
 & TOWING  
 Co. Ltd.  
 v.  
 THE KING.  
 Angers J.

19 The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:

- (a) \* \* \* \* \*
- (b) \* \* \* \* \*
- (c) every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work

If the case cannot be brought within the ambit of subsection (c) of section 19, I believe that it must fail.

According to the testimony of D. Harold McDonald, assistant engineer of the Department of Public Works, under whose supervision the work was effected, the jetty or extension to the government wharf at Port Morien, sometimes referred to in the evidence as an L, was commenced in the latter part of the fall of 1931. This addition, shown on plans, exhibits 11 and B, was erected to act as a shelter.

On September 29, 1932, McDonald made an inspection and found that a portion of the superstructure of the outer end of this jetty for a length of about 55 feet had been washed away and carried ashore; the plan, exhibit B, shows the portion of the jetty which was carried ashore.

On July 20, 1933, McDonald made an examination of the remaining portion of the section of the cribwork which had been carried away; he found that the foundation was insufficient and unsuitable for setting on it a new cribwork. McDonald says that, after consultation with the foreman, it was decided that the portion of it which was in good condition should be utilized in constructing the return L running toward the shore, indicated on plan exhibit B in cross-hatched lines. The under portion of the outer section of the jetty, the top part of which had been washed away, was partly removed and the outer end of the remaining portion of the jetty was sheeted; it seems to me apposite to quote the passage of McDonald's deposition in this regard:

Q. What was done in respect to the outer end?

A. It was close piled, sheeted

Q. Just describe how it was done; what was done in respect to the portion outside the crib work?

A. What remained on the bottom outside the pier comprised some old logs and loose stones and ballast and this would not provide a satisfactory foundation. A new crib work could not be fitted on it and you



could not put a block and span work there as these would carry it away and we made the only feasible use we could of the block which was washed up on the beach.

Q. What did you do with the remainder of the material left at the end of the 154 feet?

A. The foreman was instructed . . .

Mr. McDonald: He must tell us what was done.

The Witness: I visited the work each month and satisfied myself that he had removed as much of the obstruction as he could with a cross-cut saw.

Q. What was done about sheeting the outer end?

A. It was driven down as far as it could be driven.

Perhaps I had better cite an extract from the witness' deposition in cross-examination dealing with the same subject:

Q Mr. Martel stated that the first thing he did under the \$2,000 vote was to straighten out the wharf leaning to the south and started to build it up and, after finishing this, he went to the outer part and sawed all the logs down as far as he could see to low water?

A. Yes.

Q. And the end of that wharf was sheeted over and nothing was left to indicate that there was anything underneath the water, a completely sheeted and piled end?

A. Yes.

Q. And the part that had been washed ashore, you say, had been squared off and put as an L; instead of being put up out alongside of the end of the wharf where it came from—it was put as an L at right angles to the wharf?

A. Yes.

As previously mentioned the work was done under the supervision of D. H. McDonald, who was then assistant engineer, and the latter kept the district engineer, T. J. Locke, aware of what he was doing. I deem it convenient to again refer to McDonald's testimony and quote therefrom the following passage:

Q. And the various works that were authorized were done under your supervision?

A. Yes.

Q. And you would make reports to the District Engineer?

A. Yes.

Q. And the District Engineer would, in turn, report to the Chief engineer in Ottawa?

A. Yes.

In cross-examination, the witness made the following statements:

Q. And all that work there was under your supervision?

A. Yes.

Q. And you and Mr. Locke were down there?

A. Yes.

1938  
 HOCHELAGA  
 SHIPPING  
 & TOWING  
 Co. LTD.  
 v.  
 THE KING.  
 Angers J.

1938  
 HOCHELAGA  
 SHIPPING  
 & TOWING  
 Co. LTD.  
 v.  
 THE KING.  
 Angers J.

Q. Was Mr. Locke there when the work was going on?

A. Yes, when it began, but I was there during its progress.

It seems obvious that the underportion of the outer end of the jetty washed ashore was left submerged. The evidence does not suggest any other obstruction which the *Ostrea* could have met. This underportion, submerged and invisible, was not charted or buoyed in any way. It remained there a menace to navigation until the accident happened.

Although the evidence is perhaps not as definite as could be desired, I am satisfied that the *Ostrea* struck the said submerged underportion of the outer end of the jetty.

It was urged on behalf of the suppliant that the injury to the vessel and her loss were attributable to the negligence of officers or servants of the Crown, consisting in that they, while acting within the scope of their duties or employment on a public work, viz. the jetty aforesaid, knowing that the top part of the outward end of the same had been washed away, did not replace it nor remove the underportion thereof, which was allowed to remain in a submerged position, uncharted and unbuoyed, thus constituting a menace to navigation.

The jetty with which we are concerned is, in my opinion, a public work within the meaning of subsection (c) of section 19. On the other hand, the assistant engineer and district engineer, in charge of the construction of the said jetty and of the reparation of the damage caused to it in the month of September, 1932, must, as I think, be considered as officers and servants of the Crown. Did the loss of the *Ostrea* result from their negligence, while acting within the scope of their duties or employment? This is the question which remains for determination.

It was submitted by counsel for the respondent that His Majesty is not responsible for mere non-repair of a public work; in support of his contention counsel cited: *Hamburg American Packet Company v. The King* (1); *Legault v. The King* (2); *Harris v. The King* (3); *McHugh v. The Queen* (4); *Joubert v. The King* (5), and *Canada Steamship Lines Ltd. et al. v. The King* (6).

- (1) (1901) 7 Ex.C.R. 150; (1902)  
 33 S.C.R. 252.  
 (2) (1931) Ex.C.R. 167.  
 (3) (1904) 9 Ex.C.R. 206.

- (4) (1900) 6 Ex.C.R. 374  
 (5) (1931) Ex.C.R. 113.  
 (6) (1926) Ex.C.R. 13; (1927)  
 S.C.R. 68.

In the matter of *Hamburg American Packet Company v. The King*, the suppliant, by its petition, sought to recover damages for injuries to the steamship *Arabia* and her cargo. The vessel, while passing through the channel at Cap à la Roche in the St. Lawrence River, took the ground or struck some obstruction and was injured and her cargo damaged. The work of digging a channel between Montreal and Quebec, in the St. Lawrence River, had been commenced by the Harbour Commissioners of Montreal and continued by the Government of Canada. The work, after the Government took it over, was carried on under the direction of the Minister of Public Works. During the opening of the channel, the work of excavation was tested from time to time by sweeping the channel to find out if the required depth had been reached. Once the work was completed, no further tests were made and the sweeping was discontinued. After the accident, the Minister caused the channel to be swept and two anchors and a boulder were found.

1938  
 HOHELAGA  
 SHIPPING  
 & TOWING  
 Co. LTD.  
 v.  
 THE KING.  
 Angers J.

The learned trial judge, after briefly relating the facts, said that, having regard to the evidence as to the marks on the vessel's bottom and the position in which the anchors and boulder were found, it was not probable that the injuries to the *Arabia* had been caused by either of them; that it was obvious that the ship had come into contact with some obstruction or else had taken the ground, her draught having been by accident or inadvertence unduly increased; that in the view he took of the case it was not necessary to come to any conclusion as to which of the two things was more likely to have happened or as to whether or not the master or pilot of the vessel had not by imprudent navigation contributed to the accident.

After citing sections (c) and (d) of section 16 (now section 19) of the Exchequer Court Act, the learned judge says (p. 176):

I refer to the latter provision in respect to claims arising under any law of Canada only to add that it does not in my view come in question here, as there is no law of Canada making the Crown liable in a case such as this, unless it be that which is recognized in the earlier provision of the section that I have cited. There is no law under which the Crown is liable for the mere non-repair of a public work, or for not using, to keep it in a safe condition, money voted by Parliament for a public work. Whether in any such case the repair shall be made or the

1938  
 HOHELAGA  
 SHIPPING  
 & TOWING  
 Co. LTD.  
 v.  
 THE KING.  
 Angers J.

money expended is within the discretion of the Governor in Council, or of the Minister of the Crown under whose charge the work is, and for the exercise of that discretion he and they are responsible to Parliament alone, and not to any court. As has been frequently pointed out there is no remedy in any such case unless the claim arises out of a death or injury to the person or to the property on a public work, resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment. I have had occasion in a number of cases to refer to this provision and to discuss its origin, scope and object, and I do not see that I can now on these subjects usefully add anything to what I stated in *The City of Quebec v. The Queen* (2 Ex.C.R. 252; 3 Ex C.R. 164); and in *Lavoie v. The Queen* (3 Ex. C.R. 96). On the general question of the liability of the Crown for torts I have nothing to add to what I stated in the cases referred to.

Dealing with the question of the existence of a public work in the case before him, the learned judge, after stating that the Exchequer Court Act contains no definition of the expression "public work" but that the Act from which clause (c) of section 16, namely section 1 (c) of chapter 40 of the Revised Statutes of Canada, 1886, re-enacted in the Expropriation Act (52 Vict., chap. 13, s. 2 (d)), included such a definition, continues as follows (p. 177):

With the exception of some works that are under the charge of other ministers, the Minister of Public Works is by the 7th section of The Public Works Act given the management, charge and direction of the public works so enumerated. Among them we find "the construction and repair of . . . works for improving the navigation of any water." Now it cannot be doubted that the ship channel of the St. Lawrence Quebec is a work for improving the navigation of the St. Lawrence River; and that while the work was in the course of construction or under repair it was a public work under the management, charge and direction of the Minister of Public Works. The same may be said of any work of dredging or excavation to deepen or widen the channel of any navigable water in Canada. But it does not follow that once the Minister has expended public money for such a purpose the Crown is for all time bound to keep such channel clear and safe for navigation; and that for any failure to do so it must answer in damages. It is argued that the section of The Public Works Act to which reference has been made, and the 9th section of the same Act, which provides that the minister shall direct the construction, maintenance and repair of all harbours, roads or parts of roads, bridges, slides and other public works and buildings constructed or maintained at the expense of Canada, impose that duty and responsibility on the Minister, and that the Crown is hable for his failure to maintain any public work and to keep it in repair. With that view I do not agree.

And further on the learned judge adds (p. 178, in fine):

On the broad question as to whether or not the Crown was under a legal obligation to keep the ship channel at Cap à la Roche in repair,

and to sweep it and see that no obstruction had occurred therein, my opinion is that no such obligation existed. The importance of such precautionary measures is not questioned, and the expenditure necessary for the purpose is small and trifling compared with the great commercial interests involved. But the question as to whether the public money should be so expended or not was for the Governor in Council, or the responsible minister to determine, and it is not for the court to review the exercise of that discretion. On this question I adhere, without repeating them, to the views that I expressed in *McHugh v. The Queen* (6 Ex.C.R. 374).

1938  
 HOCHELAGA  
 SHIPPING  
 & TOWING  
 Co. LTD.  
 v.  
 THE KING.  
 Angers J.

The suppliant appealed to the Supreme Court, but the appeal was dismissed: see 33 S.C.R., 252.

The facts in the case of *McHugh v. The Queen*, referred to in the decision of Mr. Justice Burbidge in *re Hamburg American Packet Company v. The King* and relied upon by counsel for the respondent, are briefly as follows.

The suppliant *McHugh*, by his petition, claims damages for personal injuries alleged to have been suffered by falling from a horse while crossing the bridge over the Old Man River, at *McLeod*, in what was then the North-West Territories. The petition states that the bridge was out of repair and that the horse, having put his foot into a hole, stumbled and fell upon the suppliant, causing him serious injury. There were issues of fact as to whether or not the bridge was out of repair and as to whether or not the fall took place on the bridge or because of its condition. The Crown further relied upon the defence of contributory negligence. The learned judge declared that he did not find it necessary to determine any of these issues and he went on to say (p. 381):

There is no evidence that the injury resulted from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, so as to bring the case within clause (c) of the 16th section of The Exchequer Court Act. It was contended for the suppliant that the Minister of Public Works is an "officer or servant of the Crown" within the meaning of that provision; and that under The Public Works Act (R.S.C., 1886, ch. 36) it was his duty to keep this bridge in repair; and that for his negligence in that respect the Crown is liable. It was not suggested, of course, that the minister was under any duty himself from time to time to inspect the bridge and to see that it was repaired, if repairs were needed; but that he should have taken care that there was some one charged with that duty. It is not for me, I think, to express any opinion as to whether the minister ought or ought not under the circumstances existing in this case to have appointed, or to have recommended the appointment of, an overseer or caretaker for this bridge. That was, it seems to me, a matter within his own discretion which is not to be reviewed in this court, and for the proper exercise of which he is answerable to Parliament alone.

1938

HOCHELAGA  
SHIPPING  
& TOWING  
Co. LTD.v.  
THE KING.

Angers J.

There is no duty on the Crown, or any minister of the Crown, to keep a public work, such as this bridge was, in repair for the failure of which a petition of right will lie against the Crown at the suit of one injured by reason of non-repair. In such a case the suppliant cannot recover against the Crown unless the case falls within the terms of the provision of The Exchequer Court Act to which reference has been made. This case is not, I think, within the statute.

The facts in the case of *Harris v. The King* were briefly as follows. The suppliant's husband was killed by the tender of an engine on a level crossing over the tracks of the Intercolonial Railway, in Halifax. The crossing was a dangerous one and no means had been taken for the protection of the public. Immediately before the suppliant's husband attempted to cross, cars had been shunted over the crossing in a direction opposite to that from which the engine and tender by which he was killed were coming. The engine used in shunting leaked steam; the atmosphere was heavy and the steam and smoke from the engine did not lift quickly. As a result a cloud of steam and smoke was carried over toward the track on which the engine and tender, cause of the accident, were running and obscured them from the view of the victim. The train that was being shunted and the engine and tender passed each other at a short distance from the crossing. The cars and shunting engine being clear of the crossing the suppliant's husband attempted to cross the tracks. The engine and tender which were being backed at a rate of six miles an hour, emerged from the cloud of steam and smoke and were upon him before he had time to escape.

It was held that the accident was due to the negligence of officers and servants of the Crown employed on the railway in using a defective engine and maintaining too high a rate of speed.

It was contended on behalf of the suppliant, Eliza Harris, that the accident would not have occurred if there had been gates or a watchman at the crossing and that the officers and servants of His Majesty in charge of the Intercolonial Railway were guilty of negligence in not maintaining a watchman or gates at said crossing. The learned trial judge said that he could not adopt this view; and he added (p. 208):

There can be no doubt that the crossing was a dangerous one; and that it would have been prudent to keep, as at times had been done, a

1938

HOCHELAGA  
SHIPPING  
& TOWING  
Co. LTD.v.  
THE KING.

Angers J.

watchman at this place to warn persons using the crossing, or to have set up gates there to prevent them from using it while engines or trains were passing over it. But that, I think, was a matter for the decision of the Minister of Railways and of the officers to whom he entrusted the duty and responsibility of exercising in that respect the powers vested in him. There is always some danger at every crossing; but it is not possible in the conditions existing in this country to have a watchman or gates at every crossing of the Intercolonial Railway. The duty then of deciding as to whether any special means, and, if any, what means shall be taken to protect any particular crossing of the railway must rest with the Minister of Railways, or the officer upon whom, in the administration of the affairs of his Department, that duty falls. If it is decided that certain special means shall be taken to protect the public at any particular crossing, and some officer or employee is charged with the duty of carrying out the decision, and negligently fails to do so, and in consequence an accident happens, then, I think, we would have a case in which the Crown would be liable. But where the Minister, or the Crown's officer under him whose duty it is to decide as to the matter, comes in his discretion to the conclusion not to employ a watchman or to set up gates at any crossing, it is not, I think, for the court to say that the Minister or the officer was guilty of negligence because the facts show that the crossing was a very dangerous one; and that it would have been an act of ordinary prudence to provide, for the public using the crossing, some such protection.

In the case of *Legault v. The King*, the suppliant, Dame Flore Legault, by her petition sought to recover damages for the death of her husband drowned off one of the wharves in the harbour of Montreal.

In the evening of the 15th of November, 1929, Willie Chagnon, husband of the suppliant, without being invited and without business drove in his automobile, with his two children, onto a wharf, in the harbour of Montreal, to visit friends engaged in loading freight from a shed on the wharf. Chagnon had been drinking and was under the influence of liquor. When told to go, he got in his car with his children and drove straight into the canal, where all were drowned.

The Honourable Mr. Justice Audette dismissed the petition, holding that Chagnon had no business on the wharf, that he was there by tolerance and that the Crown was under no duty to him; further that Chagnon, being inebriated, was the victim of his own condition and conduct.

This case was evidently cited on account of the following statements by the learned judge, with which I agree (p. 170):

1938  
 HOCHELAGA  
 SHIPPING  
 & TOWING  
 Co. LTD.  
 v.  
 THE KING.  
 Angers J.

To succeed in a case of the kind, it is necessary to bring the case within the ambit of subsection (c) of section 19 of The Exchequer Court Act), R.S.C 1927, ch. 34).

(Subsection (c) is here quoted.)

Where a liability not existing at common law is created by statute, and the statute provides a particular remedy, that remedy must be followed. *Fort Francis Pulp & Paper Co. vs. Spanish River Pulp & Paper Co.* (1931, 2 D.L.R. 97).

The first requirement has been satisfied as I find the canal to be a public work; but coming to the second and third requirements, I first find there was no officer whose special duties were to supply the precautions alleged by the suppliant and that there was no negligence. I may add, as was decided in the case of *Harris vs. The King* (1904, 9 Ex.C.R. 206, at p. 207), that when the Minister of Railways and Canals, or the crown's Officer under him whose duty it is to decide as to the matter, comes, in his discretion, to the conclusion not to have lights, gates, buoys, poles, etc., at the *locus in quo*,—it is not for the Court to say that the Minister or the Officer was guilty of negligence because the facts may even show that it was a dangerous place.

In the case of *Joubert v. The King*, the suppliant, by his petition, claimed damages arising out of the death of his son.

Charles Wilfrid Xavier Joubert, the son of the suppliant, at the time of his death, was employed by the Department of Marine and Fisheries on a barge used to lay buoys. He was paid by the hour and was in addition lodged and fed on the barge.

On April 25, 1929, after supper, the suppliant's son, accompanied by one Lefebvre, engaged in similar work, left the barge moored at Bureau Wharf, at Three Rivers, to go to the theatre. At eleven o'clock both returned to the Bureau Wharf to sleep on board the barge. On arriving at the place where the barge was moored when they left, they found that she had been moved some 800 or 900 feet, although still moored at the Bureau Wharf. Joubert and Lefebvre walked on the top of the concrete flat coping of the front wall of the wharf towards the barge. Joubert tripped on a nigger head, i.e. an iron post placed inside an indentation in the top of the wall and used for tying moorings, fell in the water and was drowned.

The petition was dismissed. The Honourable Mr. Justice Audette, in his judgment, says (p. 116):

The suppliant, to succeed, must bring his case within the ambit of subsec. (c) of sec. 19 of the Exchequer Court Act (R.S.C., 1927, ch. 34).

(Section 19, subsection (c) is here quoted.)



To bring the case within the provisions of subsec. (c) of sec. 19, the injury must be 1st—on a public work, 2nd—there must be some negligence of an officer or servant of the Crown acting within the scope of his duties or employment; 3rd—the injury must be the result of such negligence.

There is not in this case a tittle of evidence upon the record establishing that there is a public work or that there was any particular officer or servant of the Crown whose duties or employment involved the doing or omitting of doing something which was the *causa causans* of the accident. From these facts, it necessarily follows that the Court cannot find that there was any negligence of any officer or servant of the Crown acting within the scope of his duties for whose negligence the Crown can be held responsible.

The learned judge adds that there is no evidence to show that the Crown was under any obligation to do anything which it failed to do in the circumstances of the case.

The last case cited by counsel for the respondent is that of *Canada Steamship Lines Limited et al. v. The King*. The suppliants, by their petition of right, sought to recover from His Majesty the King \$65,744.61, being the amount of claims paid by them for personal injury and loss of property sustained by passengers landing from the steamship *Richelieu* at L'Anse Tadoussac on July 7, 1923, due to the collapse of a landing slip on a wharf owned by the Crown. The wharf, built between 1910 and 1912, had been but little used. Early in 1923, Canada Steamship Lines Limited applied to the Minister of Public Works to have it put in condition. The Minister assented and estimates for the cost were sanctioned late in June or early in July, 1923. To the knowledge of the company no substantial repairs to the wharf had been made. Without further notice to the Government, the *Richelieu* began to use the wharf in the latter part of June. On her fourth trip, on July 4, among the passengers landing at the wharf in question was one Brunet, a government engineer on a trip of inspection for his department. Brunet had some apprehension regarding the safety of the slip and, the next day, he made a casual examination of it. Before leaving Tadoussac that evening, Brunet, instead of making a personal inspection or reporting his fears to his department or warning the officers of the steamship company of the danger of using this slip in its present condition, asked one Imbeau, occasionally engaged as foreman by the

1938

HOCHELAGA  
SHIPPING  
& TOWING  
Co. LTD.v.  
THE KING.

Angers J.

1938  
 HOCHELAGA  
 SHIPPING  
 & TOWING  
 Co LTD.  
 v.  
 THE KING.  
 Angers J.

Department of Public Works but not a permanent or regular employee of the government, to examine the slip and make a report to the Department of Public Works. Imbeau's report, dated July 7, was not received by the department until two days later. In the meantime the accident had occurred.

The trial judge came to the conclusion that there existed between the Crown and Canada Steamship Lines Limited a contract whereby the company, for a yearly consideration of \$2,000, could use for its vessels the government wharves between Quebec and Chicoutimi, including the one at L'Anse Tadoussac, and that the Crown, in not keeping the last-mentioned wharf in safe and proper condition, was guilty of a breach of contract and was liable for the damages resulting therefrom. The learned judge said that, having reached the conclusion that the Crown was liable *ex contractu* for the damages arising from the said accident, it became unnecessary to delve into the other questions and particularly to decide whether or not the suppliants had a right of action under subsection (c) of section 19 (then section 20) of the Exchequer Court Act. An appeal was taken by the Crown to the Supreme Court. The latter, reversing the judgment of the Exchequer Court on that point, held that the Crown was under no contractual obligation to Canada Steamship Lines Limited to provide at L'Anse Tadoussac a safe landing place for its passengers, the sum of \$2,000 per year received by the Crown in "payment of commutation of wharfage" not being equivalent to a rental for the use of the government wharves.

The Supreme Court however held that the Crown was in part responsible for the accident due to the negligence of one of its officers or servants, namely Brunet, while acting within the scope of his duties or employment upon a public work.

After stating that the evidence did not sufficiently establish that Imbeau was an officer or servant of the Crown, Anglin C.J., who delivered the judgment of the Court, said (p. 77):

The case of Brunet is quite different. He was undoubtedly an officer or servant of the Crown. He came to Tadoussac in the discharge of his duties or employment. He saw the use that was being made of

the slip which afterwards collapsed and immediately realized that its condition was dubious and had reason, as he says, to "fear" for its safety. He was told by Imbeau that there should be an inspection "comme il faut" of the slip because it might be "endommagé"—to see if it were not also in bad condition. Instead of clearing up his suspicions by an immediate personal inspection, or at least promptly reporting his fears to Quebec, or warning the officers of the steamship company of the probable danger of using the slip in its then condition, he contented himself with asking Imbeau to make an inspection and to report the result in writing to Quebec. In taking the risk of allowing the continued use of the wharf pending such report and in failing to give any warning to the officers of the steamship company Brunet was in my opinion guilty of a dereliction of duty amounting to negligence on his part as an

officer or servant of the Crown while acting within the scope of his duties or employment upon a public work (*The King v. Schrobounst*, 1925, Can. S.C.R. 458),

and his neglect entailed liability of the Crown for the consequent injuries in person and property sustained by the passengers in attempting to land on the slip on the 7th of July.

The Chief Justice then considered the conduct of the steamship company's officers and concluded that, if Brunet had been negligent, the conduct of the former savoured of recklessness. The Court, in consequence, held that the damages should be borne in the proportion of two-thirds by the steamship company and one-third by the Crown.

The decision in the latter case, if at all in point, does not, in my opinion, support the contention of the respondent.

Two other cases, which are to some extent pertinent, may perhaps conveniently be referred to ; they are *Lep-rohon v. The Queen* (1) and *City of Quebec v. The Queen* (2).

The head-note in the former case, which is fairly accurate and complete, reads as follows:

The Crown is under no legal duty or obligation to any one who goes to a post office building to post or get his letters, to repair or keep in a reasonably safe condition the walks and steps leading to such building.

A person who goes to a post office to post or get his letters goes of his own choice and on his own business; and the duty of the Crown as owner of the building, if such a duty were assumed to exist, would be to warn or otherwise secure him from any danger in the nature of a trap known to the owner and not open to ordinary observation.

A petition of right will not lie against the Crown for injuries sustained by one who falls upon a step of a public building by reason of

1938  
 HOCHELAGA  
 SHIPPING  
 & TOWING  
 Co. LTD.  
 v.  
 THE KING.  
 Angers J.

(1) (1894) 4 Ex.C.R. 100.

(2) (1892) 3 Ex.C.R. 164; (1894)  
 24 S.C.R. 420.

1938  
 HOCHELAGA  
 SHIPPING  
 & TOWING  
 Co. LTD.  
 v.  
 THE KING.  
 Angers J.

ice which had formed there and which the caretaker of the building, employed by the Minister of Public Works, had failed to remove or to cover with sand or ashes.

After determining that a post office is a public work within the meaning of subsection (c) of section 16 (now section 19), the Honourable Mr. Justice Burbidge dealt with the question of negligence in the following terms (p. 108):

Now it is obvious that the negligence of the Crown's officer or servant, for which it will be answerable, might arise either by his doing in a negligent and improper manner something that he should do, or in his neglecting to do something that it was his duty to do, and that his duty might arise in one or both of two ways.

\* \* \* \* \*

Does the Crown then as the owner or proprietor of a public building, such as a post office, owe any duty, within the legal meaning of that term, to persons using the ways and steps leading to the building, to keep the same in repair, and in reasonably good condition, and in the winter time free from any accumulation of ice?

The learned judge then, after referring to the charter and by-laws of the City of Three Rivers, where the Post Office in question was located and after stating that the Crown, as owner of land abutting on a street, would not be bound thereby, continued as follows (p. 110):

It is equally clear, it seems to me, that the Crown as the owner of the walk or way leading to the building is under no duty or obligation to keep the same in repair, for neglect of which an action would lie against it; and that not merely because of the incident, that, apart from certain special statutes, such as that on which the suppliant relies in this case, there is no remedy against the Crown in cases of tort, but also for the reason that there is no legal duty or obligation.

Further on the learned judge added (p. 112):

Assuming, however, that such a duty exists and that the Crown is bound to the exercise of such care as a prudent owner would take in a like case, then its duty is either to warn or otherwise secure persons coming to the building from hidden dangers in the nature of a trap, not open to ordinary observation; or to keep it in a reasonably safe condition to secure such persons from harm from anything about the premises hidden or open to observation making it dangerous for such persons, using reasonable care, to be upon the premises for the purposes for which they are induced to come. Whether the Crown's obligation in such a case would fall within the larger or the more limited definition that I have given would depend upon the view taken as to whether or not such persons went to the post office as well on the business and interests of the Government as on their own business.

The facts in the case of the *City of Quebec v. The Queen*, concisely summed up, were as follows:

In 1887 the Dominion Government acquired the property in the City of Quebec on which the citadel is erected. Several years previously a drain had been laid through the property by the Imperial authorities. The existence of this drain was not known to the officers of the Crown; an inspection of the property in 1880 by the engineer of the City of Quebec and others did not reveal it. This drain became choked before the property came into the possession of the Dominion Government. The water escaping from the drain loosened the earth gradually until in 1889 a large portion of rock fell from the cliff into Champlain street, situate in the lower town, at the foot of Cape Diamond, blocking up the street and rendering impossible the access to the water pipes and drains.

1938  
 HOCHELAGA  
 SHIPPING  
 & TOWING  
 Co. LTD.  
 v.  
 THE KING.  
 Angers J.

At the close of the suppliant's case, the trial judge ordered judgment of non-suit to be entered. An appeal was entered and the Supreme Court (Sir Henry Strong, C.J. and Fournier, J. dissenting, and Taschereau, Gwynne and King, JJ.) upheld the judgment of the Exchequer Court.

Dealing with the question of negligence, Mr. Justice Burbidge made (*inter alia*) the following observations (p. 179):

That brings us to the question of negligence; and so far as misfeasance is concerned, I do not think there has been any case made out.

\* \* \* \* \*

With reference to the question of non-feasance, I agree with the view which Mr. Hogg and Mr Cook put forward, that no officer of the Crown is under any duty to repair or to add to a public work at his own expense, nor unless the Crown has placed at his disposal money or credit with instructions to execute the repairs or the addition.

In that sense there is no evidence here of any officer who was charged with any such duty, and being so charged, neglected to perform his duty. The truth of the matter is, with regard to the drain, that no one knew of its existence until after this accident had occurred and minute inquiry was made into its causes. And it seems to me that the suplicants must fail, unless there was some officer or servant of the Crown whose duty it was to know of the existence of this drain, of its choking up, and to report the fact to the Government, and who was negligent in being and remaining in ignorance of the drain and of the defect.

It seems to me apposite to quote from the judgment of the Chief Justice, Sir Henry Strong, who, as indicated, was dissenting, the passage in which he deals with the questions of misfeasance and non-feasance on the part of the Crown (p. 435):

1938  
 HOCHELAGA  
 SHIPPING  
 & TOWING  
 Co. LTD.  
 v.  
 THE KING.  
 Angers J.

Upon this view of the evidence the learned judge stopped the case at the end of the suppliant's evidence, and without hearing any evidence in defence ordered judgment to be entered for the Crown. So far as proof of any misfeasance on the part of the Crown, or negligence on the part of any particular officer of the Crown charged with any duty in respect of the lands of the Crown from which this landslide took place, is requisite to make out the suppliant's case, I agree that no such misfeasance or negligence was proved. I am of opinion, however, that the suppliant's evidence does show a *prima facie* case of nonfeasance on the part of the Crown which under the 6th and 7th paragraphs of the petition it was open to the suppliant to prove, and at all events such a case as would upon an amendment of the petition have entitled the suppliant to relief in the absence of any contradictory evidence on the part of the Crown.

See also *Jokela v. The King* (1).

The doctrine is well settled that the Crown is not bound to keep in repair any public work and that it cannot be held liable for injuries resulting from the unsafe condition thereof. Under subsection (c) of section 19 the liability of the Crown for damages for injury to the person or to property is qualified and restricted: the injury must result from the negligence of an officer or servant of the Crown acting within the scope of his duties or employment upon a public work. The Crown's responsibility, as stated by the President in the case of *Jokela v. The King* aforesaid, cannot be enlarged except by express words or necessary implication. Subsection (c) of section 19 seems to exclude the case in which the injury was the result of non-repair or non-feasance. In some cases, however, non-repair or non-feasance may constitute a hazard or in other words create what has been called a trap; it may bring about a condition which renders an accident almost unavoidable. This is what happened in the present case. When on September 9, 1932, a storm blew off the top part of the outward end of the jetty and carried it ashore, the foreman, acting under the instructions of the assistant engineer in charge of the work for the Department of Public Works, squared off and sheeted the end of the portion of the jetty which remained in place and sawed the logs which emerged from the underportion of the part of the jetty washed ashore, leaving the understructure entirely submerged and invisible: in addition to the deposition of D. H. McDonald

previously mentioned, reference may be had to the testimonies of John Martel (pp. 59 and 62) and John Hennessy (p. 72).

This obstruction was left there uncharted and unbuoyed until the accident happened.

It was reasonable and natural for the *Ostrea*, when she left in the morning to go back to the wreck of the *Watford*, to turn around the end of the jetty. The pilot who steered her had reason to assume that at the end of the jetty the water was deep enough for his vessel to pass. There was not the slightest indication that the route he followed was in any way unsafe for navigation.

After a careful perusal of the evidence I have come to the conclusion that the accident is attributable to the negligence of officers or servants of the Crown, namely the district engineer and the assistant engineer under whose supervision the construction of the jetty and its reparation after the top part of the outer end thereof had been partially washed away were effected, acting within the scope of their duties or employment on a public work.

I am of opinion, however, that, after the accident, the master of the *Ostrea* was negligent in not taking the means of ascertaining the extent of the damage caused to his vessel by the collision, before proceeding to sea. Had he found that the vessel was leaking, as I think he should have, if he had made a proper inspection of the hull immediately after the impact, he would not or at least should not, assuming he had acted prudently, have proceeded on his voyage but should have brought back his vessel to the wharf. He would thus have avoided the loss of his ship and of her equipment. In this connection I deem it expedient to refer to the evidence of Charles L. Waterhouse, a mariner of twenty-two years of experience at sea, master mariner for four years and supervisor and examiner of masters and mates for the Department of Transport. At page 175 of his deposition we find the following statements:

Q. You have heard the evidence given here in regard to the nature of the construction of the ship *Ostrea* and the circumstances of her sinking as described by the witnesses?

A. Yes.

Q. And you have heard the witnesses' description of the bump which was experienced at or near the dock at Port Morien on September 22, 1934?

1938

HOCHELAGA  
SHIPPING  
& TOWING  
Co. LTD.

v.

THE KING.

Angers J.

1938

HOCHELAGA  
SHIPPING  
& TOWING  
Co. LTD.  
v.  
THE KING.  
Angers J.

A. Yes.

Q. Now, in the circumstances described by these witnesses, Captain, what, in your opinion, would have been the proper course to follow by those in charge of the ship?

A. Having felt a bump off the end of the pier it obviously must follow that the vessel hit some obstruction, and I would say the correct thing to do would have been to stop and find out if she was at all damaged before proceeding on the voyage.

Q. In order to find out what really happened what do you say should have been done by way of examination?

A. In this case she had a transverse bulkhead forward of the engine room and the Master should have ascertained from the engineer if she was making water and he should have taken a sounding near the forward hold to see if she was making water before he proceeded out to sea.

Q. Would an examination of the forward hold be more important where it appeared that the blow or contact had been made in the forward part of the ship?

A. If the bump was felt to have taken place forward, which it apparently was, then it would be much better to sound forward first and aft afterwards.

Q. In your view, it would have been a proper course, in this case, to look particularly to the forward part of the ship?

A. Yes.

Q. And if that had been done and if signs of leakage were apparent, what course should have been followed?

A. To go back alongside immediately or try and beach the ship at the nearest possible place.

Further on in his deposition the witness added (p. 178):

A. If soundings had been taken the vessel would have been found to have been leaking or not and if it was not leaking then it would be all right to proceed, but if she was leaking then it should have been run to the nearest shore water or returned to the wharf and put in a position where, if it did fill up, it would not sink. There are lots of mud flats around there and she should not have proceeded to sea.

Reference may also be had on this subject to the testimony of John Patterson, superintendent of the plant of the Halifax Shipyards, of which I believe it convenient to quote the following extracts (p. 154):

Q. And you would not expect anything?

A. If I was on board a composite vessel and felt any bump I would be suspicious.

Q. Would you not, as a seaman on a composite vessel, send some one down? What steps would you have taken had you been on board the ship?

A. Knowing this vessel to be of composite construction I would have examined the bottom.

Q. You say you would have examined the bottom; would you have gone down in the forward hold to examine the bottom of the ship?

A. Yes.



Then further on (p. 155):

Q. . . . If she was not making water, what would you do?

A. I would examine her inside and if she was not making water I would proceed providing I was coming back in the same day, but if I was going to stay out for a week I would return to the dock.

Q. And if the examination disclosed water, what would you do?

A. I would bring her back to the dock

Q. Would there be any question of that?

A. No, sir, if she was making water, the only thing to do would be to bring her back.

The investigation concerning the extent of the damage caused to the vessel by the collision was evidently summary and superficial: see deposition King (pp. 118 and 125) and deposition Worthen (pp. 141 and 142).

It seems to me convenient to quote from Worthen's deposition the following passage (p. 142):

Q. If some one had looked in the forward hold it is unlikely that this ship would have been lost; you had pumps and you could have easily used them and then returned to the dock; had you discovered water, could you not have returned to the pier?

A. Yes, if we had discovered anything.

Q. And if a reasonable investigation had been made, you would have discovered it?

A. May be so; as far as I know, yes.

I may note that the proof shows that the *Ostrea* was a vessel of composite construction, having a steel frame and a wooden shell.

I have no doubt that the extent of the damage caused to the ship by the collision could have been detected if a proper inspection had been made immediately after the collision.

In the circumstances, I believe that the damage for which the respondent is responsible is limited to the cost of the repair of the vessel. Unfortunately there is no evidence in the record enabling me to determine the said cost. If the parties cannot agree on an amount, they will be at liberty to refer the matter to me and to adduce evidence for the purpose of establishing, as exactly as possible, what the repair of the vessel would have cost.

As the suppliant alleges that it submits its petition on behalf and for the benefit of the underwriters who are subrogated to the rights of the suppliant, the parties, failing an agreement as to whom the amount agreed upon or awarded by the Court, as the case may be, should be paid, may also refer the question to me for adjudication.

Costs will follow the event.

*Judgment accordingly.*

1938

HOCHELAGA  
SHIPPING  
& TOWING  
Co. LTD.

v.

THE KING.

Angers J.

1938  
June 27.  
1940  
Feb. 12.

BETWEEN :

CANADA STEAMSHIP LINES LIM- } APPELLANT;  
ITED (PLAINTIFF) . . . . . }

AND

MONTREAL TRUST COMPANY (DE- } RESPONDENT.  
FENDANT) . . . . . }

*Shipping—Tug and tow—Terms of hiring—No responsibility accepted by tug—Duties of tug and tow—Grounding of tow due to negligence of its officers—Tug not liable for damage suffered by tow—Appeal dismissed.*

On the morning of November 5, 1933, the *Gleneagles*, owned by the appellant, engaged the services of the tug *Rival*, owned by Sin-Mac Lines Limited of which respondent is the trustee under a deed of trust and mortgage, to move the *Gleneagles* out of Little Catarauqui Bay, near Kingston, Ontario, into Lake Ontario. During the carrying out of the operation the *Gleneagles* was grounded on Samson Point in Kingston Harbour and was damaged. The Court found that the terms of hiring were that the *Rival* would not assume any responsibility but that the *Gleneagles* would go out at her own risk, and that the *Gleneagles* alone was to blame for the grounding.

*Held:* That the tug is the servant of the vessel towed or assisted, as the case may be, and is under the control and direction of the officers of the vessel.

2. That in the absence of definite and express limitation of the tug's responsibility such as is established in the present case, a contract of towage implies an engagement that each vessel will fulfill its duty in executing it; that proper skill and diligence will be used on board tug and tow and that neither vessel, by neglect or misconduct, will create unnecessary risk to the other or increase any risk incidental to the service undertaken.

APPEAL from the judgment of the District Judge in Admiralty for the Ontario Admiralty District.

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

*F. Wilkinson, K.C.* for appellant.

*C. Russell McKenzie, K.C.* for respondent.

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

ANGERS J., now (February 12, 1940) delivered the following judgment:

This is an appeal by Canada Steamship Lines, Limited, owners of the S.S. *Gleneagles*, from a decision of His

Honour Judge Field, District Judge in Admiralty for the Ontario Admiralty District, dismissing the action of Canada Steamship Lines, Limited, against Montreal Trust Company, a corporation having its head office at the City of Montreal, Province of Quebec, as trustee under a deed of trust and mortgage made on April 19, 1929, between Sin-Mac Lines, Limited, a corporation having its head office at the said City of Montreal, and the said Montreal Trust Company, securing an issue of 6 per cent first (closed) mortgage sinking fund gold bonds.

1940  
CANADA  
STEAMSHIP  
LINES  
LTD.  
v.  
MONTREAL  
TRUST  
Co.  
Angers J.

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

The evidence discloses that on the morning of the 5th of November, 1933, sometime between two and three o'clock, shortly before finishing to unload a cargo of grain at the Kingston elevator in the harbour of Kingston, the *Gleneagles* required the assistance of one of the tugs of Sin-Mac Lines Limited to move her out of Little Catarauqui Bay, which is a short distance from the harbour of Kingston proper, into lake Ontario. The task was assigned to the tug *Rival*.

The *Gleneagles*, a steel freight vessel owned and operated by appellant, has a gross tonnage of 8,233·22 tons and a register tonnage of 4,780·15 tons and is 582 feet in length and 60·2 feet in breadth, as indicated in the transcript of register filed as exhibit K. Her draught, when she left the dock unloaded, was between 16½ and 17 feet aft and from 6 to 7 feet forward.

The tug *Rival*, owned and operated by Sin-Mac Lines Limited, is a steel screw steamship having a gross tonnage of 196·19 tons and a register tonnage of 15·13 tons; it has a length of 84·4 feet and a breadth of 24·06 feet.

When the *Gleneagles* had almost finished unloading, the master Alexander F. MacIennan gave instructions to the mate Charles T. Beatty to telephone to the Sin-Mac Lines' office to request the assistance of a tug for the purpose of leaving the dock and moving out into lake Ontario. The *Gleneagles* was moored at the dock of the Kingston Elevator Company shown on the chart, exhibit A, her bow in and her port side to the dock.

1940  
 CANADA  
 STEAMSHIP  
 LINES  
 LTD.  
 v.  
 MONTREAL  
 TRUST  
 Co.  
 Angers J.  
 —

The mate of the *Gleneagles*, following the master's instructions, called up the office of Sin-Mac Lines Limited and spoke to the night manager, Henry James Nagle.

There is a direct conflict of testimony as to the conditions of hire of the tug.

Beatty testified that he called the office of Sin-Mac Lines Limited and said to the person who answered the telephone that the *Gleneagles* would be unloaded in about half an hour and that the vessel would require a tug to shove her out clear of the elevator slip. According to him that is all that was said on his part. Asked what was the reply, he stated that there was no particular reply that he could recollect, except that the company would send a tug at the time mentioned. The witness added that this was the complete conversation, as far as he recalled it.

Nagle, on the other hand, declared that he received a telephone call from the Kingston elevator for a tug to assist the *Gleneagles*. He asked if the captain were speaking; the reply was that it was one of the crew. Nagle said that he asked him to tell the captain that "the tug would not assume any responsibility, that the steamboat would go out at her own risk."

In cross-examination Nagle repeated his statement that he had asked the member of the crew of the *Gleneagles* to tell the captain that the tug would not assume any responsibility and that the steamboat would go out at her own risk. He added that that was all the conversation.

The learned trial judge accepted the version of Nagle as more reliable, his memory being, in his opinion, more accurate. His Honour Judge Field thought that there was a good reason in the mind of the witness for the limitation of the tug's responsibility, because there had been earlier in the sailing season of 1933, viz. on or about August 17, an accident to the *Lemoyne*. According to Nagle the practice of telling whoever wished to have the aid of a tug to shove a steamer from the Kingston elevator dock out into lake Ontario that the tug would assume no responsibility was adopted in the summer of 1933 after the accident to the *Lemoyne* and this practice has been followed ever since.

Moreover, as stated by the learned trial Judge, there is the fact to be considered that the mate of the *Gleneagles* as well as her master are mistaken when they say that there was on November 5, 1933, a lighted gas buoy off the end of the breakwater shown on the chart exhibit A. This chart, published by the Canadian Hydrographic Service, Department of Marine, in June, 1933, shows a light; the evidence however establishes clearly that this gas buoy was installed later and that, at the time of the accident, there was at the spot indicated on the chart exhibit A at the end of the breakwater only a black spar buoy; see in this connection the depositions of Captain Miller Begg Donnelly and of Captain Luke Mallan, exhibits L and O, and the admissions of counsel to be found on pages 3 (in fine) and 4 of the argument of counsel on appeal and in the discussion which followed the reading of Mallan's testimony on pages 261 and following of the volume of evidence.

I think that the learned trial judge was right in accepting Nagle's version in preference to that of Beatty regarding the terms and conditions of hire of the tug.

I entirely agree with him when he says that such a limitation as that hereinabove referred to would not excuse any and all negligence on the part of the tug's crew in the latter's share in the manoeuvre. I shall consider in a moment the question as to whether there was on the part of the *Rival's* crew such negligence as to implicate the tug in respect of the grounding of the *Gleneagles'* stern on Samson Point.

In view of this finding with respect to the terms and conditions of the hiring of the tug's services the action, in my opinion, must fail. Seeing however that the learned trial judge has dealt with the acts of negligence ascribed to the defendant and that the same have been discussed at length by counsel, it seems to me apposite to express briefly my opinion on the subject.

As stated by the learned trial judge, up to the time the tug started to shove back the *Gleneagles* it is common ground that no fault is imputable to the tug. She tied herself to the starboard bow of the vessel in compliance with the instructions received from the *Gleneagles* to the satisfaction of captain Maclennan. It is admitted that the *Rival* was a sound and efficient tug.

1940  
CANADA  
STEAMSHIP  
LINES  
LTD.  
v.  
MONTREAL  
TRUST  
Co.  
Angers J.

1940  
 CANADA  
 STEAMSHIP  
 LINES  
 LTD.  
 v.  
 MONTREAL  
 TRUST  
 Co.  
 Angers J.

The *Gleneagles* was not towed out astern but was pushed out, in accordance with the usual practice.

When the *Gleneagles* was ready to go she was hove back along the dock with the aid of her own winch until her stern was clear of the dock. A line was secured on one of the bow mooring winches of the vessel and on a spile on the dock for the purpose of springing the stern of the vessel out from the line of the dock.

When the *Gleneagles* had been steadied and captain MacLennan felt that she was in a position to be shoved out astern, he gave a signal to his mate to let go the line fastened on the dock and blew a long and a short whistle to notify the tug that it was all right to go ahead. The tug answered with one long and one short blast and started to shove the *Gleneagles* out.

After the vessel had cleared the end of the concrete section of the dock, that is when she was opposite the trestle extension marked with a red line on chart exhibit A, which is considerably narrower than the dock itself, the *Gleneagles'* bow began to swing to port, due to the pressure of the tug on her starboard bow.

The engines of the *Gleneagles* were not in use at the time and her rudder was amidships.

Noticing that the stern of his vessel was going to eastward more than it should, MacLennan told his mate to tell the tug to straighten her up. He says that he heard the mate communicating two or three times with the captain of the tug by megaphone. He was not in a position to hear if any reply were made by the tug captain. At all events, according to MacLennan, the tug did not obey the instructions and the *Gleneagles'* stern "kept swinging more to the eastward all the time and faster."

As the *Gleneagles* was continuing to swing, MacLennan states that he got her working ahead on a hard to starboard wheel. Then he gave the tug a check signal consisting of three short blasts, which is a recognized signal between steamers and tugs. This signal means that the tug is to slow her speed.

MacLennan says that a short while after, as the tug did not stop shoving, he blew an alarm signal and in spite of this the tug continued shoving. MacLennan thinks that there was then a second alarm signal.

Beatty corroborates to a certain extent Macleannan's story. He testifies that the captain instructed him to tell the tug to straighten up the vessel; he conveyed this order with the aid of a megaphone; the words he used were: "Straighten her up." Beatty was then on the bow deck of the *Gleneagles* on the starboard side, almost directly over the tug; according to him there is no question that the tug heard the order. He shouted two or three times, in fact kept repeating the instructions until he received an answer. The tug, in spite of these instructions, kept shoving. In witness' opinion if the tug had endeavoured to straighten up the *Gleneagles* at the time, the accident could have been avoided. Beatty states that the tug captain's reply was that he had his wheel hard over and was doing all he could. Beatty says that he communicated this reply to Macleannan, who thereupon instructed him to tell the tug captain to stop shoving. Beatty conveyed those instructions to the tug captain by megaphone, but the latter, as far as witness remembers, did not answer.

According to Beatty, almost immediately after this, a matter of seconds, a check whistle was given to the tug by the *Gleneagles*. The witness stated that he was not in a position to see whether or not anything had been done to the vessel's engines. A danger signal followed almost immediately the check signal and the tug backed off to the eastward. Asked if the tug maintained a strain on the line when it backed off, the witness replied: "No, not a strain that would be of any disadvantage or advantage to the boat; it was merely kept clear of water."

In reply to a question as to whether the tug at any time exercised any strain on the starboard bow of the *Gleneagles* which would tend to pull her bow to starboard, Beatty stated:

Not any—no, in the position he was it would be practically impossible to pull her bow to starboard.

According to the witness the *Gleneagles* "in probably a very short time" struck aft.

Robert Bruce Bennett, wheelsman on the *Gleneagles*, testified that, as soon as the vessel had cleared the end of the dock, she started to swing to port, that her master thereupon yelled down to the mate to tell the tug to straighten her up, that he heard the mate convey the order

1940  
CANADA  
STEAMSHIP  
LINES  
LTD  
v.  
MONTREAL  
TRUST  
Co  
Angers J.

1940  
 CANADA  
 STEAMSHIP  
 LINES  
 LTD.  
 v.  
 MONTREAL  
 TRUST  
 Co.  
 Angers J.

by megaphone, that the tug did not comply with the order and that the same was conveyed by the mate a second time; that the mate hollered up that the skipper had said that he was doing all he could and that the tug's wheel was hard over or something to that effect—the witness admitting that he “didn't get it very clear,” that he “didn't get it all”—; that the master called to the mate to tell the tug to stop pushing, that he heard the mate convey this order to the tug captain but that this was not as plain as when he had answered the skipper; that almost immediately after this the skipper blew the tug a check whistle (three blasts), that the skipper operated the telegraph to full speed ahead and instructed the witness to put the wheel hard to starboard, that an alarm signal was blown by the *Gleneagles*, that the vessel stopped swinging and struck something.

According to Bennett the *Gleneagles* had been going full speed ahead with her wheel hard to starboard for about a minute—“a minute, maybe a minute and a half, maybe not quite a minute,” as the witness put it—before striking.

Nicholas Kozak, watchman on the *Gleneagles* on the morning of the accident, was in the windlass room, below the bow deck; there are two portholes on each side of the windlass room; he could see the tug. After the tug got the *Gleneagles* moving, Kozak heard instructions passing between the vessel and the tug; they were given by the mate through a megaphone; he was in a position to hear these instructions, but he was not interested and he paid no attention. He thinks that the captain of the tug should have heard them.

George Edwin Price, chief engineer of the *Gleneagles*, was in the engine room when the signal full speed ahead was given. The engines remained at full speed for about twenty seconds, until they were stopped. About ten seconds after the *Gleneagles* started full speed ahead, there was a slight rub, as if the vessel had rubbed against coarse gravel; the witness went over and looked into the steering gear room and, as he was coming out, there was a rumbling noise at the shoe or rudder position; this happened approximately twenty seconds after the engines had been put full speed ahead.



Price said he did not recollect hearing any whistle signals.

William Francis Gogo, deckhand on the tug, said that he heard a signal from the *Gleneagles*, one long and one short blast, which meant that the vessel was ready to leave; that was the only whistle signal given by the *Gleneagles*. He heard, however, a danger signal given by the tug; it was a series of short blasts; that was about eight or ten minutes after the tug had started to shove the vessel. According to witness there was no check signal nor danger signal given by the *Gleneagles*.

Fred Crepeau, chief engineer on the *Rival*, said that he was in the engine room when a danger signal was given by the tug some ten minutes after she had started to go ahead; within a few minutes he got a signal to stop his engines, which he did. The danger signal was sounded by the tug's whistle.

Captain Luke Mallan, master of the tug *Rival*, was, on account of illness, examined before a Commissioner at his house and a transcript of his deposition was deposited in the record.

Early in the morning, on November 5, 1933, Mallan received orders from Nagle, night watchman at the office of Sin-Mac Lines at Kingston, to go to the Kingston elevator to shove out the *Gleneagles*, which he did. After a while the captain of the vessel, who was ashore, got aboard and a few moments later gave the tug one long and one short blast, indicating that the vessel was ready to go. The tug answered the signal.

The *Gleneagles* had a shore line out in order to spring her stern off the dock. The *Rival* was attached to the *Gleneagles* by a line off the latter's starboard bow.

After being hove back some distance (indicated by the witness, likely with the aid of the models) by means of her own winch, the *Gleneagles* blew one whistle to cast off the line; the tug thereupon started to push the vessel astern. According to witness the *Gleneagles* kept going towards Samson Point all the time. When Mallan noticed this he hollered to the mate of the *Gleneagles* to come ahead but received no reply. He blew the vessel a danger signal; this was eight or ten minutes after the tug had started to shove her out.

1940

CANADA  
STEAMSHIP  
LINES  
LTD.  
v.  
MONTREAL  
TRUST  
Co.

Angers J.

1940  
 CANADA  
 STEAMSHIP  
 LINES  
 LTD  
 v.  
 MONTREAL  
 TRUST  
 Co.  
 Angers J.

Asked who, as between the *Gleneagles* and the tug, was in charge of the manoeuvre, Mallan replied:

A. Well, of course, the captain would be in charge of his own boat, certainly; he is always in charge of his own ship; he would do as he likes; we are only the tug; he can shove her back or go where he likes; he is in charge of his own boat.

In answer to a question as to what had happened after the danger signal, Mallan stated:

A. Well, when I seen she was going to go on the bank I hollered and hollered at him to come ahead on her; I didn't get any answer; somebody said that some of the crew or somebody hollered but I didn't get any answer anyway—and when I seen she was going to go on the bank I backed away from her, back here (indicating) but I still had a line on her—and she went into the bank.

In cross-examination, Mallan stated that he did not want the *Gleneagles* to back up, which was the worst thing that she could have done. He blew her a danger signal and yelled for her to come ahead.

Mallan declared that it is easier to handle a big boat from the bow, when she is light and explained the reason for this as follows:

A. Of course, the stern is deeper than the bow and naturally they have got their own power to help themselves, they can come ahead or go back; if they come ahead they can shove me right back if they want to or if they want to go back we will shove them on down

The witness explained with the aid of the models the manner in which a tug attached to the starboard bow of a vessel can manoeuvre to direct her bow to port or to starboard; I must say that without the illustration given by the witness by means of the models his testimony on this point is somewhat difficult to follow.

According to Mallan, there is no reason why a tug on the bow of a ship, with a line attached to the bridle of the ship, could not go back and get on the other bow, if she wished to do it; however, it would be up to the captain of the ship to ask the tug to do this.

Mallan said that there were certain recognized signals between tug and steamer and he described them at length, if not very lucidly. He summed up his description substantially as follows: If the tug is going ahead, one whistle from the steamer means for her to stop; if the tug is stopped one whistle means to go ahead; two whistles,

whether the tug is going ahead or stopped, mean to back up; three whistles mean to check down; according to witness, that is the whole system of signals.

If the captain of the vessel decides to work her engines he has no signal to give to the tug; he handles his vessel as he wishes.

The tug can direct the vessel either by whistle or verbal instructions to the mate. One blast to the vessel means to stop, if she is working her engines; if she is not moving her engines, it means to come ahead on her. Two blasts mean for the vessel to back up.

In cross-examination Mallan maintained his statement that there was no conversation between him and the captain or the mate of the *Gleneagles* as to what was to be done to shove the *Gleneagles* out.

Mallan was unable to say what caused the *Gleneagles* to go on shore; he shoved many steamers out from Kingston elevator, including the *Lemoine*, the biggest boat on the lakes.

There is a kind of current at that place; Mallan said that he has gone out several times right and straight; at other times he would have "quite a little bit of bother with the current." Ever since the breakwater was erected, there has been a certain amount of eddying.

If a vessel is going out and her stern is dropping down, the tug has to shove her over (witness indicating, obviously with the models). In this case Mallan put his tug across the bow of the *Gleneagles* and the vessel went over until he hollered for her to come ahead, so as to stop going into the bank.

Mallan said that he worked his wheel to port from the start. The master of the *Gleneagles* swung her off the dock; usually she will straighten up pretty well. Witness thought he would get her straightened up a little more, because she was going down towards the shore; he swung across the bow and tried to straighten her up; he does not know what happened aboard the *Gleneagles*, but she seemed to go right back and, when she got back so far he saw that she was going into the bank, he blew a danger signal and hollered for her to come ahead; she did not do it and the tug backed away from her. He was pulling on her all the time, intending to pull her port to bow, but her stern kept going down towards the bank.

1940  
 CANADA  
 STEAMSHIP  
 LINES  
 LTD.  
 v.  
 MONTREAL  
 TRUST  
 Co.  
 Angers J.

1940  
CANADA  
STEAMSHIP  
LINES  
LTD.  
v.  
MONTREAL  
TRUST  
Co.  
Angers J.

Asked if the *Gleneagles* were close to the bank when he blew the danger signal, Mallan replied:

A. Well, she was quite a ways off. Well, if he had come ahead on her and straightened her stern up we would not have went on; that is how far she was off the bank when I blew my whistle.

Dealing with the manner in which the *Gleneagles* was swinging, Mallan made the following comment:

A. Well, now, she was not swinging so fast; she was going down all the time on me, that is all; of course, if she had been swinging fast we could not have told him to come ahead on her. He had all the chance in the world to *back her up* (?) after I had yelled at him.

Mallan said that in an emergency the master of the ship has command. Asked if, supposing the weather were clear and the tug were able to steer a good course, the captain would use the steamer's engines, Mallan replied:

A. No; I have shoved her out there and he never used his engines because he had no need to; she has gone out—no wind blowing or anything; I have gone out there when I wanted them to use her engines because the wind was blowing, taking her down, and probably they would come ahead on her just to take her off there—and straighten her stern up, you see.—I have gone out there nights when there would be no trouble at all and I have gone out when it was all we could do to get out, sometimes.

Reverting to the question of signals, counsel for plaintiff asked the witness if the steamer should give a signal, supposing she decided to go ahead; Mallan apparently misunderstood and answered in the affirmative; he corrected his answer however and reiterated the statement he had made in his examination in chief to the effect that the vessel blows signals to the tug to indicate to the latter what she wants the tug to do, but not for the purpose of letting the tug know what she is doing herself; it may be apposite to reproduce an extract from Mallan's testimony on the subject:

Q. Then supposing the captain of the steamer decided for some reason or other he ought to come ahead he should blow you one, should he?

A. Yes.

Q. And what would that mean to you?

\* \* \* \*

A. Well, that would mean that he was going ahead if he gave me one whistle.

Mr. McKenzie—Q. If he gave it to you?

Q. If he blew it to you?

A. No, I am wrong there; you see, he blows for me—he don't blow anything that he is doing himself but he blows to me what he wants me to do; he is handling the ship, tug, tow and all, in a way of speaking; if he wants me to back up he will tell me to back up. If he wants me to stop he will tell me to stop, and if he wants me to come ahead he will give me one—but he don't give me any signals of his, understand, at all; he cannot give me signals what he is doing and give me the same signals for the tug. If he gives me any signals what he is doing I would think he wanted the tug to do it and I would answer him back and do it.

If the tug wanted the vessel to use her engines and blew her one blast, that would mean for the vessel to come ahead; the latter would answer and the tug would know that the vessel was coming ahead. If the tug blew two blasts and the vessel answered, the tug would know that the vessel was backing up.

There is no change in the system of signals once command of the manoeuvres is understood. The *Gleneagles* being in control, Mallan said that he had never changed the signals which he was to receive from the vessel.

The only signal which the tug received from the *Gleneables* was the "all right" signal, viz. one long and one short blast, at the time of leaving the dock. Asked if every other whistle had been blown by the tug, Mallan replied:

A. I did not blow any at all until he was going shore and I blew a danger whistle at him; I blew him a lot of danger signals when I seen he was going on and I didn't get any answer; that is all I can tell you.

Recalled to explain certain answers to questions put to him by the nautical assessor, which he said he had misunderstood, Beatty declared that he had never known of a vessel blowing whistles to a tug to indicate what the latter is to do with her engines and that, if the *Gleneagles* had blown two whistles to the tug, it would simply have indicated that the vessel's engines were working astern. It is customary for a tug on the lakes, when she wishes a steamer to go astern, to blow two whistles. If the steamer had blown first, it would only have implied that her engines were going astern.

Asked if Nagle had requested the witness, when the latter telephoned asking to send a tug to the elevator dock, to tell the captain of the *Gleneagles* that the tug would not assume any responsibility and that the vessel would go out at her own risk, Beatty replied that at no

1940  
 CANADA  
 STEAMSHIP  
 LINES  
 LTD.  
 v.  
 MONTREAL  
 TRUST  
 Co.  
 Angers J.

1940  
CANADA  
STEAMSHIP  
LINES  
LTD.  
v.  
MONTREAL  
TRUST  
Co.  
Angers J.

time during 1933 was this stipulation ever conveyed to him by telephone or otherwise; he added that these words were not used in the conversation between Nagle and himself on November 5, 1933. It is only in the spring of 1934 that these words limiting the responsibility of the tug were first conveyed to him. He remembers that, when these words were used for the first time in the spring of 1934, he conveyed them to the captain and made the remark that this limitation of responsibility was probably due to the accident in the previous fall.

Maclennan, called in rebuttal, testified that if Nagle, after August, 1933, had invariably made the restrictive stipulations mentioned in his testimony when he hired a tug, they were not conveyed to him.

According to Maclennan it is customary for a steamer having occasion to use her engines to give the tug a signal: one blast to indicate that the vessel is working ahead and two blasts to indicate that she is going astern. If a tug was pushing a steamer astern there would be no occasion for the steamer to blow a back-up signal to the tug. If the tug thought that a steamer was getting out of control and cared to use the steamer's engines, the tug would blow one whistle to go ahead and two to back up.

When she takes hold of a steamer, a tug is more or less always in control. The tug asks the assistance of the vessel if needed; that is common practice on the lakes. The steamer is never in control; the only time she might possibly use her engines without the request of the tug is in the event of her getting into trouble.

Maclennan said that if he wanted to work the *Glen-eagles'* engines ahead he would signal one whistle to the tug; this would not mean that the tug was to stop working. He has never notified a tug to back up; in his experience that has never been done.

The three-blast signal was given to the tug because the latter did not pay any attention to the verbal orders which the witness gave her. The check signal is the only one which a vessel can give to a tug, except when the vessel is through with the tug, the signal being then one long and one short blast.

To avoid trouble witness moved the *Gleneagles* ahead on a hard to starboard wheel. He told the mate to ask

the tug to stop shoving and he blew the check signal. The tug did not heed the stop signals but kept shoving until after the second alarm signal.

Putting the *Gleneagles'* engines full speed ahead and her wheel hard to starboard, when her stern was swinging over to Samson Point, was designed to drive the vessel back against the force of the tug; she would then be working full speed against the pressure of her rudder only, going back in the direction of the dock from where she had come.

The rudder of the *Gleneagles* was not to be of effect in the operation, until the vessel had to use it for protection; when she used it, the effect of the rudder was overcome by the tug pushing on the bow.

I share the view of the learned trial judge when he says that the allegations of negligence set forth in sub-paragraphs (e), (f) and (g) of paragraph 9 of the statement of claim are shown not to have been factors in the failure of the operation. There is no evidence establishing that the tug proceeded at an excessive speed. As regards the wind the proof discloses that on the morning of the accident it was light and that it could not have any effect on the vessel or the tug. As stated by the learned trial judge, if a "system of signals" between the tug and the steamer were an essential feature in executing the manoeuvres safely, it was as much the duty of the *Gleneagles* as it was of the tug to arrange one.

This leaves the elements of negligence mentioned in sub-paragraphs (a), (b), (c) and (d) of paragraph 9. They refer to the alleged ignoring by the tug of instructions and of danger signals or warnings given by officers of the *Gleneagles* and the adoption of a course liable to bring the *Gleneagles* into dangerous proximity to Samson Point and the failure of the defendant's agents in charge of the tug to alter or check her course or speed even when warned of the imminent danger to the *Gleneagles*. The evidence in this connection is conflicting and, I must say, not very satisfactory. There is some confusion incident to the signals given at the time of the emergency. We are again faced with a question of credibility. The learned trial judge saw the witnesses (except Mallan, who, as already stated, was examined at his residence), listened to

1940  
CANADA  
STEAMSHIP  
LINES  
LTD.  
v.  
MONTREAL  
TRUST  
Co  
Angers J.

1940  
 CANADA  
 STEAMSHIP  
 LINES  
 LTD  
 v.  
 MONTREAL  
 TRUST  
 Co.  
 Angers J.

them, watched them explain the movements and positions of the vessel and tug with the models; he was unquestionably in a better position than I am to judge of the credibility of the witnesses and of the plausibility of their versions; he came to the conclusion that the witnesses heard on behalf of the defendant were to be preferred to those heard on behalf of the plaintiff and that their statement of the facts was to be given credit to. After reading the depositions attentively and comparing the two versions I do not feel inclined to adopt a different conclusion from that arrived at by His Honour Judge Field.

The tug is the servant of the vessel towed or assisted, as the case may be, and is under the control and direction of the officers of the vessel: Bucknill, Tug and Tow, 2nd ed., pp. 14 *et seq.*; Halsbury's Laws of England, 2nd ed., vol. 30, No. 840.

The master of the *Gleneagles* was in charge of the operation. He was standing in the *Gleneagles'* pilot house from where he could see all about him. He was in a position to determine when he should undertake to manoeuvre his vessel in the manner he subsequently did so as to keep her in the channel and off Samson Point, viz. to put his engines full speed ahead and his wheel hard to starboard.

Fifteen minutes elapsed from the time the *Gleneagles* started to be hove back with her own winch to the time she touched the bottom off Samson Point; the operation started at three o'clock and the vessel grounded at a quarter past three. From the moment the vessel cleared the dock and the tug started to shove her back, which the evidence discloses to have occurred seven or eight minutes after three o'clock, the vessel was going back towards Samson Point and getting into a more dangerous position all the time and nobody on board her appears to have done anything to protect her stern movement. The second mate, who is supposed to have been at the stern of the *Gleneagles*, either was not at his post or was not on the alert and vigilant; the proof establishes beyond doubt that he made no report to the captain that the stern of the vessel was getting into a dangerous position.

In the absence of definite and express limitation of the tug's responsibility such as is established in the present case, a contract of towage implies an engagement that



each vessel will fulfill its duty in executing it, that proper skill and diligence will be used on board tug and tow and that neither vessel, by neglect or misconduct, will create unnecessary risk to the other or increase any risk incidental to the service undertaken: Bucknill, op. cit.; Halsbury's Laws of England, 2nd ed., vol. 30, No. 839; *The Julia* (1); *Read v. The Tug Lillie* (2); *Spaight v. Tedcastle* (3); *The Valesesia* (4).

1940  
CANADA  
STEAMSHIP  
LINES  
LTD.  
v.  
MONTREAL  
TRUST  
Co.  
Angers J.

After a careful perusal of the evidence, I can reach no other conclusion than that adopted by the trial judge, to wit, that the order to put the engines full speed ahead and the wheel hard to starboard was given too late; in fact only forty seconds, if not less, before the vessel stranded. For this reason I believe that the *Gleneagles* is alone to blame for the grounding.

I was assisted by Captain J. W. Kerr as nautical assessor and I may say that I find myself in accord with his views.

On the whole, I am of opinion that the appeal fails and it is accordingly dismissed, with costs.

*Appeal dismissed.*

- (1) (1860) 14 Moore's P.C. 210, 230.      (3) (1881) 6 A.C. 217, 220.  
(2) (1907) 11 Ex.C.R. 274.      (4) (1927) P. 115, 118.

BETWEEN:

RUSSELL T. STACKHOUSE ..... SUPPLIANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

1940  
March 15  
—  
Aug. 2.

*Crown—Petition of Right—Courts of Justice Act, 1925, R.S.P.Q., c. 145 and amendment by 2 Geo. VI, P.Q., c. 72—“Senior Judge” of Circuit Court of the District of Montreal—Senior Judge must receive title as such by his Commission.*

The Circuit Court of the District of Montreal consists of three Judges of whom one is senior as provided for by c. 30 of the Statutes of Quebec for 1899. C. 72 of the statutes of the Province of Quebec for the year 1938 amending the Courts of Justice Act, R.S., P.Q., 1925, c. 145, provides:

“The senior Judge, within the meaning of this section means and has always meant the Circuit Court Judge who, by his Commission, has received the title of senior Judge of such Court.”

1940  
 RUSSELL T  
 STACKHOUSE  
 v.  
 THE KING.  
 Maclean J.

Suppliant was appointed a Judge of the Circuit Court in 1925. In November, 1937, Mr. Justice Archambault died, he having been appointed a Judge of the Circuit Court in 1913, and the Senior Judge of that Court in September, 1934. Suppliant contends that upon the death of Mr. Justice Archambault he became the senior Judge of the Circuit Court by operation of law because he then became the senior of the Judges of the Circuit Court in point of service.

*Held:* That the senior Judge provided for by the statute means the one to be appointed by the competent authority, the Government of Canada, and not the Judge whose appointment to the Circuit Court was anterior to that of all the other Judges of that Court.

2. That the Act of 1938 defining the expression "senior judge" is retroactive.

PETITION OF RIGHT by suppliant claiming a declaration that he is entitled to a salary of \$8,000 per annum, since November, 1937, from the Crown.

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

*T. R. Ker, K.C.* and *W. G. Pugsley, K.C.* for suppliant.  
*F. P. Varcoe, K.C.* and *C. Stein* for respondent.

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

THE PRESIDENT, now (August 2, 1940) delivered the following judgment:

The suppliant here is a judge of the Circuit Court of the District of Montreal (hereafter to be called "the Circuit Court") and he claims in his petition that he is entitled to receive and be paid the salary of \$8,000 per annum, since November, 1937, instead of the annual salary of \$7,000 which he has been receiving since that date. The ground of the suppliant's claim is that upon the death, in November, 1937, of Mr. Justice Archambault, one of the judges of the Circuit Court, appointed in November, 1913, and later appointed "the senior judge" of that Court, he, the suppliant, became the "senior judge" because of the date of his commission, that is to say, his entrance upon office being anterior to that of any other judge of that court, after the death of Mr. Justice Archambault, he, by reason of his period of service, and by operation of the relevant statute of the Province of Quebec referable to the constitution of the Circuit Court, became the "senior judge" of the

Circuit Court, and under the Judges Act, Chap. 105, R.S.C., 1927, became entitled to the salary therein specified to be paid the senior judge of the Circuit Court. It will be convenient first to refer to the various statutes relating to the constitution of the Circuit Court.

1940  
 RUSSELL T.  
 STACKHOUSE  
 v.  
 THE KING.  
 Maclean J.

By Chap. 24 of the Statutes of the Province of Quebec for the year 1893 there was established the "Circuit Court of the District of Montreal." Sec. 2 of that Act provided that:

Such court shall be composed of two judges, called "Circuit Judges of the District of Montreal," who shall be advocates of ten years' practice, be chosen from among the members of the Bar of the Province and be appointed by the competent authorities.

By Chap. 31 of the Statutes of the Province of Quebec for the year 1897, s. 2 of the above mentioned Act was repealed and there was substituted therefor the following:

Such court shall be composed of three judges, called "Circuit Judges of the District of Montreal," who shall be advocates of ten years' practice, to be chosen from among the members of the Bar of the Province, and be appointed by the competent authorities.

In 1899, by Chap. 30 of the Statutes of the Province of Quebec, the last-mentioned section was replaced by the following:

Such court shall be composed of three judges, of whom one shall be senior, called "Circuit Judges of the District of Montreal," who shall be advocates of ten years' practice, chosen from among the members of the Bar of the Province, and be appointed by competent authority.

In 1900, by Chap. 18 of the Statutes of the Province of Quebec, the last above-mentioned section was amended by adding thereto the following clause:

The senior shall have, over such court, and the judges and officers thereof, all the powers *mutatis mutandis* which the chief justice of the Superior Court has over such latter court, its judges and its officers.

In 1938, by Chap. 72 of the Statutes of the Province of Quebec, the provisions respecting the Circuit Court, then found in Division IV of the Courts of Justice Act, Chapter 145 of the Revised Statutes of the Province of Quebec, 1925, were amended by adding to section 92 the following paragraph:

The senior judge, within the meaning of this section, means and has always meant the Circuit Court judge who, by his commission, has received the title of senior judge of such court.

1940

Sec. 20 of the Judges Act, Chap. 105 of the Revised

Statutes of Canada, 1927, provides:

RUSSELL T.  
STACKHOUSE

The salaries of the judges of the Circuit Court of the District Court of Montreal shall be as follows:

v.  
THE KING.

Maclean J.

The Senior Judge of the said Court, \$8,000 per annum; the three other judges of the said Court, each \$7,000 per annum.

The Quebec Courts of Justice Act now provides that the Circuit Court of the District of Montreal shall consist of five judges.

The suppliant was appointed a judge of the Circuit Court in 1925. In November, 1913, Mr. Justice Archambault was appointed a judge of the Circuit Court, and in September, 1934, he was appointed "the Senior Judge (doyen) of the Circuit Court of the District of Montreal," by the same authority. The suppliant pleads that Mr. Justice Archambault received the latter appointment by reason of the date of his commission, and that he was at that date of such appointment in fact the senior of the judges of the Circuit Court, in point of service. Mr. Justice Archambault died in November, 1937, and, as already stated, the suppliant claims that he thereupon became the senior judge of the Circuit Court, by the mere operation of the law, because on the death of Mr. Justice Archambault he became the senior of the judges of the Circuit Court in point of service,—and that is conceded—and therefore entitled to the salary of \$8,000 per annum. Such are the facts of the case, and they, together with the relevant statutes which I have recited, will reveal sufficiently the issue here to be determined.

The designation "senior" is perhaps not a happy one, but, I do not think it can be given the construction which the suppliant claims should be given it, nor do I think that such was the meaning intended by the legislature. It may be assumed that the designation "senior," was intended as a rank or title to be conferred upon one of the judges constituting the Circuit Court, and that one was to be the presiding judge, or head of the court. That has since been made clear by the Act of 1938, which declared that "the senior judge . . . means and has always meant the Circuit Court judge who, by his commission, has received the title of senior judge of such court." It was not, I think, intended that the judge whose appointment to the Circuit Court was anterior to

that of all the other judges was, by operation of the statute, to become the "senior judge" of that court, upon the death or resignation of a judge holding that rank or title. If that were the intention of the legislature it might very easily and clearly have been so expressed. The words "of whom one shall be senior" import the idea of the selection and appointment of one from a body of three judges, to be the "senior" judge, and not the idea of succession to that rank or title by virtue of seniority in point of service, and I think it was intended that the words, "and be appointed by competent authority," in Chap. 30 of the Quebec Statutes for 1899, should apply to the words "of whom one shall be the senior" as well as to the words, "such court shall be composed of three judges." Sec. 2 of that statute reads: "Such court shall be composed of three judges, of whom one shall be senior, . . . and be appointed by competent authority." If it were intended that the judge senior in years of service were to become the "senior" judge of the Circuit Court, there could be but one who was qualified for that rank or title, and the words "one of whom shall be senior" would then seem inappropriate, and besides those words seem to negative such an idea because they suggest that the senior judge shall not be a particular one, but one of three. I think the statute means that the judge who was to be "senior" was one to be appointed by the competent authority, the Government of Canada. I am of the opinion therefore that the word "senior" is not to be given the construction claimed for it by the suppliant.

Whatever doubt there may have been as to the true construction of the word "senior" as employed in the statute, that was clearly removed by the Act of 1938. That this Act was intended to have a retroactive operation appears in plain and unambiguous language, and that, I think, is the end of the question.

The declaration prayed for by the suppliant must therefore, in my opinion, be refused. There will be no order as to costs.

*Judgment accordingly.*

1940  
 RUSSELL T.  
 STACKHOUSE  
 v.  
 THE KING.  
 Maclean J.

1939  
 Mar. 21.  
 —  
 1940  
 May 6.

BETWEEN:

MYSTERIOUS CHEMICAL CO. LTD... PLAINTIFF;

AND

PROTEX CORPORATION OF }  
 CANADA LTD..... } DEFENDANT.

*Trade Mark—Unfair Competition Act, 22-23 Geo. V, c. 38, secs. 2, 3,  
 4 & 5—Registration—Delays—Infringement.*

*Held:* Notwithstanding that plaintiff's application for registration of its mark was made after the expiry of the various periods of six months mentioned in section 4 of the Act, and that the Registrar of Trade Marks had failed to wait for the expiry of six months from the date of the application before registering the same, such irregularity is not fatal to plaintiff's action

2. That though two marks may exhibit some differences of detail, yet where the main idea is the same, so that the purchaser knowing the first, and not having the second beside it for comparison, might, if the goods bore the second mark, be deceived into believing he was getting the goods which bore the mark with which he was acquainted, the second will constitute an infringement of the first. The Court in comparing the plaintiff's and defendant's marks must look to their ensemble and not to the differences of detail, to decide whether there is infringement.

ACTION by plaintiff to restrain the defendant from using a trade mark alleged to be an infringement of its mark, and for damages and costs.

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

*H. Gerin-Lajoie, K.C.* for plaintiff.

*Edouard Bernard* for defendant.

Application was made to the Registrar of Trade Marks on the 20th February, 1935, namely, after the expiry of the various six months mentioned in section 4 of the Act, and was by the Registrar of Trade Marks registered on the 28th of the same month, e.g., without waiting for the expiry of the six months from date of application, as provided in the said section.

Plaintiff is the owner of a "Design-Mark consisting of the representation of a hand holding a Dagger" etc., used in connection with the manufacture and sale of insecticides. It had been used for many years, namely, from

1917, and a considerable sum was spent in advertising the goods and the mark. The defendant's mark, the use of which it is sought to restrain by injunction, is described by its President and Manager, on his examination for discovery, put in as evidence at trial, as consisting of a circle with a hand therein holding a foil, with the words "En Garde," used in connection with the sale of insecticides. He says he cannot state whether this mark was used before 1930. A copy of the defendant's advertisement which appeared in the Bell Telephone Company's directory for 1938 was filed as exhibit 3.

1940  
 MYSTERIOUS  
 CHEMICAL  
 CO. LTD.  
 v.  
 PROTEX  
 CORP. OF  
 CANADA  
 LTD.  
 ———  
 Angers J.

By its defence the defendant denies infringement and alleges that the action is unfounded in law and in fact. In the above mentioned examination he states as follows:

A. Well, in the first place, I had the words "En Garde" in my mind and had them for a long time, and really, I cannot recall the name of the Moving Picture, but I got the idea of the foil from a Moving Picture, watching the Moving Pictures one day in a Theatre. You might recall the name if you happen to have heard it—it has Douglas Fairbanks, Junior, and Roland Coleman fighting a duel and that appealed to me, the way, at the time, they rushed together, and the words "En Garde" were mentioned, and that struck me as singular at the time, and I thought the idea of the foil was just something, merely to fill up the hole around "En Garde." I had thought of the old time warrior with the spear attacking a dragon, I had those ideas in my mind: in fact, I have made some sketches of it, but this appealed to me for the reason, it was more likely to draw attention—that was my object in designing it, to draw attention to the Ad.

Q. It did not occur to you that a foil was fairly close to a dagger?

A. It did, yet I have never. . . I tried to recall ever seeing a foil on an Ad. and finding there was no resemblance of any foil to any dagger, I didn't think there was any resemblance in the foil and the dagger: I had never seen at any time any foil in advertising in our line of business. There is such a difference in them that I didn't think there could be any friction caused by the two. In fact it was not, in our opinion, it was not important at all, the foil end of it. In fact the words "En Garde" were what we were concentrating upon.

1940  
 MYSTERIOUS  
 CHEMICAL  
 CO. LTD.

In answer to a question as to whether or not it was the intention of the defendant to continue using the mark in question, he says:—

v.  
 PROTEX  
 CORP. OF  
 CANADA  
 LTD.

A. It is immaterial, if it offends somebody, it is of no importance to us whatsoever. I did not think it was even worth while requesting a registration for it.

Angers J.

Q. Still that does not quite apply to the question, as to whether it is the defendant company's intention to use it?

A. Well, it was our intention to let it go on like that for . . .

Mr. BERNARD:

Q. He (Mr. Gerin-Lajoie) is asking you what is the intention of the company about it?

A. Well, no, not now, of course not. Under the circumstances we will discontinue the use of it.

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

ANGERS J., now (May 6, 1940) delivered the following judgment:

[The learned Judge after summarizing the pleadings, citing the above evidence and giving a summary of the balance of the evidence, proceeds as follows]:

Toute la question se résume à déterminer si le dessin adopté par la défenderesse est similaire à la marque de commerce de la demanderesse, au sens de la Loi sur la concurrence déloyale, 1932 (22-23 Geo. V, chap. 38).

Il s'agit en l'espèce de ce que la loi appelle un dessin-marque. Le dessin-marque est décrit au paragraphe (c) de l'article 2 comme suit:

2. (c) 'dessin-marque' signifie une marque de commerce composée d'une marque ou d'un dessin arbitraire et sans importance en soi, ou de la représentation d'un objet ou d'objets, ou de lettres ou chiffres en série ou autrement, ou d'une combinaison de deux des éléments qui précèdent ou plus, et dépendant, pour son caractère distinctif, de ses forme et couleur ou de la forme, de l'arrangement ou de la couleur de ses diverses parties, indépendamment de toute idée ou de tout son susceptible d'être suggéré par la disposition particulière des lettres et/ou chiffres, s'il en est, qui en font partie, ou par leur partage en groupes, et comprend tout signe distinctif capable de constituer une marque de commerce.

Le paragraphe (k) de l'article 2 définit ainsi le mot "similaire":

2. (k) 'similaire', par rapport aux marques de commerce, aux noms commerciaux ou aux signes distinctifs, détermine les marques, noms ou



signes qui se ressemblent tellement ou donnent à ce point l'impression que l'emploi simultané des deux dans une même zone, sur des produits de même nature, porterait probablement les marchands et/ou usagers de ces produits à déduire que la même personne a assumé la responsabilité de la nature ou qualité de ces produits, des conditions dans lesquelles ils ont été fabriqués, ou de la catégorie de personnes qui les a fabriqués, ou de leur lieu d'origine.

1940

MYSTERIOUS  
CHEMICAL  
CO. LTD.  
v.  
PROTEK  
CORP. OF  
CANADA  
LTD.

Angers J.

La demanderesse appuie son recours sur les articles 3, 4 et 5 de la loi. Les dispositions de l'article 3 qui sont pertinentes se lisent comme suit:

3. Personne ne doit sciemment adopter, pour s'en servir au Canada sur des produits, une marque de commerce ou un signe distinctif.

(c) Qui est similaire à quelque marque de commerce ou signe distinctif en usage, ou en usage et connu comme susdit.

Les dispositions de l'article 4 pouvant avoir quelque pertinence en l'espèce sont ainsi conçues:

4. (1) La personne qui, selon les prescriptions de l'article précédent, emploie ou fait connaître la première au Canada, relativement à des produits, une marque de commerce ou un signe distinctif susceptible de constituer une marque de commerce, a droit à l'usage exclusif au Canada de cette marque de commerce ou de ce signe distinctif relativement à ces produits, pourvu que cette marque de commerce soit inscrite sur le registre existant en vertu de la Loi des marques de commerce et dessins de fabrique à la date de l'entrée en vigueur de la présente loi, ou pourvu que conformément aux dispositions de la présente loi elle demande l'enregistrement de cette marque de commerce dans les six mois de la date à laquelle la présente loi entre en vigueur, ou de la date de son premier emploi au Canada, ou de la date à laquelle la marque de commerce ou le signe distinctif a été pour la première fois révélé au Canada, suivant les dispositions de l'article précédent, et qu'elle obtienne et maintienne dans la suite son enregistrement en exécution des dispositions de la présente loi.

(3) Nonobstant les dispositions du paragraphe un du présent article, la personne qui emploie ou fait connaître la première au Canada, relativement à des produits, une marque de commerce ou un signe distinctif, susceptible de constituer une marque de commerce, peut demander et obtenir son enregistrement dès l'expiration de l'une quelconque des périodes de six mois spécifiées au paragraphe un; toutefois, cette marque de commerce ou ce signe distinctif ou une marque de commerce ou un signe distinctif similaire ne doit pas avoir été enregistré par une autre personne pour servir sur les mêmes produits ou des produits similaires; mais cette demande ne doit pas être accordée ou l'enregistrement de cette marque de commerce ne doit pas être fait avant l'expiration d'une période de six mois à compter de la date de cette demande.

L'article 5 décrète ce qui suit:

5. Sauf tel qu'autorisé à ce faire par leur propriétaire enregistré, personne ne doit vendre, distribuer ou annoncer au Canada des produits sur lesquels est apposée une marque de commerce ou un signe distinctif que, conformément aux dispositions de la présente loi, une autre personne a adopté et enregistré pour s'en servir sur des produits identiques ou similaires.

1940  
 MYSTERIOUS  
 CHEMICAL  
 Co LTD.  
 v.  
 PROTEX  
 CORP. OF  
 CANADA  
 LTD.  
 Angers J.

Quoique la demande d'enregistrement de la marque de commerce de la demanderesse ait été faite après l'expiration des diverses périodes de six mois spécifiées au premier paragraphe de l'article 4, le registraire, au lieu d'attendre l'expiration d'une période de six mois à compter de la date de la demande, a, le 28 février 1935, accordé cette demande qui porte la date du 20 du même mois; cette irrégularité n'affecte aucunement les droits de la demanderesse à l'égard de la défenderesse et les intérêts de cette dernière n'en sont point lésés.

La preuve démontre que la marque de commerce pièce 1 désigne les produits de la demanderesse; elle est utilisée non seulement sur les contenants des produits de celle-ci mais aussi sur son papier, ses annonces, ses voitures de livraison.

Il est prouvé que la demanderesse est la maison la plus importante et l'une des mieux connues au Canada de celles qui font le commerce d'insecticides et désinfectants.

Le procureur de la demanderesse a soutenu que le dessin de la défenderesse est, au sens de la loi, similaire à la marque de la demanderesse: les deux représentent une arme, épée ou poignard peu importe, tenue par une main qui menace. C'est là l'idée générale qui se dégage des deux marques.

L'objet d'une marque de commerce est de frapper l'attention de l'acheteur. Ce qui frappe l'attention ce n'est généralement pas les détails, mais l'ensemble. Il n'y a pas de doute qu'à regarder les deux marques côte à côte l'on en constate facilement les différences. Ce n'est cependant pas l'épreuve qu'il faut faire; les deux marques doivent être considérées séparément et il y a lieu de déterminer l'impression qui ressort de chacune d'elles. Kerly, dans son ouvrage "The Law of Trade Marks and Trade Names" (6ème édition), traitant la question de similitude, fait les observations suivantes, qui me paraissent bien au point (p. 270):

Two marks, when placed side by side, may exhibit many and various differences, yet the main idea left on the mind by both may be the same; so that a person acquainted with the mark first registered, and not having the two side by side for comparison, might well be deceived, if the goods were allowed to be impressed with the second mark, into a belief that he was dealing with goods which bore the same mark as that with which he was acquainted. Take, for example, a mark representing a game of football; another mark may show players in a different dress, and in very different positions, and yet the idea conveyed by each might be simply a game of football. It would be too much to expect

that persons dealing with trademarked goods, and relying, as they frequently do, upon marks, should be able to remember the exact details of the marks upon the goods with which they are in the habit of dealing.

A la page 276, l'auteur, parlant de la comparaison qu'il y a lieu de faire entre les marques, s'exprime ainsi:

It is also clear that the Registrar ought not merely to look at the marks as they stand side by side, for, from the nature of the case, they will not be so put before any customer whom it is sought to deceive by means of either of them. He can only contrast the mark upon the goods offered to him with his recollection of the mark used upon those he is seeking to buy, and allowance must be made for this in estimating the probability of deception. Any other rule would be of no practical use (*Seizo v. Provezende*, 1866, L.R. 1 Ch. 192, Cranworth, L.C.; *Wilkinson v. Griffith*, 1891, 8 R.P.C. 370, Romer, J., and Lord Alverstone. M.R., in *Hubbuck v. Brown*, 17 R.P.C. at p. 645).

Plus loin, Kerly, revenant sur la question de ressemblance, ajoute (p. 463):

No definite rule as to the amount of resemblance required can be formulated *a priori*, but the net impression produced and "the main idea left on the mind" by one mark must be compared with that left by the other, for marks may well be confused by purchasers, who see the defendant's mark when they have present in their memories only an indefinite recollection of the plaintiff's, in cases where the mark could not be mistaken for each other if they were seen side by side. So that the whole mark of the defendant may too nearly resemble that of the plaintiff, although all the essential particulars of the two are distinguishable; but special regard must, nevertheless, be paid to the essential features of the plaintiff's mark in considering whether the defendant has infringed it.

Sebastian, en son traité *The Law of Trade Marks* (5ème édition), p. 145, adopte la même opinion.

Voir aussi sur ce sujet la décision du juge Wurtele dans la cause de *The Queen v. Authier* (1).

Le fait qu'une marque contient le nom du manufacturier ne suffit pas pour la différencier d'une autre par ailleurs similaire aux yeux de la loi. A mon avis, il faut comparer les deux marques indépendamment des indications de provenance ou du texte, quel qu'il soit, qui les accompagnent.

Le procureur de la demanderesse a prétendu que la publication du dessin de la défenderesse dans l'annuaire du téléphone l'a fait connaître à un grand nombre de personnes et a de la sorte causé à la demanderesse un tort irréparable. Je dois dire que l'on me semble exagérer quelque peu l'effet de cette publication.

1940  
MYSTERIOUS  
CHEMICAL  
CO. LTD.  
v.  
PROTEX  
CORP. OF  
CANADA  
LTD.  
Angers J.

La preuve établit que la défenderesse n'a pas utilisé le dessin en question ailleurs que dans l'annonce parue dans l'édition de juillet 1938 de l'annuaire du téléphone et le témoignage de son président et gérant, M. Frank Owen, laisse entendre que sa compagnie a décidé de l'abandonner.

Si la défenderesse avait résolu, comme ce semble être le cas, de ne plus faire usage de ce dessin, elle n'aurait pas dû contester l'action. Je suis d'avis que la demanderesse, dans les circonstances révélées par la preuve, avait droit à une injonction afin de prévenir la publication du dessin en question, voire son adoption possible comme marque de commerce.

La ressemblance entre la marque et le dessin n'est peut-être pas très frappante, mais, au dire de la majorité des témoins désintéressés, elle est susceptible de créer de la confusion; je suis enclin, non sans quelque hésitation je dois dire, à adopter leur manière de voir.

Le procureur de la défenderesse a plaidé que sa cliente n'avait pas été mise en demeure, avant l'institution de l'action, de cesser d'employer le dessin qu'on lui reproche. Je ne crois pas qu'une mise en demeure était requise.

Le procureur de la défenderesse a soutenu que l'article 3 de la loi ne s'applique point vu qu'il ne s'agit pas d'une marque de commerce et que la défenderesse n'a pas utilisé le dessin contesté sur ses produits. Je suis d'opinion que la demanderesse était justifiable d'agir promptement afin d'empêcher la défenderesse d'utiliser le dessin comme marque de commerce et de se créer par ce moyen une clientèle au détriment de la demanderesse.

Les articles 5 et 11 de la loi me paraissent couvrir le cas qui nous occupe.

*Judgment accordingly.*

---

BETWEEN :

THE SHIP *NEWBRUNDOC* . . . . . APPELLANT;

AND

A. S. RUDOLF . . . . . RESPONDENT.

1940  
 Jan. 9.  
 —  
 July 4.

*Shipping—Appeal from District Judge in Admiralty—Damage to respondent's vessel in Cornwall Canal—No negligence on part of appellant ship—Damage due to negligent operation of respondent's vessel—No rule of the road, custom or practice requiring an upbound ship passing through the Cornwall Canal to wait in the Wide Bay for a vessel that has passed through Lock 21 downbound—Appeal allowed.*

Appellant steamship, westbound from Montreal, and the steamer *Rutenfjell*, owned by respondent, eastbound met and passed one another in the narrow stretch of the Cornwall Canal between Lock 21 and the Wide Bay. The *Rutenfjell*, after passing through Lock 21, proceeded downward, and, after observing that the appellant steamer was not holding back in the Wide Bay, but instead was proceeding upwards and through the narrow stretch of the Canal, put its engines full speed astern, allegedly to avoid a collision. The result of this operation was that the *Rutenfjell's* stern sheered towards the south bank of the Canal and her bow to the north bank and she went out of control, ending crosswise the Canal with her bow on the north bank and her stern on the south bank. Her lines were got ashore and she was pulled over against the south bank of the Canal and tied up. The *Newbrundoc*, having held back some four or five ship lengths below, then passed the *Rutenfjell* without difficulty and without damage to either ship.

The owner of the *Rutenfjell* brought action against the *Newbrundoc* to recover for the loss of her rudder shoe alleged to have been broken off through striking some submerged object when the *Rutenfjell* was manoeuvring to avoid the collision anticipated by her pilot.

*Held:* That it is not the custom or the usual practice for an upbound ship to hold up in the Wide Bay and there meet and pass a downbound ship after it is definitely ascertained that the downbound ship has passed through the lock and has not stopped in the wider section just outside the lower end of the lock.

2. That there is no Rule of the Road applicable to the Cornwall Canal which requires an upbound ship reaching the Wide Bay to hold back there until a downbound ship sighted in Lock 21, or after leaving the lock, reaches the Wide Bay.
3. That the damage incurred by the *Rutenfjell* was solely attributable to the negligent handling of the *Rutenfjell* before the ships began to pass one another.

APPEAL from the decision of the District Judge in Admiralty for the Quebec Admiralty District, allowing plaintiff's action for damages for loss of a rudder shoe alleged due to the negligent operation of the defendant steamer.

1940  
 THE SHIP  
*Newbrundoc*  
 v.  
 A. S. RUDOLF  
 Maclean J.

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

*C. Russell McKenzie, K.C.* for appellant.  
*R. C. Holden, K.C.* for respondent.

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

THE PRESIDENT, now (July 4, 1940) delivered the following judgment.

The respondent, owner of the steamship *Rutenfjell*, was the plaintiff in an action brought against the appellant steamship *Newbrundoc* claiming damages alleged to have been occasioned by the negligent navigation of the *Newbrundoc*, in the Cornwall Canal. The action was heard by Cannon, J., District Judge in Admiralty for the Quebec Admiralty District, who found that the damage suffered by the *Rutenfjell* was attributable solely to the improper and negligent navigation of the *Newbrundoc*, and this is an appeal from that decision. On the hearing of the appeal I was assisted by Captain A. Barrett as Nautical Assessor.

The ship *Rutenfjell*, of Norwegian registry, a steel single screw steamship of 1,334 tons gross, 250 feet in length and with a beam of 41·3 feet, was on July 9, 1938, proceeding down the Cornwall Canal, east bound, laden with general cargo, on a voyage from the Great Lakes to London, England, via Montreal and Quebec. Early in the morning of that day she passed through Lock 21 of the Cornwall Canal, at or near Dickinson's Landing. The ship *Newbrundoc* is of the usual full size lower canal type of grain carrier, 1,935 tons gross, 253 feet in length, and with a beam of 43·2 feet. On the morning of July 9, 1938, the *Newbrundoc*, cargo laden, was proceeding up the Cornwall Canal on a voyage from Montreal to the Upper Lake ports. The *Rutenfjell* and the *Newbrundoc* met and passed one another in the Cornwall Canal, on the date mentioned, and in the circumstances I shall presently describe.

It will be desirable to describe generally that section of the Cornwall Canal wherein occurred the events culminating in this action. About a mile below Lock 21 there is a rather sharp bend in the Cornwall Canal and this is usually referred to as the "Big Bend." A ship proceeding westerly up the canal and before fully rounding the Big Bend

would be unable to see a ship in Lock 21, or anywhere between that lock and the Big Bend, but once having rounded the Big Bend she would easily observe a downbound ship in the lock, and thereafter while en route between the lock and the Big Bend. A ship downbound from Lock 21 would observe an upbound ship after the latter had rounded the Big Bend. The north or land-side of the canal has a considerable elevation but the south bank—a wall or bank between the canal and the River St. Lawrence—is quite low and while there is a slight bend in one or two places between Lock 21 and the Big Bend yet the canal between those two points may be said to be comparatively straight. Immediately above and west of the Big Bend the canal is wider for a short distance than it is from there on towards the lock, and this short but wider stretch of the canal was referred to frequently as the “Wide Bay,” and it will probably avoid confusion if I continue thus to distinguish between the Big Bend and the Wide Bay, the latter being a short section of the canal where it is agreed two ships may meet and pass with ease and safety, whereas in the stretch between the Wide Bay and a point just a little below Lock 21 the canal is considerably narrower, and consequently it is more difficult for ships of full canal size to meet and pass one another in that stretch of the canal than it is in the Wide Bay, or immediately below the lock where, for a short distance, the canal also widens.

The current in the section of the canal in question is a good two knots. The canal banks are set with stones and it was suggested that in some places stones had fallen to the bottom of the canal, particularly on the south side, but the extent of this condition, if existing at all, on the occasion in question, was not clearly established. There is no system of signals of any kind for controlling or directing the movements of ships pursuing opposite courses between Lock 21 and the Big Bend, but there does appear to be some method of advising ships passing downwards through Lock 21 that a ship has passed, or is about to pass, upwards through Lock 20, the next lower lock, and that appears to have been done in this case.

On the morning in question the *Rutenfjell* left Lock 21 at 4.20 a.m., daylight saving time, it then being broad day-

1940  
 THE SHIP  
*Newbrundoc*  
 v.  
 A S RUDOLF  
 Maclean J

1940  
 THE SHIP  
*Newbrundoc*  
 v.  
 A. S. RUDOLF  
 Maclean J

light; the weather was fine and clear with a light south-westerly wind. Early after leaving the lock, and having the Big Bend in mind, the *Rutenfjell* gave a long blast of her whistle, as the *Newbrundoc* did before rounding the Big Bend, but it appears that neither ship heard the signal of the other. The lockhand Dunlop testified that the *Rutenfjell* had just cleared the lock and was proceeding down the canal when he observed the *Newbrundoc* rounding the Big Bend. The master of the *Rutenfjell* testified that his ship had moved down the canal about one-third of the distance between the lock and the Big Bend before he first saw the *Newbrundoc* coming around that bend, while his pilot stated that she was about 900 feet below the lock when the *Newbrundoc* came into sight. There would seem to be a substantial discrepancy between the master and the pilot, as to the position of the *Rutenfjell* when the *Newbrundoc* was seen coming around the Big Bend, but mathematical exactness is not to be expected in such cases. The master of the *Newbrundoc* testified that when his ship rounded the Big Bend at half speed he saw the *Rutenfjell* in the lock and he proceeded slowly upwards expecting to pass the *Rutenfjell* in the stretch between the Wide Bay and the lock. There would not appear to be any reason why the *Rutenfjell* should not have seen the *Newbrundoc* as early as did the lockhand Dunlop, whose evidence upon this point I would be disposed to accept. The master of the *Newbrundoc*, I have no doubt, on rounding the Big Bend was able to see the *Rutenfjell*, whatever was then her precise position. However, in my view of the case, I do not think it is of vital importance at what precise points in the canal the respective ships first observed one another. In any event, the *Rutenfjell* proceeded downwards without stopping immediately outside the lock where the canal was wider than onwards to the Wide Bay, and the *Newbrundoc* passed through the Wide Bay and proceeded slowly onwards into the narrower stretch of the canal. Neither ship gave any signal after sighting one another in order to indicate what each expected the other to do, or that either anticipated difficulty in meeting and passing one another.

The pilot of the *Rutenfjell* testified that when he became satisfied that the *Newbrundoc* was not holding back in the Wide Bay and was proceeding upwards and through the



narrow stretch of the canal he made up his mind that a collision was inevitable and that he would tie up to the south bank. The engines were then put full speed astern, which continued for four or five minutes, to get the way off the *Rutenfjell*, but in this movement her stern sheered towards the south bank of the canal and her bow to the north bank and she went out of control, ultimately ending crosswise the canal with her bow on the north bank and her stern on the south bank. During this time, it is claimed, the *Rutenfjell* struck some submerged object at or near the south bank of the canal, breaking off her rudder shoe, which is the damage complained of and attributed to the *Newbrundoc*. The lines of the *Rutenfjell* had then to be got ashore to pull her over against the south bank of the canal and when this was done she was there tied up. I find it difficult to avoid the suspicion that the pilot's decision to tie up to the south bank of the canal was because he had to get lines ashore to heave his ship from being crossways in the canal. The *Newbrundoc*, which in the meanwhile had held back some four or five ship's length below, then proceeded to pass the *Rutenfjell* and this she did without difficulty and without damage to either ship of any kind. There was the suggestion that in passing the ships rubbed against one another but that, in my opinion, was not established.

It was contended on behalf of the *Rutenfjell*, that good seamanship, custom and practice, required that an upbound ship on rounding the Big Bend should hold back in the Wide Bay until any downbound ship which had left Lock 21 had passed through the intervening narrow stretch, and for such ships to meet and pass in the Wide Bay. On behalf of the *Newbrundoc* it was contended that there was no Rule requiring an upbound ship, in the situation just mentioned, to hold back in the Wide Bay for the downbound ship, and there to meet and pass one another, and that it was quite safe and usual for ships to meet and pass one another in the narrow stretch of the canal, and that no custom or practice prevailed to the contrary, though upbound ships do frequently hold back in the Wide Bay and there meet and pass downbound ships. The important question then for decision here

1940  
 THE SHIP  
*Newbrundoc*  
 v.  
 A. S. RUDOLF  
 Maclean J

1940  
 THE SHIP  
*Newbrundoc*  
 v  
 A S RUDOLF  
 Maclean J

would seem to be whether or not the *Newbrundoc* should have held back in the Wide Bay until the *Rutenfjell* had there passed her.

The learned trial judge, *inter alia*, found that good seamanship required and that it was a recognized custom and practice for an upbound ship to hold back in the Wide Bay, until any downbound ship which had left the lock had passed through the narrow stretch, and for such ships to meet and pass in the Wide Bay; that the *Newbrundoc* should, under the circumstances, have held back in the Wide Bay until the *Rutenfjell* had passed; that if those on the *Newbrundoc* had exercised proper care and attention and had navigated her in a proper and seamanlike manner the *Rutenfjell* would not have sustained damage; that in the emergency thus created, and throughout, the *Rutenfjell* was handled in a proper and seamanlike manner; and that whereas the *Rutenfjell* suffered damage owing to the negligent navigation of the *Newbrundoc*, the latter was liable in law for the damages incurred by the *Rutenfjell*, either by a collision between the two ships or in any other way.

There is no Rule of the Road applicable to the Cornwall Canal which requires an upbound ship reaching the Wide Bay to hold back there until a downbound ship sighted in Lock 21, or after leaving the lock, reaches the Wide Bay. Mr. Shields, the Lockmaster of Lock 21 for the past twenty-seven years, testified that ships often meet and pass one another in the narrow stretch of the canal, and his evidence is, I think, entitled to great weight. He stated that fully loaded canal boats frequently remain in the Wide Bay if the downbound ship is close, but all do not do this. The Lockmaster leaves the impression with me that it is not at all unusual for ships to meet and pass anywhere in the canal between the Wide Bay and Lock 21, in the narrow stretch, in fact, he would appear to say that such is rather the rule than the exception, but of that I cannot be quite certain. The master of the *Newbrundoc* stated that, in his own experience, ships pass one another in the narrow stretch of the canal every day. He stated that he himself would meet and pass from one to two hundred ships a year in the narrow stretch of the canal. My assessor, who has had a long and practical acquaintance with this canal informs me that ships do pass

one another frequently in the narrow stretch of the canal in question, but he also informs me that it is a common occurrence for an upbound ship to hold back in the Wide Bay for a downbound ship after she has passed through the lock. I am quite satisfied that it is quite common for ships to meet and pass one another in the narrow stretch of the canal, though it is quite possible that the more usual practice is for the upbound ship, after turning the Big Bend to remain in the Wide Bay after sighting a downbound ship below the lock, but that would not establish a custom or practice in the sense suggested here. The evidence does not establish that it is the "custom," or the "usual practice" for an upbound ship to hold up in the Wide Bay and there meet and pass a downbound ship, after it is definitely ascertained that she has passed through the lock and has not stopped in the wider section just outside the lower end of the lock. Good seamanship, in certain weather conditions, might require this, but under favourable weather conditions, as was the case here, I do not think that "custom" or "practice" requires an upbound ship to hold back in the Wide Bay for a downbound ship. A "custom," or "usual practice," of waiting at the Wide Bay should be so widely known and followed that it would be considered unusual or extraordinary to do the other thing, and that cannot be said of the situation here.

1940  
 THE SHIP  
*Newbrundoc*  
 v  
 A S RUDOLF  
 Maclean J

My assessor advises me that ships passing one another in the narrow stretch of the canal might rub one another or the canal banks, but without damage to either. In such circumstances the speed of the meeting ships would be the main factor determining whether they would meet and pass one another without any particular difficulty or without causing damage to one another. If each ship proceeds cautiously and slowly my assessor tells me that the risk of rubbing one another, or the canal banks, is not a very serious one, and that, I think, must be so. In such a situation both ships must, of course, proceed cautiously and well under control in order to avoid the risk of any serious collision. In the narrow stretch of the canal in question my assessor informs me that a common manœuvre for an upbound ship is to put her bow on her starboard bank with her engines working at slow speed ahead so as to hold her there until the downbound ship is nearly abreast of her bow, and then she should alter her course to port so as to bring her stern to starboard, leaving room

1940  
 THE SHIP  
*Newbrundoc*  
 v.  
 A. S. RUDOLF  
 Maclean J.

for the downbound ship to pass, and as the bow of the upbound ship works clear of the banks she slowly passes by; this manœuvre would leave the bigger share of the canal clear for the downbound ship to pass in. In such a situation both ships must be well under control and proceed slowly. The *Rutenfjell* did not in my opinion observe this requirement, and I am so advised by my assessor, because, by improper handling she was allowed to get out of control and go crosswise the canal, and this was probably due to the fact that the *Rutenfjell* was attempting to get her way off too hurriedly in order to pass the *Newbrundoc* at slow speed. I am advised, and it seems quite manifest, that in going full speed astern on her engines for four or more minutes, with a current behind her, the *Rutenfjell* was bound to sheer across the canal just as she did; this my assessor tells me was not a proper handling of the ship. This could have been avoided by a proper manœuvring, that is, by going astern with an occasional full speed ahead, with her rudder hard astarboard, and the *Rutenfjell* had sufficient power to do this; had this been done I have no doubt it would have prevented her striking her stern against the south bank, and going crosswise in the canal, thus causing the damage in question, and it is the contention of the *Newbrundoc* that whatever damages the *Rutenfjell* suffered were caused by her own negligent navigation in attempting to slow up before meeting and passing the *Newbrundoc*.

We have then the following state of facts pretty clearly established in this case. Had the *Newbrundoc* remained in the Wide Bay and there allowed the *Rutenfjell* to meet and pass her the incident in question here would not have arisen. There is no Rule which required the *Newbrundoc* to await the *Rutenfjell* in the Wide Bay, and no custom or practice to that effect was established; in fact it was shown that ships do pass one another frequently in the narrow stretch of the canal, and probably there are very practical shipping considerations which necessitate this practice, otherwise serious congestion of traffic might at times ensue. The *Newbrundoc* did not hold back in the Wide Bay but proceeded upwards slowly towards the lock and it consequently became necessary for the two ships to pass one another in the narrow stretch of the canal. In slowing down preparatory to meeting and passing the *Newbrundoc* those in charge of the *Rutenfjell* lost control

of that ship and, I am satisfied, by improper handling allowed her to sheer and go crosswise the canal in the manner I have described; in this interval the *Rutenfjell* suffered the damage complained of, and the master of the *Rutenfjell* stated that it was this sheering of the stern of his ship over to and against the starboard canal bank that caused the breaking of his rudder shoe. While pulling the *Rutenfjell* over against the south bank of the canal the *Newbrundoc* held back three or four lengths below, but after the *Rutenfjell* was tied up the *Newbrundoc* proceeded ahead and passed the *Rutenfjell* without damage occurring to either ship.

The damage incurred by the *Rutenfjell* therefore seems to me to have been attributable solely to the negligent handling of the *Rutenfjell* considerably before the ships began to pass one another. I am of the opinion, as is my assessor, that with the *Rutenfjell* proceeding at the slowest possible speed, well under control, and properly handled, the two ships would have passed one another successfully and without causing any damage the one to the other. I am satisfied, upon the evidence, that in the narrow stretch of the canal there is well over 90 feet, probably 100 feet and more, at the bottom of the canal for fourteen feet navigation or draft, and that there was ample room for the ships to pass one another with safety. In passing one another it is possible that both ships might have rubbed the canal banks, or they might have rubbed one another, which would not have been a serious matter, and this is likely an almost daily experience with canal boats. I think the damage to the *Rutenfjell* was caused by her own negligent navigation and manœuvring, and by that alone. The only possible offence that might be charged against the *Newbrundoc* is that she did not hold back in the Wide Bay, but she decided to meet and pass the *Rutenfjell* in a comparatively straight section of the narrow stretch of the canal, which seems to have been a common thing to do, and against which there is no Rule; and there can be no suggestion of negligent navigation on the part of the *Newbrundoc* in attempting to carry out this intention. I do not think therefore that the *Newbrundoc* should be held liable for the occurrence causing the damage to the rudder shoe of the *Rutenfjell*, and with the greatest of respect I accordingly allow the appeal and with costs.

1940  
 THE SHIP  
*Newbrundoc*  
 v.  
 A. S. RUDOLF  
 Maclean J

*Appeal allowed.*

1940

Mar 27  
Aug 1

BETWEEN :

ALBANY PACKING COMPANY INC . . . . APPELLANT;

AND

THE REGISTRAR OF TRADE MARKS . . . . RESPONDENT.

*Trade mark—Unfair Competition Act, 22-23 Geo. V, c 38, sects 26 (1) (c) and 28 (1) (d) and (2)—Convention of the Hague (1925)—Word mark “Tenderized” descriptive or misdescriptive—“Country of origin”—Word “Tenderized” not a distinctive mark—Appeal from Registrar of Trade Marks dismissed.*

Appellant, a corporation organized under the laws of the State of New York, USA, applied in Canada for registration of the word mark “Tenderized” to be applied to “hams, pork shoulders and picnics”. The Registrar of Trade Marks refused registration on the ground that the proposed mark was considered descriptive or misdescriptive of the character or quality of the wares with which it was used.

On appeal to this Court the appellant claimed the right to registration of the mark “Tenderized” on the grounds that prior to the Canadian application the mark had been registered in the US, the “country of origin” of such registration; that having regard to all the circumstances, including the length of time the mark had been used, the mark had acquired a distinctive character or was not wholly without distinctive character.

*Held:* That the proposed mark “Tenderized” is descriptive of the character or quality of the products with which it is proposed to be used and therefore unregistrable under s 26 (1) (c) of the Unfair Competition Act.

2. That the “country of origin” as used in s. 28 (1) (d) and (2) of the Unfair Competition Act refers to a country, other than Canada, which has acceded to the Convention of the Hague (1925), and in which a person has registered a trade mark, which he now seeks to register in Canada under s 28 (1) (d) and (2) of the Act.
3. That the appellant’s registration in the United States is not one made in the “country of origin” as contemplated by s. 28 (1) (d) and (2) of the Unfair Competition Act since the mark was registered under the United States Act of 1920, the purpose of which was “to give effect to certain provisions of the Convention for the Protection of trade mark and commercial names, made and signed in the City of Buenos Aires, in the Argentine Republic, August 20, 1910, and for other purposes”, to which Convention the United States was a signatory, but not Canada.
4. That the mark “Tenderized” designates or describes a character or quality imparted to certain meat products by some process or treatment and the evidence does not establish that the mark by user or otherwise, has acquired a distinctive character as provided for in s. 28 (1) (d) (iv) of the Unfair Competition Act, the onus to establish such being on the applicant for registration

5. That a word which is merely a description of the goods with which it is associated is not a distinctive mark, because it is not adapted to distinguish the goods of one trader from those of other traders, and it cannot acquire a secondary signification by user to denote solely the goods of any particular trader.

1940  
 ALBANY  
 PACKING  
 Co INC.

v.  
 REGISTRAR OF  
 TRADE  
 MARKS.  
 Maclean J

APPEAL from the refusal of the Registrar of Trade Marks to register a word mark applied for by appellant.

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

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

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

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

THE PRESIDENT, now (August 1, 1940) delivered the following judgment:

This is an appeal, heard on affidavits, from the refusal of the Registrar of Trade Marks to register the word mark "Tenderized", to be applied to "hams, pork shoulders, and picnics", on the application of Albany Packing Company, Inc., a corporation organized under the laws of the State of New York, U.S.A., and having its principal place of business at West Albany, in the said State of New York. The case involves some important questions, and is, I think, a novel one in this jurisdiction, and is not without its difficulties. Had I been made acquainted earlier with the nature of the questions presented by this appeal it is probable I should have required that public notice by advertisement be given of the hearing of the appeal, under s. 51 (3) of the Unfair Competition Act.

In February, 1938, an application was made by Dumarts Ld., of Kitchener, Ontario, to register as a word mark the word "Tenderized", which word, the application states "(indicates a special process)". In a letter accompanying the application the applicant stated that: "This word denotes a special process which we are commencing to use in connection with our meats, and therefore wish to have this word registered", and in a letter to the Registrar, in May, 1938, the applicant stated: "You may be interested to know that this word was registered in the United States, and we might state that the word denotes a special process of producing this Ham". In a still later letter to the

1940  
 ALBANY  
 PACKING  
 CO. INC.  
 v.  
 REGISTRAR OF  
 TRADE  
 MARKS  
 Maclean J.

Registrar the applicant stated: "We still, however, contend that the word 'Tenderized' denotes a special process, of making this Ham tender". The application states that the applicant had used the mark since February 15, 1938, in Canada, on wares ordinarily and commercially described by it as "Meats & Sausage—Fresh—Smoked—or Canned", to indicate that such wares were sold by it.

In November, 1939, the application of Dumarts Ld. was formally and finally refused registration by the Registrar on the ground that the proposed mark was considered descriptive or misdescriptive of the character or quality of the wares with which it was used, and was therefore not registrable under the provisions of s. 26 (1) (c) of the Unfair Competition Act. In December, 1939, Dumarts Ld. wrote the Registrar, saying: "We have now completed arrangements whereby we proposed to have the Albany Packing Company of Albany, N.Y., register this trade mark in Canada and transfer same to us."

Prior to the dates just above mentioned, in March, 1939, objection was made in writing to the Registrar by the Solicitor of Canada Packers Ld., and J. M. Schneider Ld., two Canadian corporations, against the registration of the mark "Tenderized" by Dumarts Ld., on the ground that it was "distinctly descriptive of a quality of the goods", and that it was "being quite commonly used by most of the Packing House Trade". It was pointed out therein that the term "Tenderized" had been used by Canada Packers Ld., and by J. M. Schneider Ld., for some months, and that the same word mark was "being used in the United States and goods so marked are being sold in Canada by The Tobin Packing Company Inc., of Fort Dodge, Iowa". This protest was accompanied by samples of printed matter used and circulated in some way by Canada Packers Ld., and The Tobin Packing Company, referable to their meat products, but just how this printed matter was used, or when such use was commenced, was not made clear. In the printed matter used and circulated by The Tobin Packing Company the following excerpts therefrom may be mentioned: "Genuine Tenderized Ham", and "Tenderized Canned Ham". In the printed matter used and circulated by Canada Packers Ld. the following words extracted therefrom may be mentioned:



“Canada Packers are producers of the ‘New Maple Leaf’ Tendersweet Ham”, and, “An improved process so tenderizes the Ham that it cooks in much less time than formerly. And when cooked the delicate flavour is delicious and the meat so tender you can cut it with a fork.”

1940  
ALBANY  
PACKING  
Co. INC.  
 v.  
 REGISTRAR OF  
 TRADE  
 MARKS.  


---

 Maclean J.

In May, 1939, the Albany Packing Company, Inc., applied for the registration of the word mark “Tenderized”, in Canada. The application states that the applicant had used the said mark principally in the United States, on such wares as “hams, pork shoulders, and picnics”, but the applicant was commercially concerned with meat products generally. The application further stated that the applicant had caused the said mark to be registered in the United States in September, 1937, a certificate of which registration accompanied the application; that the applicant had a real and substantial commercial establishment in the town of Colonie, in the State of New York; and that the applicant considered it was entitled to adopt and use the said mark in Canada, having regard to the provisions of the Unfair Competition Act, no doubt having particular reference to s. 28 (1) (d) of that Act.

The Registrar decided that the word mark “Tenderized” was descriptive or misdescriptive of the character or quality of the products with which it was used, and accordingly the application of Albany Packing Company Inc. (hereafter called “the appellant”) was rejected, and this appeal is from that decision. Subsequent to the Registrar’s refusal of the appellant’s application, and before this appeal had actually been asserted, the appellant filed with the Registrar the affidavit of Wilson C. Codling, and this affidavit was referred to by Mr. Biggar on the hearing of the appeal. That affidavit reads as follows:

1 That I am Vice-President and General Manager of the Albany Packing Company, Inc., the applicant for registration of the trade mark “TENDERIZED” filed in the Canadian Trade Marks Office on May 9, 1939, under Serial No 175,632. The word “TENDERIZED” has been used by the applicant company as a trade mark for specially processed hams since about May 14th, 1934, its use having been coupled with widespread advertising which has circulated in both Canada and the United States

2 In all the markets in which the applicant company’s product is sold the trade and the purchasing public recognize the word “TENDER-

1940  
 ALBANY  
 PACKING  
 Co INC  
 v.  
 REGISTRAR OF  
 TRADE  
 MARKS  
 Maclean J.

IZED" as indicating the fact that the meat products originate with the applicant company, and that the word is not used merely as a term descriptive of the quality of the product.

3. The fact that the word "TENDERIZED" is distinctive of the products of the applicant company has been generally recognized by the trade.

The facts referred to in this affidavit, it will be observed, are stated in very general terms, and no further material was placed before the Registrar, or before the Court on the hearing of the appeal, in support of the several allegations set forth in the affidavit of Mr. Codling, of the appellant company.

It will be convenient now to refer to an affidavit introduced by Mr. Scott, on the hearing of the appeal, and particularly because it is directed to the ineligibility of the word "Tenderized" as a trade mark, on the ground that it is descriptive of the character or quality of the goods to which it was to be applied. The affidavit to which I refer is that of Frederick B. Schneider, a member of the firm of J. M. Schneider Ltd., of Kitchener, Ontario, which concern is engaged in the meat packing business. This affidavit was sworn to on March 7, 1940. It will be more satisfactory if I quote the relevant portions of that affidavit than if I attempted to summarize its substance. The affidavit states:

That I am aware that a Process for tenderizing meat has been developed and has been in use by various packers for a period of between two and three years;

That the word "TENDERIZED" was commonly used in the United States in connection with hams treated by this Process;

That the Process of tenderizing hams has been developed in Canada over a period of two years or more; that the word "TENDERIZED" is commonly used by a number of the Canadian Firms in the Packing House business using such Process;

That the firm of J. M. Schneider Limited has been stamping hams with the word "TENDERIZED" thereon for a period of fifteen months or better;

That specifically to my knowledge Canada Packers Limited use the word "TENDERIZED" in their advertising and have been doing so for a considerable period;

That the suffix "IZE" is commonly used in the formation of verbs from nouns or adjectives and meaning to be or do the thing denoted by the noun or adjective, such for instance as to dextrinize, pauperize, sensitize, parkerize, botanize, jeopardize, tenderize, etc., etc., as is found in the Century Dictionary and Encyclopedia, Volume 5, page 3206, published 1911, and that the word is, in accordance with my knowledge and understanding essentially descriptive of the character of the meat to which the term is applied

It will appear from this affidavit that J. M. Schneider Ltd. commenced the use of the word "Tenderized", by stamping the same on its hams, prior to the date of the appellant's application for registration, in Canada. It is also to be observed that the affidavit states that a process for tenderizing meat has been in use by various packers for a period between two and three years, and the affiant would seem to state that a process of tenderizing hams has been used in Canada over a period of two years or more.

This would seem an appropriate stage at which to express my opinion as to whether the word "Tenderized" is descriptive of the character or quality of the goods with which it is to be associated, in which event it would be unregistrable under s. 26 (1) (c) of the Unfair Competition Act. I did not understand Mr. Biggar to contend definitely that this word was not descriptive of the goods with which it was to be associated. Mr. Codling, in his affidavit, states that the word in question "is not used merely as a term descriptive of the quality of the product" but he does state definitely that it was "distinctive" of the products of the appellant company and that this distinctiveness was recognized by the trade. It seems to me that the real purpose of the affidavit of Mr. Codling was to establish that the word "Tenderized", while descriptive of the character or quality of the product with which it was associated, was nevertheless registrable under s. 28 (1) (d) of the Act, because that word, used as a trade mark, had already acquired a distinctive character, a secondary meaning, which indicated to dealers in or users of such products that the same were manufactured and sold by the appellant. It appears to me to be hardly debatable but that the word mark "Tenderized" is descriptive of the character or quality of the products to which it is to be applied, and was so intended. It can only mean that the meat products with which this mark is to be associated have been "tenderized" by some process, or in some manner, that is, the meat products were made tender in some way, and the mark "Tenderized" was used to indicate the presence of such quality or character in such products. I have already pointed out that Dumarts Ltd., in its application, and in its correspondence with the Registrar, explained that the word "Tenderized" denoted

1940  
 ALBANY  
 PACKING  
 Co. INC.  
 v.  
 REGISTRAR OF  
 TRADE  
 MARKS.  
 Maclean J.

1940  
 ALBANY  
 PACKING  
 CO INC.  
 v.  
 REGISTRAR OF  
 TRADE  
 MARKS  
 Maclean J.

“ a special process of producing this Ham ”, and, that it “ denotes a special process, of making this Ham tender ”. And Mr. Codling in his affidavit stated that the word “ Tenderized ” was “ used as a trade mark for specially processed hams ”, and that, I think, was intended merely to signify that such hams were “ tender ”; the consumer would have no knowledge of the employment of the process. Can there be any doubt but that was the purpose of using such a mark, or that the consuming public would give to such a mark the meaning that the appellant’s meat products possessed the quality of tenderness? I think not. The word “ tender ” has a well-known meaning when applied to meats and in that connection is a word of common usage. It is immaterial in what grammatical sense the word “ Tenderized ” is used. I think that word is here used adjectively, so as to convey the idea, for example, of a “ Tenderized Ham ”, just as the word “ Sweet ” might be used before the word “ Ham ” to indicate a “ Sweet Ham ”, if such a thing there be. I can hardly believe that the mark was not intended to be descriptive of the character or quality of the meats “ specially processed ”; and that will perhaps more clearly appear when I explain the nature of the trade mark statute under which the mark was registered in the United States. The mark in question being, in my opinion, descriptive of the character or quality of the products with which it is proposed to be used, it is therefore unregistrable, unless upon other grounds, by way of an exception to s. 26 (1) (c) of the Act, it may be registered, but that is another question and will presently be considered. A word which is descriptive of the character or quality of the goods with which it is associated is not one adapted to distinguish the goods of one trader from goods of the same class of other traders. No monopoly can be allowed in names clearly descriptive of the character or quality of the goods. If that were so it would give the first user a monopoly in the term. I think therefore the Registrar was right in refusing to register the mark upon the grounds already mentioned, and his decision must stand unless the appellant can bring itself within s. 28 (1) (d) of the Act, which Mr. Biggar contends his client has done.

The real foundation of the appellant’s claim to registration of the mark in question, as presented on the appeal,

is (1) that prior to the Canadian application the mark had been registered in the United States, the "country of origin" of such registration it is claimed; (2) that having regard to all the circumstances, including the length of time the mark had been used, the mark had acquired a distinctive character, or was not wholly without distinctive character; and (3) that even if the mark were unregistrable under the Unfair Competition Act because it was descriptive of the goods with which it was to be used, or were unregistrable upon other grounds, yet, notwithstanding this, it was registrable upon the facts mentioned in (1) and (2) above, as provided by s. 28 (1) (d) of the Act.

1940  
 ALBANY  
 PACKING  
 Co. INC  
 v.  
 REGISTRAR OF  
 TRADE  
 MARKS  
 Maclean J.

Sec. 28 (1) (d) and (2) of the Act reads as follows:

(1) Notwithstanding anything hereinbefore contained: . . . . .

(d) A word or group of words, which the applicant or his predecessor in title, without being guilty of any act of unfair competition, has already caused to be duly and validly registered as a trade mark in the country of origin of such registration, shall, although otherwise unregistrable by reason of its or their form, sound or meaning, be registrable under this Act provided (i) that its use as a trade mark is not prohibited by this Act; (ii) that it is not calculated to deceive nor otherwise contrary to some law or regulation directly concerned with the maintenance of public order; (iii) that is not in conflict with any mark already registered for similar wares; (iv) that having regard to all the circumstances, including the length of time its use has continued, it cannot be said to be wholly without distinctive character; (v) that it does not include the personal or trade name of any person domiciled or carrying on business in Canada.

(2) For the purpose of this section, the expression 'country of origin' means the country of the Union other than Canada in which the applicant for such registration had at the date of the application a real and substantial industrial or commercial establishment, or if he had no real and substantial commercial or industrial establishment in any country of the Union means the country of the Union in which he was then domiciled, or if at the said date he neither had a real and substantial commercial or industrial establishment in any country of the Union nor was domiciled in any such country, means the country, if any, of the Union of which he was then a national.

It will be seen therefore, that a prerequisite to registration in Canada, under s. 28 (1) (d) of the Unfair Competition Act, is that the appellant has already caused its trade mark to be validly registered in the "country of origin of such registration". Sub-s. (2) of s. 28 defines, for the purpose of that section, the expression "country of origin" to mean any country of the Union other than Canada, and "Country of the Union" is defined by s. 2 (b) of the Act to mean any country which has acceded to the Union for

1940  
 ALBANY  
 PACKING  
 Co INC  
 v.  
 REGISTRAR OF  
 TRADE  
 MARKS.  
 Maclean J.

the Protection of Industrial Property under the Convention defined in s. 2 (a) of the Act, now known as the Convention of The Hague (1925), to which Convention both Canada and the United States are signatories. Mr. Biggar contended that the appellant's registration in the United States was a registration in the "country of origin", as contemplated by s. 28 (1) (d), while Mr. Scott argued that this registration was not one made in the "country of origin", within the true meaning of that statute, and that point of controversy may be considered first.

Turning now to the words "country of origin" as used in s. 28 (1) (d) and (2) of the Act, and their relevance, if any, to the appellant's application to register its mark in Canada. There can be no doubt but that those words have reference to a country, other than Canada, which has acceded to the Convention of The Hague, and in which a person has registered a trade mark, which he now seeks to register in Canada, under s. 28 (1) (d) and (2) of the Act. The contracting countries under the Convention constituted themselves into a Union for the protection of industrial property, which property comprises trade marks. The fundamental principle of the Union is that of national treatment, that is to say, in each of the member countries the nationals of the others, as also all persons domiciled or possessing industrial or commercial establishments in the Union, enjoy the same advantages, rights, remedies, and protection that are now granted or will be granted in the future to nationals of that country. For the protection of trade marks the following specific rights, *inter alia*, are granted by the Convention: (1) a right of priority of six months for registration in other countries after filing an application for a trade mark in the country of origin; and (2) validation of trade marks in their original form in the member countries after their registration in the country of origin, subject to certain defined exceptions. Article 6 of the Convention provides that every trade mark duly registered in the country of origin shall be admitted for deposit and protected in its original form in the other countries of the Union, but nevertheless registration may be refused or cancelled of "marks which have no distinctive character, or which consist exclusively of signs or indications which serve in trade to designate the kind, quality, destination, value, place of origin of the goods or

date of production . . . ”, and the Article also provides that “in arriving at a decision as to the distinctive character of a mark, all the circumstances of the case must be taken into account, including the length of time during which the mark has been in use”. The Article also provides that the “country of origin” shall be considered to be the country of the Union where the depositor has a real and effective industrial or commercial establishment, and if he has no such establishment then the country where he is domiciled, and if he is not domiciled in the Union the country of his nationality if he is a person within the jurisdiction of one of the countries of the Union.

It will be apparent that one of the purposes of s. 28 (1) (d) and (2) of the Unfair Competition Act was to give legislative effect to Article 6 of the Convention of The Hague, and not any provision of any other Convention. The right of priority for the registration in Canada of trade marks registered in the “country of origin”, as provided for by the Convention, was given operative effect in Canada by s. 40 (1) (a) of the same Act. The appellant’s Canadian application would appear to suggest that it was claiming registration in Canada, because it had already registered the mark in question in the United States, which is in point of fact a country of the Union, and because it had in the United States a substantial commercial or industrial establishment. Such a contention was advanced but it was contested by Mr. Scott who urged that the appellant’s United States mark was not one entitled to registration or protection under s. 28 (1) (d) and (2) of the Unfair Competition Act because it was not a mark previously registered in “the country of origin”, within the meaning of the Unfair Competition Act. These opposing contentions must therefore be discussed. Before proceeding to do so, however, I should perhaps here add that, I think, it is correct to say that the terms of the Convention of The Hague may be referred to by the Court as a matter of history, in order to understand the scope and intent of the terms of that Convention, and under what circumstances any of the provisions of the Unfair Competition Act were enacted, in order to give legislative effect to the same. But the terms of the Convention cannot, I think, be employed as a guide in construing any of such provisions so enacted, for the reason

1940  
ALBANY  
PACKING  
CO. INC.  
 v.  
 REGISTRAR OF  
TRADE  
MARKS.  
 Maclean J.

1940

ALBANY  
PACKING  
CO. INC.

v.

REGISTRAR OF  
TRADE  
MARKS

Maclean J.

that in Canada a treaty or convention with a foreign state binds the subject of the Crown only in so far as it has been embodied in legislation passed into law in the ordinary way.

I come then to a consideration of the terms of the trade mark legislation under which the appellant's mark was registered in the United States. In the United States there are two Public Acts relating to the registration of trade marks. The principal Act, the Act of 1905 so called, is one which authorizes—as its title indicates—“the registration of trade marks used in commerce with foreign nations or among the several States, or with Indian Tribes, and to protect the same”. Sec. (5) of that Act provides, *inter alia*, that no mark which consists “merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods . . . shall be registered under the terms of this Act”. The other Act was enacted in March, 1920, and is usually referred to as “the 1920 Act”, and it was under this Act that the appellant's mark was registered in the United States. The purpose of this Act, as is stated in its title, was “to give effect to certain provisions of the Convention for the protection of trade marks and commercial names, made and signed in the City of Buenos Aires, in the Argentine Republic, August 20, 1910, and for other purposes”, and to this Convention the United States was a signatory, but not Canada. The purpose of this Convention was to create a Union between the American States for the protection of trade marks and commercial names. This Convention concerning the protection of trade marks attempts to institute the principle of automatic registration. Every mark registered in any of the contracting countries shall be considered as also registered in the others, with the qualification, however, “without prejudice to the rights of third persons and to the provisions of the law of each state governing the same”. This broad reservation practically nullifies the principle of automatic registration, since the provisions of the law of each country are not derogated from in any way. Sec. 1 (b) of the 1920 Act provides for the registration of marks not registrable under the 1905 Act, except those specified in paragraphs (a) and (b) of section 5 of the latter Act.



The Act of 1920 would accordingly permit of the registration of a mark which is descriptive of the character or quality of the goods with which they are to be used, while the Act of 1905 expressly prohibits the registration of such a mark. Rule 19, one of the Rules governing the registration of trade marks under the Trade Mark Acts of the United States, provides that no trade mark will be registered under s. (1) (b) of the 1920 Act which is registrable under the Act of 1905. It is not necessary that I should refer to other provisions of the 1920 Act.

1940  
 ALBANY  
 PACKING  
 CO INC.  
 v.  
 REGISTRAR OF  
 TRADE  
 MARKS  
 Maclean J.

It will be seen therefore that if the appellant's registration in the United States under the Act of 1920 is to be accepted as one made in the "country of origin", as defined by s. (28) (1) (d) and (2) of the Unfair Competition Act, then, the result would be that while the appellant could not register his mark in the United States under the Act of 1905, and it was not registrable in Canada by a national of Canada because it offended against s. 26 (1) (c) and (d) of the Unfair Competition Act, yet, as is contended, it would be registrable in Canada by the appellant under the terms of s. 28 (1) (d) and (2) of the Act, because its mark was previously registered in a "country of origin" under a Convention other than that of the Convention of The Hague. If this contention should be a correct one then it would appear to reflect an anomalous and inequitable state of affairs.

There was introduced on the hearing of the appeal, by Mr. Scott, the affidavit of Kennard N. Ware, a member of the bars of the District of Columbia and of the State of Pennsylvania, wherein is expressed the affiant's opinion of the applicability of the provisions of the United States Trade Mark Act of 1920, to the matter in issue here. This affidavit is quite lengthy, and it is not easily or briefly summarized without incurring the risk of stating inaccurately the affiant's expressed opinions, and disturbing the continuity of his reasoning in support of the conclusions of law at which he arrives. Therefore, it will, I think, be more satisfactory if I quote fully this affidavit, even though it consumes a considerable space. It is possible that two or three paragraphs of this affidavit are hardly admissible

1940

ALBANY  
PACKING  
CO. INC.

v.

REGISTRAR OF  
TRADE  
MARKS

Maclean J.

as evidence, but that is not, I think, of any serious consequence. After stating his professional qualifications and experience Mr. Ware proceeds to state:

In considering the scope and effect of any Federal Trade Mark Legislation in the United States, it must be borne in mind that trade marks are not, in the purview of our legal system creatures of statute. Substantive rights in and to trade marks are based on the principles of common law—ownership is not derived from statute, but from priority of adoption and use. The Federal general registration statute (Act of February 20, 1905) merely recognizes and records claims to ownership of common law trade marks and furnishes a *prima facie* presumption of ownership and inferentially of validity. It also confers certain procedural advantages upon those who have registered their common law marks in compliance with the permissive provisions of that statute.

In order to understand the scope and limitations of the Trade Mark Registration Act of March 19, 1920, it is important to appreciate the circumstances under which it was passed and the objectives sought.

The general registration act of the United States, as pointed out above, is the Trade Mark Act of February 20, 1905. (A copy of this Act is hereto annexed and marked "Exhibit 1") Generally stated, the object of that statute was to provide a Federal Register for trade marks which were of a character recognized as the subject of qualified ownership under the principles of common law and which were used in interstate and foreign commerce. Section 5 (U.S.C Title 15 Sec. 85) has a number of provisos excluding various categories of alleged trade marks including the proviso:

"That no trade mark which consists . . . merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods . . . shall be registered under the terms of this Act."

This was, of course, merely a statutory recognition of an established canon of the common law that a designation descriptive of the goods to which it is applied, is not the subject of trade mark ownership. There is a qualified exception to the common law prohibition of exclusive appropriation of descriptive designations, i.e., where a designation intrinsically descriptive has been exclusively used in a trade mark sense and the character and extent of such use has been sufficient to cause the originally descriptive designation to acquire a widely recognized "secondary" significance indicating a particular origin. This common law exception was, to a degree, recognized in a proviso of Section 5 of the Act reading:

"That nothing herein shall prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived, in commerce with foreign nations or among the several States or with Indian tribes, which was in actual and exclusive use as a trade mark of the applicant, or his predecessors from whom he derived title, for ten years next preceding February twentieth, nineteen hundred and five: etc."

The Act of 1905 thus provides a somewhat inelastic and arbitrary, but easily applied test for determining the existence of "secondary meaning". It is to be noted with reference to the general doctrine of "secondary meaning" that the courts in the United States, in determining the existence of facts which justify recognition of a quasi trade mark status in a designation inherently descriptive, have been relatively

strict. Such marks have been granted recognition only on the basis of an exclusive use of long duration and great notoriety. Even when the applicability of the "secondary meaning" rule has been recognized in a given case, the proprietor cannot prevent the use of the designation by a competitor when the competitor uses the designation in a clearly primary sense and in a manner not calculated to confuse a purchaser or prospective purchaser. (*Thaddeus Davids v. Davds*, 233 U.S. 461 at page 469)

1940  
 ALBANY  
 PACKING  
 CO. INC  
 v  
 REGISTRAR OF  
 TRADE  
 MARKS

Maclean J.

There were several difficulties which led to the enactment of the Act of March 19, 1920. One was a general dissatisfaction with the inelastic "ten year clause" of the Act of 1905 referred to above. There were many marks of a primarily descriptive nature which had been in such widespread and exclusive use for sufficient time to give them a secondary meaning, but which had not been in use as early as 1895. Such marks, despite their "secondary meaning" did not fall within the ten year clause and were thus not registrable. A second difficulty which led to the enactment of the Act of March 19, 1920, was the unsatisfactory situation with respect to trade marks existing in most of the Latin-American countries. Trade mark rights, under the legal systems of these countries, were created not by priority of adoption and use, but by registration under a statute. It appears to have been the practice in such countries to permit the registration of descriptive marks. A foreigner was permitted registration however only where he could show a corresponding registration in his home country. This led to wholesale piracy of American trade marks because of the fact that there was no provision for the registration of descriptive marks in this country.

As originally proposed, the bill leading to the enactment of the Act of 1920, was intended to cure both of the difficulties referred to above. However, in the course of its progress through the houses of Congress, less and less emphasis was placed upon the domestic difficulty and increased emphasis upon the foreign trade difficulty. As a result, the bill as it was modified and finally enacted into law, presents certain anomalous features to which attention will now be directed.

Referring now to the text of the Act of March 19, 1920 (copy of which is hereto annexed and marked "Exhibit 2"), it will be noted that Section 1 (b) provides for registration of certain marks not registrable under the Act of February 20, 1905, including marks which are descriptive of the quality of the goods to which they are applied. It is clear from the language of the Act that a primary object of the Act was to permit the registration of marks not theretofore registrable in this country (USA) because descriptive and thus not true or valid trade marks at common law. As will hereinafter be pointed out, the Act as construed by the courts, did not by granting registration of such mark, intend to affect any change in their domestic status—although, as pointed out above, such had been the original intention.

Section 6 of the Act of 1920, adopts by reference various sections of the Act of 1905. Among these sections are 17, 19 and 20 which confer jurisdiction of infringement suits upon the "District and Territorial Courts of the United States, etc.", and make available relief by injunctive process and reparation by means of the recovery of damages and profits, etc. There is, however, no provision in the Act which, explicitly or by reference, makes registration a *prima facie* evidence of ownership as is the case with registrations under the Act of 1905. Thus the Registrant under the Act of 1920 has the right to bring suit on his registered trade mark in United States District Courts and if he shows himself qualified to such relief, may obtain an injunction and damages, but there is no

1940

ALBANY  
PACKING  
Co. Inc.

v.

REGISTRAR OF  
TRADE  
MARKS.

Maclean J.

presumption whatever in his favour as to ownership and there is actually a negative presumption as to validity, for if a registered mark were inherently a proper trade mark at common law, it could and would have been registered under the Act of 1905.

The Act of 1920 has uniformly been construed by the courts as conferring no domestic benefits whatever, except those of a jurisdictional nature upon registrants thereunder. The limited scope of registration under the Act of 1920 will be apparent from a brief consideration of the leading cases in which it has been judicially construed. An early and leading case on the subject is that of *Charles Broadway Rouss, Inc., v. Winchester Co.*, reported in Volume 300 of the Federal Reporter at page 706. The mark in issue was "The Winchester" as applied to shirts. The designation was not a technical trade mark because of its geographical significance. Having been refused registration under the Act of 1905, it was registered under the Act of 1920. In an infringement suit the Court of Appeals for the Second Circuit held that the registration was not even *prima facie* evidence of title. A copy of the pertinent portion of a long decision is attached hereto as an appendix.

In *Sleight Metallic Ink Co. v. Marks*, 52 Fed. (2d) 664 (D.C. Pa.), the Court, in dismissing the bill of complaint charging infringement of the trade mark "Metallic" as applied to ink, which was registered under the Act of 1920, said, *inter alia*:

"The first question is as to the plaintiff's rights in the word 'Metallic' as a technical trade mark. It has been noted that the plaintiff was refused registration under the Act of 1905. The effect of registration under the Act of 1920 is fully considered in *Charles Broadway Rouss, Inc., v. Winchester Co.* (C.C.A.) 300 F. 706, and the conclusion reached that registration under the Act of 1920 does not give the registrant even a *prima facie* title to the word as a trade mark or trade name. The statement of the committee, in recommending passage of the bill, was that the Act would have no effect upon the domestic rights of any one. I accept the view of the scope of the Act of 1920 taken by the court in the Rouss Case. This plaintiff's case, therefore, stands entirely upon the plaintiff's common-law rights, as though there had been no registration at all"

The Act was construed by the Supreme Court of the United States in the case of *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, in a decision rendered on December 5, 1938, and reported in 305 U.S. 315-336. The trade mark in issue was "Nu-enamel" as applied to enamel, varnish, etc. The court, after commenting upon the legislative history of the Act, held that registration thereunder, while it gave the right of access to Federal Courts, did not confer any substantive rights nor any *prima facie* evidence of title. The mark was then considered merely on a common law basis and the plaintiff denied relief.

It is thus apparent that the Act of 1920 has no effect upon substantive domestic rights and that its primary and essential function is to permit the registration of trade marks regarded as invalid in this country for the purpose of obtaining registration primarily in the Latin-American countries, in which such marks which could otherwise be pirated regardless of any question of priority of use. It is clear that in passing this Act, there was no thought or intention of obtaining any advantage in the Dominion of Canada and, in fact, there was no mechanism for securing such advantage in existence at the time since the Act was passed prior to the Convention of The Hague of 1925 to which both the United States and the Dominion of Canada are now signatory.

In view of the limited scope of registrations under the Act of 1920, it has been and is my practice to advise clients who are not interested in Latin-American trade to refrain from obtaining registration under this Act of trade marks qualified thereunder. The reason for this attitude is the fact that, in general, the procedural advantages obtained do not compensate for the virtual concession of invalidity inherent in such registration. I believe that this procedure is common among practitioners in the field of my speciality.

It is submitted, with diffidence as somewhat beyond your affiant's presumed competence, that under subsection 2 of Section 6 of The Hague Convention, there is no obligation on the part of the Canadian Government to permit the registration of a mark previously registered in the United States under the Act of 1920 since registration under that Act constitutes in effect an admission that the mark so registered is, in the language of said subsection, a mark which has "no distinctive character, or which consist exclusively of signs or indications which serve in trade to designate the kind, quality . . . of the goods"

In the writer's opinion, the concluding paragraph of subsection 2 raises an issue of fact which is to be determined without reference to registration under the Act of 1920. In other words, it appears to the writer that marks registered in the United States under the Act of 1920 fall within the exception of sub-paragraph 2 of Section 6 of The Hague Convention and are not entitled to registration in any other signatory country unless by reason of the establishment to the satisfaction of the country in which application for such registration is made, of a fact situation which brings it within the scope of the concluding paragraph of said subsection 2.

Your affiant has read the affidavit submitted by Wilson C. Codling and is of the opinion that the vague, indefinite and undocumented statements set forth in said affidavit fall far short of furnishing an adequate basis according to the standards of the courts in this country for establishing the existence of a secondary meaning for the alleged trade mark "TENDERIZED"

In brief, my opinion with respect to the Trade Mark Act of March 19, 1920, is that it is an ill-drafted piece of legislation which was intended to secure two inconsistent objectives:

(a) To permit the registration of words or designations which are not true technical trade marks because they are merely descriptive or merely surnames or merely geographical. In order to secure the right of registration in certain countries which permits the registration of marks of such character, but allows foreigners to procure such registrations only upon proof of such registration in the home country;

(b) To permit the registration of words which, though intrinsically unregistrable, have been used so extensively and intensively as to have acquired a secondary meaning, i.e., to liberalize the ten year clause of the Act of 1905.

That in the prosecution of the bill through Congress considerations of registrability in certain Latin-American countries were emphasized at the expense of the creation of new domestic rights and that the bill while somewhat ambiguous in its terminology, has been construed in the light of its legislative history to bestow practically no right in the domestic market.

To use this Act as a means for procuring registration in a foreign country under a statute which does not permit registration of descriptive marks to its own citizenship, impresses your affiant as being beyond the intended scope of the Act and utterly unwarranted.

1940  
 ALBANY  
 PACKING  
 Co. INC.  
 v.  
 REGISTRAR OF  
 TRADE  
 MARKS  
 Maclean J

1940  
 ALBANY  
 PACKING  
 Co. INC.  
 v.  
 REGISTRAR OF  
 TRADE  
 MARKS.  
 Maclean J.

presumption whatever in his favour as to ownership and there is actually a negative presumption as to validity, for if a registered mark were inherently a proper trade mark at common law, it could and would have been registered under the Act of 1905.

The Act of 1920 has uniformly been construed by the courts as conferring no domestic benefits whatever, except those of a jurisdictional nature upon registrants thereunder. The limited scope of registration under the Act of 1920 will be apparent from a brief consideration of the leading cases in which it has been judicially construed. An early and leading case on the subject is that of *Charles Broadway Rouss, Inc., v. Winchester Co.*, reported in Volume 300 of the Federal Reporter at page 706. The mark in issue was "The Winchester" as applied to shirts. The designation was not a technical trade mark because of its geographical significance. Having been refused registration under the Act of 1905, it was registered under the Act of 1920. In an infringement suit the Court of Appeals for the Second Circuit held that the registration was not even *prima facie* evidence of title. A copy of the pertinent portion of a long decision is attached hereto as an appendix.

In *Sleight Metallic Ink Co. v. Marks*, 52 Fed. (2d) 664 (D.C. Pa.), the Court, in dismissing the bill of complaint charging infringement of the trade mark "Metallic" as applied to ink, which was registered under the Act of 1920, said, *inter alia*:

"The first question is as to the plaintiff's rights in the word 'Metallic' as a technical trade mark. It has been noted that the plaintiff was refused registration under the Act of 1905. The effect of registration under the Act of 1920 is fully considered in *Charles Broadway Rouss, Inc., v. Winchester Co.* (C.C.A.) 300 F. 706, and the conclusion reached that registration under the Act of 1920 does not give the registrant even a *prima facie* title to the word as a trade mark or trade name. The statement of the committee, in recommending passage of the bill, was that the Act would have no effect upon the domestic rights of any one. I accept the view of the scope of the Act of 1920 taken by the court in the Rouss Case. This plaintiff's case, therefore, stands entirely upon the plaintiff's common-law rights, as though there had been no registration at all."

The Act was construed by the Supreme Court of the United States in the case of *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, in a decision rendered on December 5, 1938, and reported in 305 U.S. 315-336. The trade mark in issue was "Nu-enamel" as applied to enamel, varnish, etc. The court, after commenting upon the legislative history of the Act, held that registration thereunder, while it gave the right of access to Federal Courts, did not confer any substantive rights nor any *prima facie* evidence of title. The mark was then considered merely on a common law basis and the plaintiff denied relief.

It is thus apparent that the Act of 1920 has no effect upon substantive domestic rights and that its primary and essential function is to permit the registration of trade marks regarded as invalid in this country for the purpose of obtaining registration primarily in the Latin-American countries, in which such marks which could otherwise be pirated regardless of any question of priority of use. It is clear that in passing this Act, there was no thought or intention of obtaining any advantage in the Dominion of Canada and, in fact, there was no mechanism for securing such advantage in existence at the time since the Act was passed prior to the Convention of The Hague of 1925 to which both the United States and the Dominion of Canada are now signatory.

In view of the limited scope of registrations under the Act of 1920, it has been and is my practice to advise clients who are not interested in Latin-American trade to refrain from obtaining registration under this Act of trade marks qualified thereunder. The reason for this attitude is the fact that, in general, the procedural advantages obtained do not compensate for the virtual concession of invalidity inherent in such registration. I believe that this procedure is common among practitioners in the field of my specialty.

It is submitted, with diffidence as somewhat beyond your affiant's presumed competence, that under subsection 2 of Section 6 of The Hague Convention, there is no obligation on the part of the Canadian Government to permit the registration of a mark previously registered in the United States under the Act of 1920 since registration under that Act constitutes in effect an admission that the mark so registered is, in the language of said subsection, a mark which has "no distinctive character, or which consist exclusively of signs or indications which serve in trade to designate the kind, quality . . . of the goods".

In the writer's opinion, the concluding paragraph of subsection 2 raises an issue of fact which is to be determined without reference to registration under the Act of 1920. In other words, it appears to the writer that marks registered in the United States under the Act of 1920 fall within the exception of sub-paragraph 2 of Section 6 of The Hague Convention and are not entitled to registration in any other signatory country unless by reason of the establishment to the satisfaction of the country in which application for such registration is made, of a fact situation which brings it within the scope of the concluding paragraph of said subsection 2.

Your affiant has read the affidavit submitted by Wilson C. Codling and is of the opinion that the vague, indefinite and undocumented statements set forth in said affidavit fall far short of furnishing an adequate basis according to the standards of the courts in this country for establishing the existence of a secondary meaning for the alleged trade mark "TENDERIZED"

In brief, my opinion with respect to the Trade Mark Act of March 19, 1920, is that it is an ill-drafted piece of legislation which was intended to secure two inconsistent objectives.

(a) To permit the registration of words or designations which are not true technical trade marks because they are merely descriptive or merely surnames or merely geographical. In order to secure the right of registration in certain countries which permits the registration of marks of such character, but allows foreigners to procure such registrations only upon proof of such registration in the home country;

(b) To permit the registration of words which, though intrinsically unregistrable, have been used so extensively and intensively as to have acquired a secondary meaning, i.e., to liberalize the ten year clause of the Act of 1905.

That in the prosecution of the bill through Congress considerations of registrability in certain Latin-American countries were emphasized at the expense of the creation of new domestic rights and that the bill while somewhat ambiguous in its terminology, has been construed in the light of its legislative history to bestow practically no right in the domestic market.

To use this Act as a means for procuring registration in a foreign country under a statute which does not permit registration of descriptive marks to its own citizenship, impresses your affiant as being beyond the intended scope of the Act and utterly unwarranted.

1940  
 ALBANY  
 PACKING  
 CO. INC.  
 v.  
 REGISTRAR OF  
 TRADE  
 MARKS  
 Maclean J

1940  
 ALBANY  
 PACKING  
 Co. INC  
 v.  
 REGISTRAR OF  
 TRADE  
 MARKS  
 Maclean J

I have carefully considered the provisions of the 1920 Act, under which the appellant's mark was registered in the United States, the authorities mentioned by Mr. Ware in his affidavit, and I have referred to other sources having reference to the same subject matter, and I agree with the conclusion expressed by Mr. Ware, a conclusion which I may say I had reached independently altogether of this affidavit. It is my opinion that the appellant's registration in the United States is not one made in the "country of origin" as contemplated by s. 28 (1) (d) and (2) of the Unfair Competition Act, and that is, I think, of itself conclusive of the whole matter, that is to say, that s. 28 (1) (d) of the Act is not available to the appellant in support of its application for registration in Canada. However, lest I be found in error in reaching this conclusion, and because of the skilful argument advanced by Mr. Biggar in respect of the eligibility of the appellant's mark for registration under the remaining terms of s. 28 (1) (d) of the Act, and particularly clause (IV) thereof, I feel that I cannot in fairness refrain from a further consideration of those provisions of that section.

Sec. 28 (1) (d) would appear to enact that if an applicant has registered a word mark—not a design mark—in the "country of origin", and though it be unregistrable under any previous section of the Act, it shall nevertheless be registrable if not barred by any one of the five provisos therein mentioned. Mr. Biggar argued that the mark in question was not one the "use" of which was prohibited by the Act, and that contention is, I think, a correct one. Proviso (i) has, I think, reference to those marks the "use"—not the registration—of which is prohibited by s. 14 of the Act, though possibly it has reference also to s. 13. I do not think that a mark which is descriptive of the goods to which it is to be applied, such as in this case, can be said to be "calculated to deceive", within the meaning of proviso (11). If the mark here is not descriptive in the sense I have earlier indicated, then it would convey a false description of the goods, and would be "calculated to deceive", and therefore in any event unregistrable. I prefer, however, to regard the mark as being merely descriptive, and one not calculated to deceive. Proviso (iii) may be disregarded because the mark in question has not been



shown to be in conflict with a mark already registered, and proviso (v) clearly does not enter into the controversy. Mr. Biggar contended that upon the facts disclosed, and the authorities, the appellant's mark was one not "wholly without distinctive character", and therefore entitled to registration. In this connection Mr. Biggar referred to certain provisions of the English Trade Mark Acts, 1905 to 1919, and certain English decisions.

1940  
 ALBANY  
 PACKING  
 Co. INC.  
 v.  
 REGISTRAR OF  
 TRADE  
 MARKS.  
 Maclean J.

The Unfair Competition Act contains no definition of the words "distinctive character", as used in s. 28 (1) (d) (iv). Bearing in mind the evident purpose of s. 28 (1) (d), those words can only mean that a mark otherwise unregistrable, may, in a certain state of facts be registrable, if a case on the merits is proved sufficiently strong to induce the Registrar in the first instance, or the Court in the event of an appeal, to do so. In this case it is open to the appellant to show that its mark, notwithstanding it is unregistrable on account of being descriptive of the character or quality of the goods to which it is applied, has, in fact, by user become more or less completely identified with its goods by having been continuously used in connection therewith, and thus acquired a distinctive character; and this section of the Act expressly provides that the length of user, and all other circumstances, may be considered in deciding whether or not the mark has in fact acquired a distinctive character. There may be cases where the Registrar, or the Court, might say that a mark cannot be distinctive solely of the applicant's goods because it is merely descriptive of the goods, but the applicant may show that in fact the mark has become so. To overcome the statutory obstacles in the way of registration of such a mark, the applicant must show that his mark is able to conform to the conditions mentioned in the five provisos to s. 28 (1) (d), and particularly in this case, to the proviso numbered (iv) which states "that having regard to all the circumstances, including the length of time its use has continued, it cannot be said to be wholly without distinctive character". Whether a mark has acquired a "distinctive character" is therefore a question of fact, to be determined upon the merits of each individual case. Sec. 28 (1) (d) purports to create an exception, to those provisions of the Act which exclude certain marks from registration, in the case of marks which have been already

1940  
 ALBANY  
 PACKING  
 Co. INC.  
 v.  
 REGISTRAR OF  
 TRADE  
 MARKS.  
 Maclean J.

registered in the "country of origin", in a country of the Union other than Canada; there would seem to be no corresponding provision for the relaxation of such provisions of the Act in respect of marks not already registered in a country of the Union other than Canada, and if this is correct it becomes all the more evident that the term "descriptive character" signifies something more than mere registration or use of the mark, or anything inherent in the mark itself. Whether the "distinctive character" which the applicant must establish means distinctiveness in Canada, or abroad, is a question which will readily occur to one. It would appear to me that as s. 28 (1) (d) purports to deal with marks already registered in a country of the Union other than Canada, that distinctiveness in that country would be sufficient if established; however, that point was not discussed by counsel on the appeal, and I pronounce no definite opinion concerning the point, which, in any event, is unnecessary in my view of the case.

Now, has the appellant produced evidence sufficient to establish the fact that its mark has acquired a distinctive character? To that point there is directed only the affidavit of Mr. Codling, an officer of the appellant company, and that is of the most general character indeed. It can hardly be said in fairness that this affidavit really attempts to show how a distinctive character has been acquired by the mark. On the other hand it has been shown that Dumarts Ld. used the mark in Canada before the appellant's application for registration was made in Canada, apparently to designate the character or quality of its goods. The mark was used in Canada by Canadian Packers Ld., by J. H. Schneider Ld., and by The Tobin Packing Co. Inc., all of whom produce and sell the same class of goods as the appellant, and apparently for the purpose of describing a character or quality of their goods. To establish that an unregistrable mark has acquired a distinctive character requires more evidence than that produced by the appellant, and weighing such evidence as there is before me, it, in my opinion, falls short of establishing that the appellant's mark, by user or otherwise has acquired a distinctive character, and the onus is on the appellant in the case of an application for registration. The evidence would tend to show that the mark, in the

United States and Canada, designates and describes a character or quality imparted to certain meat products by some process or treatment. The mark describes a quality in meat products universally sought for and demanded by the customers of those vending such products. The evidence is far from satisfying me that the mark in question has come to denote solely the goods of the appellant, and on that ground alone the appeal should fail.

We are concerned here with a mark which, I think, is merely descriptive of the character or quality of the goods to which it is applied, or to which it is to be applied. This immediately suggests the question whether such a mark can ever become a distinctive mark in the sense of the statute, and that may next be considered. I think it is obvious that the answer to that question must be in the negative, except it be in a very exceptional state of facts. A mark which is merely descriptive of the character or quality of the goods is not a distinctive mark because it is not used to distinguish the goods of the proprietor of the mark; it is used to distinguish goods having certain qualities from goods having other qualities, and it cannot acquire a secondary signification by user to denote solely the goods of any particular trader. It would not seem proper or reasonable to grant to the appellant here a monopoly for the use of the word "Tenderized" because by some process or treatment it has made its meat products "tender", or, because it produces, for example, "tender hams", to the exclusion of another trader who in some manner, or by some treatment, has imparted to his goods the same character or quality, and who might wish to assure his customers that his hams are "tender", or that he was offering for sale "tender hams", by stamping thereon a word or words to indicate that fact. If both used the word "Tenderized" of neither trader could it be said that the mark was being used solely to distinguish his goods. It would be obvious that such a mark was being used to advertise that a particular property or quality was to be found in the goods of each trader, and therefore the mark could never become distinctive of the goods of either of them. For the same reason laudatory epithets used as a mark and applied to goods have been held to be descriptive and not distinctive and therefore marks which any one may use. I find this point very clearly and succinctly

1940  
 ALBANY  
 PACKING  
 Co. INC.  
 v.  
 REGISTRAR OF  
 TRADE  
 MARKS.  
 Maclean J.

1940  
 ALBANY  
 PACKING  
 Co. INC.  
 v.  
 REGISTRAR OF  
 TRADE  
 MARKS.  
 Maclean J.

registered, and the extent of the user is to be considered in determining if a mark is "distinctive". This paragraph expresses much the same idea as s. 28 (1) (d) (iv) of our own Act, and for much the same purpose.

In 1909, the English Court of Appeal had, for the first time, to consider the meaning and effect of s. 9 of the Trade Mark Act of 1905, and particularly paragraph (5) thereof, in three well-known cases. These three cases are to be found reported in Volume 26 of the Reports of Patent Cases at page 437, et seq., the judgments rendered therein being found in the same volume at page 854 and following pages. The judgments rendered in these cases are so well known, and so often quoted, that I propose only to mention the principal points actually decided. In the "Orlwoola Case", the word "Orlwoola" was held not to be a distinctive mark for woolen goods, because it was the equivalent of the words "All Wool", and therefore descriptive of the goods. It was said if the goods were not wholly made of wool it would constitute a misdescription which was so certain to deceive that its use could hardly be otherwise than fraudulent. In the "Perfection Case", the word "Perfection" was refused registration as a "distinctive" mark for soap, because, whether used as a noun or adjectively, it was a mere laudatory epithet, commendatory of the goods with which it was associated, and that class of words could not have a secondary or distinctive meaning as indicating only the goods of the applicant. It was considered wrong by the Court to allow any man a monopoly of ordinary words, descriptive or laudatory of the quality of the goods. The word "Tenderized" may be considered as merely a laudatory epithet commending the meat products of the appellants, because possessing a certain property or quality. In the third case the words "California Syrup of Figs," used in respect of a widely known proprietary medicine, were allowed to proceed to registration on the ground that the evidence was considered ample to establish a *prima facie* case of those words being identified by long user with the goods of the applicant, and as being distinctive. From these cases it will be observed that whether a mark had acquired distinctiveness was one largely of fact.

Under the English Trade Marks Act, 1905, as amended in 1919, registrable marks are of two classes; the Act of

1919 divided the register into two parts, A and B, and created a new class of registrable trade marks. One class is registrable under the Act of 1905, in Part A of the register, and comprises marks that are "adapted to distinguish" the goods of the proprietor of the trade mark from those of other persons. The other class is registrable under the Act of 1919, in Part B of the register, and comprises marks that are "capable of distinguishing" the goods of the applicant. It would seem that the former class refers to cases where the mark has been in use, while in the latter case it is marks that have not been used and for which registration is applied for. It would seem also to be fairly well settled that marks applied for registration in Part A have to pass a stricter test as regards distinctiveness than those applied for registration in Part B, that is to say, a mark which is registrable in Part B may have a lesser degree of distinctiveness than that necessary for registration in Part A. Then, at least two years' user of the mark prior to the date of application is essential for registration in Part B, though not for registration in Part A. It has been held that registration in Part B may be refused by the Registrar where the mark, though it has acquired distinctiveness by user, is of such a character that the effect of registration would be seriously to interfere with the legitimate rights of other traders.

I was referred to two cases in which application was made for registration in Part B of the register, namely, *Davis et al. v. Sussex Rubber Co. Ld.* (1), and *Bale and Church Ld. v. Sutton Parsons* (2). I do not think that these cases are of any assistance here because they involve considerations of statutory provisions different from those found in the Unfair Competition Act; the actions were for infringement and passing off, not for applications to register marks, and the marks of the respective plaintiffs were registered in Part B of the register; and generally these cases had to do with a state of facts entirely different from anything appearing in the case under discussion. I do not think therefore that the cases mentioned call for further discussion.

In the result, it is my opinion that the Registrar was right in refusing registration of the appellant's mark. In

1940  
 ALBANY  
 PACKING  
 CO. INC.  
 v.  
 REGISTRAR OF  
 TRADE  
 MARKS.  
 Maclean J.

(1) (1927) 44 R.P.C. 412.

(2) (1934) 51 R.P.C. 129.

1940  
ALBANY  
PACKING  
Co. INC.  
v.  
REGISTRAR OF  
TRADE  
MARKS.  
Maclean J.

the first place, it is not a mark that was already registered as a trade mark in "the country of origin", within the meaning of s. 28 (1) (d) of the Unfair Competition Act, and that provision of the statute is not therefore available to the appellant. Then, the mark is either descriptive or misdescriptive of the goods with which it is proposed to use the mark and in either event is unregistrable, and further, the mark has not been shown to have acquired any distinctive character. And finally, the mark is one merely descriptive of the goods and cannot become adapted to distinguish solely the goods of the appellant. The appeal must therefore be dismissed.

There are circumstances connected with the application to register here which probably would warrant me in dismissing the appeal with costs, but as the appeal involves some questions which for the first time arise for decision, I think I would be justified in declining to make any order as to costs. I do not, however, intend that this shall in any way be regarded as a precedent which I would follow in any other case.

*Judgment accordingly.*

---

## INDEX

### ADMISSIBILITY OF ADMIRALTY CHARTS AND LIGHT LIST BOOK.

See REVENUE, No. 4.

### AN ACT TO REVIVE AND AMEND THE BUSINESS PROFITS WAR TAX ACT, 1916; 1 GEO. VI, c. 19.

See REVENUE, No. 2.

### “ANNUAL NET PROFIT OR GAIN . . . DIRECTLY OR INDIRECTLY RECEIVED BY A PERSON . . . FROM ANY TRADE, MANUFACTURE OR BUSINESS”.

See REVENUE, No. 7.

### APPEAL ALLOWED.

See REVENUE, Nos. 1 and 2.

See SHIPPING, No. 2.

### APPEAL DISMISSED.

See REVENUE, No. 5.

See SHIPPING, No. 1.

### APPEAL FROM DISTRICT JUDGE IN ADMIRALTY.

See SHIPPING, No. 2.

### APPEAL FROM REGISTRAR OF TRADE MARKS ALLOWED.

See TRADE MARK, No. 4.

### APPEAL FROM REGISTRAR OF TRADE MARKS DISMISSED.

See TRADE MARK, Nos. 1 and 3.

### “ASSOCIATION”.

See REVENUE, No. 7.

### “BELL BOY”.

See TRADE MARK, No. 6.

### BENEFIT TO THE PUBLIC.

See PATENTS, No. 1.

### BURDEN OF PROOF.

See REVENUE, No. 6.

### BUSINESS PROFITS WAR TAX ACT, 1916; 6-7 GEO. V, c. 11.

See REVENUE, No. 2.

### CHARGE AGAINST REVENUE.

See REVENUE, No. 1.

### CLAIM FOR MILITARY PAY AND ALLOWANCES WHILE TEMPORARILY ENGAGED AS A DEPARTMENTAL SOLICITOR AND DEPUTY JUDGE ADVOCATE DISALLOWED.

See CROWN, No. 3.

### COMBINATION PATENT.

See PATENTS, No. 1.

### COMMISSION OR FEE.

See REVENUE, No. 3.

### CONTRIBUTORY NEGLIGENCE ON PART OF MASTER OF SHIP.

See CROWN, No. 1.

### CONVENTION OF THE HAGUE (1925).

See TRADE MARK, No. 1.

### COPYRIGHT.

1. DAMAGES, No. 1.

2. GOOD FAITH OR IGNORANCE IN COPYRIGHT AS DEFENCE, No. 1.

3. INFRINGEMENT, No. 1.

4. INJUNCTION, No. 1.

**COPYRIGHT**—*Infringement*—*Good faith or ignorance in copyright as defence*—*Injunction*—*Damages*.]—Plaintiff is the author of and owner of the copyright in a short story entitled “Le sang-froid de Marie,” which was first published in the *Bayard*, a publication edited in Paris, France, at the end of which her name appeared. The Publishers Holding Corporation Limited, of Canada, prints and edits supplements which, by agreement with the owners of various newspapers, are furnished to the latter free, on condition that the said supplements be distributed by them with their newspapers to their subscribers, and which supplements bear the name of the newspaper with which they are to be distributed. Defendant entered into such an agreement with the P. H. Corporation Limited, and on July 29, 1937, she distributed to her subscribers with her newspaper a supplement in which was reproduced the story aforesaid and on which supplement was printed the name of her newspaper and the words “Founder, Camille Duguay,” Duguay being the name of her late husband and partner. Hence the action

COPYRIGHT—*Concluded*

asking for a declaration of infringement, an injunction, damages and costs. Defendant, in substance, alleged most of the above facts, *inter alia*, that the printing and editing was not done by her; that she did not "publish" the work aforesaid; that she acted in good faith and in ignorance of any copyright in the work, and referred to Section 22 of the Copyright Act. The copyright was not registered under the provisions of the Act. *Held*: That the plaintiff was the owner of the copyright in the work in question, and that registration of a copyright, under the provisions of the Act, is a formality not necessary to the existence of copyright. 2. That ignorance of existence of copyright, or the good faith of defendant is no answer to an action like the present one. 3. That the proper attitude of mind of a copyist toward the work that he copies is that copyright in the latter exists, unless he has evidence to the contrary. (Dennistoun J. in *Gribble v. Manitoba Free Press* (1931) 3 W.W.R. 571 followed). 4. That, by distributing to its subscribers with its newspaper, *La Voix des Bois Francs*, the supplement in question with the name of its newspaper and the name of its founder printed thereon and containing plaintiff's work, without the permission or authority of the author, the defendant infringed plaintiff's copyright in said work, notwithstanding that the said supplement was printed or edited by a third party. 5 That the act of the defendant being an isolated one, not continued or likely to be continued, the Court refused an order for injunction but granted damages, with a reference to determine the same. *MARTHE FIEL v. DORIA LEMAIRE*..... 21

## "COUNTRY OF ORIGIN."

See TRADE MARK, No. 1.

COURTS OF JUSTICE ACT, 1925  
R.S.P.Q., C. 145 AND AMENDMENT BY 2 GEO. VI., P.Q., C. 72.

See CROWN, No. 4.

## CROWN.

1. CLAIM FOR MILITARY PAY AND ALLOWANCES WHILE TEMPORARILY ENGAGED AS A DEPARTMENTAL SOLICITOR AND DEPUTY JUDGE ADVOCATE DISALLOWED, No. 3.
2. CONTRIBUTORY NEGLIGENCE ON PART OF MASTER OF SHIP, No. 1.
3. COURTS OF JUSTICE ACT, 1925, R.S.P.Q., C. 145 AND AMENDMENT BY 2 GEO. VI., P.Q., C. 72, No. 4.
4. DAMAGES, No. 1.
5. DAMAGES LIMITED TO COST OF REPAIR OF SHIP, No. 1.

CROWN—*Continued*

6. EXCHEQUER COURT ACT, R.S.C. 1927, C. 34, Nos. 1 AND 2.
7. INTERPRETATION ACT, R.S.C. 1927, C. 1, No. 3.
8. LIMITATION OF ACTION, No. 2.
9. LOSS OF SHIP THROUGH COLLISION WITH SUBMERGED PART OF A JETTY CONSTRUCTED BY THE CROWN, No. 1.
10. MANITOBA AND ONTARIO INSURANCE ACTS, No. 2.
11. MANITOBA AND ONTARIO LIMITATION OF ACTIONS ACTS, No. 2.
12. MILITIA ACT, THE, R.S.C. 1927, C. 132, No. 3.
13. NEGLIGENCE ON PART OF OFFICERS OR SERVANTS OF THE CROWN, No. 1.
14. NON-FEASANCE OR MISFEASANCE, No. 1.
15. ORDER IN COUNCIL DOES NOT CONSTITUTE A CONTRACT BETWEEN THE CROWN AND SUPPLIANT, No. 3.
16. PAY AND ALLOWANCE REGULATIONS, 1927, ARTICLES 269 AND 270, No. 3.
17. PETITION OF RIGHT, Nos. 1, 2, 3 AND 4.
18. PREROGATIVE OF THE CROWN SUPERSEDED ONLY BY EXPRESS ENACTMENT, No. 3.
19. PUBLIC WORK, No. 1.
20. RETURNED SOLDIERS' INSURANCE ACT, 10-11 GEO. V, C. 54, No. 2.
21. "SENIOR JUDGE" OF CIRCUIT COURT OF THE DISTRICT OF MONTREAL, No. 4.
22. SENIOR JUDGE MUST RECEIVE TITLE AS SUCH BY HIS COMMISSION, No. 4.
23. TRAP, No. 1.

**CROWN—*Petition of Right—Public Work—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19 (c)—Damages—Loss of ship through collision with submerged part of a jetty constructed by the Crown—Negligence on part of officers or servants of the Crown—Contributory negligence on part of master of ship—Non-feasance or misfeasance—Trap—Damages limited to cost of repair of ship.***—In 1931, the Dominion Government undertook the construction of a jetty, projecting at right angles to the large Dominion Government breakwater at Port Morien, N.S. The method of construction was cribwork made of logs and timber, with stones used as ballast. Before it was completed, a large part of the upper portion of the outward end broke away during a storm on September 9, 1932. This left the lower portion of the outer cribwork and its rock ballast remaining in position but entirely submerged. Under instructions of the assistant engineer in charge of the work for the Department of Public Works, the foreman in charge of the job squared off



## CROWN—Continued

and sheeted the end of the portion of the jetty which remained in place and sawed the logs which emerged from the under-portion of the part of the jetty washed away, leaving the understructure entirely submerged and invisible. No buoy or other warning sign was placed at or near the spot. Suppliant's towboat *Ostrea*, engaged in salvage operations in Morien Bay, in the early morning of September 22 1934, left her berth at Port Morien in good and seaworthy condition and while on her way out came into collision with the submerged portion of the jetty. The collision caused the *Ostrea* to spring a leak. She proceeded on her way for a distance of about 3½ miles when it became apparent to those on board that she was filling with water. She was abandoned and a few minutes after she sank with her furnishings and salvage equipment. Suppliant seeks to recover from His Majesty the King the value of the *Ostrea* and her salvage equipment. *Held*: That the jetty is a public work within the meaning of s. 19 (c) of the Exchequer Court Act. 2. That the accident was due to the negligence of officers or servants of the Crown, namely, the district engineer and the assistant engineer under whose supervision the construction of the jetty and its reparation, after the top part of the outer end had been practically washed away, were effected, acting within the scope of their duties or employment on a public work. 3. That, after the accident, the master of the *Ostrea* was negligent in not taking the means of ascertaining the extent of the damage caused to his vessel by the collision, before proceeding to sea. 4. That the damage for which the respondent is responsible is limited to the cost of the repair of the vessel. HOCHELAGA SHIPPING AND TOWING COMPANY LIMITED v. HIS MAJESTY THE KING..... 199

2.—*Petition of Right—The Returned Soldiers' Insurance Act, 10-11 Geo. V, c. 54—Manitoba and Ontario Insurance Acts—Exchequer Court Act, R.S.C. 1927, c. 54, s. 32—Limitation of actions—Manitoba and Ontario Limitation of Actions Act.*—B., a returned soldier, resident at Winnipeg, Manitoba, was issued a policy of insurance under the provisions of The Returned Soldiers' Insurance Act, 10-11 Geo. V, c. 54, and amendments thereto, the suppliant being named the beneficiary therein. The contract was signed at Ottawa, in the Province of Ontario, by the Minister of Finance, on behalf of the Dominion of Canada. B. died in 1932. The Court found that there was no fraudulent concealment or misrepresentation of facts on the part of B. in his application for insurance. The respondent pleaded that suppliant's right of action

## CROWN—Continued

was barred by the failure to commence action within the time required by s. 152 (1) of The Manitoba Insurance Act, or of a corresponding provision in the Insurance Act of Ontario. These statutes provide that "any action or proceeding against the insurer for the recovery of insurance money shall be commenced within one year next after the furnishing of reasonably sufficient proof of the maturity of the contract and of the right of the claimant to receive payment . . ." The Manitoba and Ontario Limitation of Actions Acts provide for the commencement of actions within six years after the cause of action arose. The Returned Soldiers' Insurance Act contains no provision relating to prescription and the limitation of actions. The Exchequer Court Act, R.S.C., 1927, c. 34, s. 32, provides: "The laws relating to prescription and the limitation of actions in force in any province between subject and subject shall, subject to the provisions of any Act of the Parliament of Canada, apply to any proceeding against the Crown in respect of any cause of action arising in such province." *Held*: That the "laws" referred to in s. 32 of The Exchequer Court Act are the public general Acts relating to the limitation of actions, unless a special period of limitation is fixed by some particular provincial statute for proceedings in respect of acts done in pursuance of or in the execution of such statute, and such statute clearly contemplates the same subject-matter as that involved in any proceeding taken against the Crown in the right of the Dominion of Canada. 2. That this proceeding is not barred by the terms of the Insurance Act of the Province of Manitoba, or that of Ontario, relating to the limitation of actions. ANNIE HULL v. HIS MAJESTY THE KING..... 1

3.—*Petition of Right—The Militia Act, R.S.C., 1927, c. 132, secs. 30, 32, 64, 75 to 85 inclusive—Pay & Allowance Regulations, 1927, Articles 269 & 270—The Interpretation Act, R.S.C., 1927, c. 1, s. 16—Claim for military pay and allowances while temporarily engaged as a Departmental Solicitor and Deputy Judge Advocate General disallowed—Prerogative of the Crown superseded only by express enactment—Order in Council does not constitute a contract between the Crown and suppliant.*—Suppliant holds the rank of Colonel in the reserve of Non-Permanent Active Militia under the provisions of the Militia Act, R.S.C., 1927, c. 132. He was appointed temporary Junior Departmental Solicitor in the Department of National Defence and reported for duty on June 14, 1929. The appointment was for a period of six months, which term

**CROWN—Continued**

was extended from time to time, the last extension expiring on March 31, 1932, suppliant in the meantime having been promoted to the temporary position of Departmental Solicitor. By an Order in Council, dated November 27, 1930, suppliant was appointed Deputy Judge Advocate General and for a period of approximately one year fulfilled the two positions of Departmental Solicitor and Judge Advocate General. Suppliant's appointment as Deputy Judge Advocate General continued to March 31, 1934. The duties of the position of Departmental Solicitor and the qualifications required therefor as set out in the advertisement published by the Civil Service Commission were: "Duties—To assist the Judge Advocate General in the legal work of his office, including advising in general law pertaining to all the Provinces of the Dominion and particularly Naval, Military and Air Force and Civil Aviation matters, especially in drafting, examining, interpreting and administering Naval, Military and Air Force law and regulations; conducting courses of instruction therein; also, when required in important cases, to act as Counsel in Naval, Military and Air Force courts-martial at important Courts of Inquiry and, if necessary, in Civil or Criminal Courts; and to perform other related work as required. Qualifications—Graduation from a recognized school of law; at least five (5) years of successful practice at the Bar; thorough knowledge of and practice in Civil and Criminal law; special knowledge of Military law, regulations and administration; military service, including, preferably, service in the Great War in a position of command, with experience in presiding at and conducting courts-martial; good judgment and ability to conduct courses of instruction and delivery of lectures, with wide experience in administration of Military law in all its branches; wide legal experience in counsel work before Civil Courts and Courts-martial and experience as President or Member of courts-martial." Suppliant's claim against the respondent is for the pay and allowances of the rank of Colonel from November 27, 1930, to March 31, 1932, less civil emolument, and for pay and allowances of the rank of Colonel from April 1, 1932, to March 31, 1934. *Held*: That the Order in Council of November 27, 1930, appointing suppliant Deputy Judge Advocate General, does not constitute a contract between His Majesty the King and the suppliant, all engagements between the Crown and those in the military service being voluntary only on the part of the Crown. 2. That the prerogative of the Crown can only be superseded by an express provision in a statute and not by implication.

**CROWN—Concluded**

3. That suppliant's appointment as Deputy Judge Advocate General was at best a bare military one, and no provision having been made for payment of a remuneration as required by s 32 of the Militia Act suppliant has no recourse against the Crown. **JAMES SABISTON RANKIN v. HIS MAJESTY THE KING**..... 105

4.—*Petition of Right—Courts of Justice Act, 1925, R.S.P.Q., c. 145 and amendment by 2 Geo. VI, P.Q., c. 72—"Senior Judge" of Circuit Court of the District of Montreal—Senior Judge must receive title as such by his Commission*—The Circuit Court of the District of Montreal consists of three Judges of whom one is senior as provided for by c. 30 of the Statutes of Quebec for 1899. C. 72 of the statutes of the Province of Quebec for the year 1938 amending the Courts of Justice Act, R.S., P.Q., 1925, c. 145, provides: "The senior Judge, within the meaning of this section means and has always meant the Circuit Court Judge who, by his Commission, has received the title of senior Judge of such Court." Suppliant was appointed a Judge of the Circuit Court in 1925. In November, 1937, Mr Justice Archambault died, he having been appointed a Judge of the Circuit Court in 1913, and the Senior Judge of that Court in September, 1934. Suppliant contends that upon the death of Mr. Justice Archambault he became the senior Judge of the Circuit Court by operation of law because he then became the senior of the Judges of the Circuit Court in point of service. *Held*: That the senior Judge provided for by the statute means the one to be appointed by the competent authority, the Government of Canada, and not the Judge whose appointment to the Circuit Court was anterior to that of all the other Judges of that Court. 2 That the Act of 1938 defining the expression "senior judge" is retroactive. **RUSSELL T. STACKHOUSE v. HIS MAJESTY THE KING** ..... 235

**CUSTOMS ACT, R.S.C. 1927, c. 42.**

See REVENUE, Nos. 4 and 6.

**DAMAGE DUE TO NEGLIGENT OPERATION OF RESPONDENTS' VESSEL.**

See SHIPPING, No. 2.

**DAMAGE TO RESPONDENTS' VESSEL IN CORNWALL CANAL.**

See SHIPPING, No 2

**DAMAGES.**

See CROWN, No. 1.

See COPYRIGHT, No 1.

**DAMAGES LIMITED TO COST OF REPAIR OF SHIP.**

See CROWN, No. 1.

**DELAYS.**

See TRADE MARK, No. 5.

**"DISBURSEMENTS OF EXPENSES NOT WHOLLY EXCLUSIVELY AND NECESSARILY LAID OUT OR EXPENDED FOR THE PURPOSE OF EARNING THE INCOME".**

See REVENUE, No. 1.

**DUTIES OF TUG AND TOW.**

See SHIPPING, No. 1.

**EFFECTS OF STANDING TIMBER ON VALUE OF LAND EXPROPRIATED.**

See EXPROPRIATION, No. 1.

**EXCHEQUER COURT ACT, R.S.C. 1927, c. 34.**

See CROWN, Nos. 1 and 2.

**EXCLUSIVE USE OF TRADE MARK.**

See TRADE MARK, No. 2.

**EXPROPRIATION.**

1. EFFECT OF STANDING TIMBER ON VALUE OF LAND EXPROPRIATED, No. 1.
2. EVIDENCE, No. 1.
3. VALUE OF LAND AT DATE OF EXPROPRIATION NOT AFFECTED BY THE USE TO WHICH IT IS TO BE PUT, No. 1.
4. VALUE OF PROPERTY EXPROPRIATED, No. 1.

**EXPROPRIATION**—*Value of property expropriated—Effect of standing timber on value of land expropriated—Value of land at date of expropriation not affected by the use to which it is to be put—Evidence.*—Plaintiff expropriated certain lands in the County of Gatineau, Quebec, for a public work known as the Federal District Commission Gatineau Park. The lands expropriated were unoccupied mountainous wood lots, unimproved and unsuitable for agricultural purposes. The case reported and four others were tried together before this Court in order to have established the value of the expropriated lands. *Held:* That the probability of any of the lands taken being utilized for building or residential purposes is too remote and speculative to have any effect on their present market value. 2 That it is the market value of the land, as land, that is to be ascertained or estimated in fixing the compensation to be awarded, and if the land expropriated contains

**EXPROPRIATION—Concluded**

stone, gravel, growing crops, or timber, and they belong to the soil and are capable of being converted into a merchantable product their existence as part of the realty may be taken into consideration in determining the compensation so far as they affect the market value of the land, and there can be no recovery for standing timber, for example, valued separately as a merchantable product, and as an item additional to the value of the land. 3 That it is the value of the land as it stood at the date of expropriation that is to be established, unaffected by the laying out or construction of the public work on behalf of which the power of expropriation was invoked. 4 That evidence of offers to purchase lands which have been expropriated is always open to suspicion, easily fabricated and generally unsatisfactory, and in most cases should be rejected entirely, unless made by some person qualified to testify concerning land values, who has made an offer to purchase the lands in question, and states his reasons for making the offer and the grounds upon which he arrived at the price offered. 5. That evidence of the amount at which property is assessed for taxation purposes, given by a municipal officer, not an assessor, is utterly valueless and should always be rejected. THE FEDERAL DISTRICT COMMISSION, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA v. MARY LEAHY ET AL. . . . . 115

**EVIDENCE.**

See EXPROPRIATION, No. 1.  
See REVENUE, No. 4.

**EVIDENCE OF VESSEL'S POSITION.**

See REVENUE, No. 4.

**FAILURE TO REGISTER IN ACCORDANCE WITH PROVISIONS OF UNFAIR COMPETITION ACT.**

See TRADE MARK, No. 2.

**FORFEITURE.**

See REVENUE, No. 6.

**GIFT.**

See REVENUE, No. 3

**GOOD FAITH OR IGNORANCE IN COPYRIGHT AS DEFENCE.**

See COPYRIGHT, No. 1.

**GROUNDING OF TOW DUE TO NEGLIGENCE OF ITS OFFICERS.**

See SHIPPING, No. 1.

**HOVERING VESSEL.***See* REVENUE, No. 4.**INCOME.***See* REVENUE, Nos. 1, 2, 3 and 7.**INCOME WAR TAX ACT, R.S.C 1927, c. 97.***See* REVENUE, Nos. 1, 2, 3, 5 and 7.**INDUSTRIAL VALUE.***See* PATENTS, No. 1.**INFRINGEMENT.***See* COPYRIGHT, No. 1.*See* PATENTS, No. 1.*See* TRADE MARK, No. 5.**INJUNCTION.***See* COPYRIGHT, No. 1.**"INNOCENT PASSAGE".***See* REVENUE, No. 4.**INTERPRETATION ACT, R.S.C., 1927, c. 1, s. 16.***See* CROWN, No. 3.**INVENTION.***See* PATENTS, No. 1.**LEGAL EXPENSES INCURRED IN DEFENDING ACTION AT LAW TO PROTECT FRANCHISE.***See* REVENUE, No. 1.**LIABILITY FOR TAX.***See* REVENUE, No. 5.**LIMITATION OF ACTIONS.***See* CROWN, No. 2.**LOSS OF SHIP THROUGH COLLISION WITH SUBMERGED PART OF A JETTY CONSTRUCTED BY THE CROWN.***See* CROWN, No. 1.**MANITOBA AND ONTARIO INSURANCE ACTS.***See* CROWN, No. 2.**MANITOBA AND ONTARIO LIMITATION OF ACTIONS ACT.***See* CROWN, No. 2.**MARK "GRO-PUP" AS APPLIED TO DOG FOOD NEITHER DESCRIPTIVE NOR MISDESCRIPTIVE.***See* TRADE MARK, No. 4.**MARK LIKELY TO LEAD TO CONFUSION.***See* TRADE MARK, No. 6.**MILITIA ACT, R.S.C. 1927, c. 132, secs. 30, 32, 64, 75 to 85 inclusive.***See* CROWN, No. 3.**MISTAKE BY MASTER.***See* REVENUE, No. 4.**MONEY ADVANCED BY CANADIAN COMPANY TO NON-RESIDENT PARENT CORPORATION AND REMAINING OUTSTANDING FOR ONE YEAR, NO INTEREST BEING PAID OR CREDITED TO THE CANADIAN COMPANY.***See* REVENUE, No. 5.**NEGLIGENCE ON PART OF OFFICERS OR SERVANTS OF THE CROWN.***See* CROWN, No. 1.**"NET ROYALTIES" OR "UNITS OF PRODUCTION" SOLD TO INVESTORS BY A COMPANY ENGAGED IN THE BUSINESS OF DRILLING FOR AND TAKING OIL FROM CERTAIN SPECIFIED LANDS. PROCEEDS OF SUCH NET ROYALTIES OR UNITS OF PRODUCTION ARE NOT TAXABLE AS INCOME OF THE COMPANY.***See* REVENUE, No. 7.**NO NEGLIGENCE ON PART OF APPELLANT SHIP.***See* SHIPPING, No. 2.**NO RESPONSIBILITY ACCEPTED BY TUG.***See* SHIPPING, No. 1.**NO RULE OF THE ROAD, CUSTOM OR PRACTICE REQUIRING AN UPBOUND SHIP PASSING THROUGH THE CORNWALL CANAL TO WAIT IN THE WIDE BAY FOR A VESSEL THAT HAS PASSED THROUGH LOCK 21 DOWNWARD.***See* SHIPPING, No. 2.**"OFFICERS."***See* REVENUE, No. 4.**ORDER IN COUNCIL DOES NOT CONSTITUTE A CONTRACT BETWEEN THE CROWN AND SUPPLIANT.***See* CROWN, No. 3.

**"OUTLAY, LOSS OR REPLACEMENT OF CAPITAL OR ANY PAYMENT ON ACCOUNT OF CAPITAL OR ANY DEPRECIATION, DEPLETION OR OBSOLESCENCE."**

See REVENUE, No. 1.

**"PAGE BOY."**

See TRADE MARK, No. 6.

**PATENTS FOR INVENTION.**

1. BENEFIT TO THE PUBLIC, No. 1.
2. COMBINATION PATENT, No. 1.
3. INDUSTRIAL VALUE, No. 1.
4. INFRINGEMENT, No. 1.
5. INVENTION, No. 1.
6. PATENTABILITY, No. 1.
7. SUBJECT-MATTER, No. 1.
8. UTILITY, No. 1.

**PATENTS — Infringement — Subject-matter—Combination patent—Invention—Utility—Patentability—Industrial value—Benefit to the public.**—The action is one for infringement by defendant of five patents owned by plaintiffs. The Harrison patent claimed an invention for a horn constructed according to the exponential law and having a mouth diameter approximately one-quarter the wave length of the critical frequency of the horn; the Court found that there was no infringement of this patent because the defendant's construction does not fall within the ambit of the particular construction described and claimed by Harrison. The invention claimed in the Wente patent relates to improvements in acoustic devices such as are used in receiving and transmitting sound, and ordinarily referred to as loud speakers; the distinguishing characteristics is the use of a spherical plug in the sound chamber for the purpose of decreasing the cross-sectional area of a portion of the sound chamber. The Court found that the sound chamber employed by the defendant and that described by Wente are not alike, nor can defendant's sound chamber be said to be the equivalent of Wente's sound chamber, and there was no infringement. The object of the Miller patent is stated to be a film sound reproducing system operating on alternating current. This patent was held to lack subject-matter and therefore there was no infringement. The Wilson patent relates to improvements in electron discharge devices. The Court found that there was subject-matter in Wilson and there had been infringement by the defendant. The DeForest patent claims an invention for the control of electric currents by and in accordance with variations of light; this patent was found to be without utility and therefore void and without subject-matter. *Held:* That a claim for a particular means to

**PATENTS—Concluded**

effect certain purposes is not infringed where the same purposes are effected by different means; nor is a combination to effect certain results infringed by a combination of similar parts operating in a different manner, though the results effected are the same. 2. That it is not permissible to claim an article which as an article requires no inventive ingenuity merely because, if used in a particular way, it will be useful in achieving a particular purpose. 3. That the combination disclosed in the Wilson patent is in principle to be differentiated from that disclosed in prior patents, and is novel and possesses subject-matter. 4. That an invention to be patentable must confer on the public a benefit; utility, as predicated of inventions, means industrial value and no patent can be granted for a worthless art or arrangement. **NORTHERN ELECTRIC CO. LTD., AND WESTERN ELECTRIC CO. INC. v. BROWN'S THEATRES LTD. . . . . 36**

**PATENTABILITY.**

See PATENTS, No. 1.

**PAY AND ALLOWANCE REGULATIONS, 1927, ARTICLES 269 and 270.**

See CROWN, No. 3.

**PAYMENT FOR SERVICES OR AS PART OF PURCHASE PRICE.**

See REVENUE, No. 3.

**PETITION OF RIGHT.**

See CROWN, Nos. 1, 2, 3 and 4.

**PETITION TO EXPUNGE.**

See TRADE MARK, No. 6.

**PREROGATIVE OF THE CROWN SUPERSEDED ONLY BY EXPRESS ENACTMENT.**

See CROWN, No. 3.

**PRIORITY OF USE.**

See TRADE MARK, No. 2.

**PUBLIC WORK.**

See CROWN, No. 1.

**PURSUIT BEYOND TERRITORIAL LIMIT.**

See REVENUE, No. 4.

**QUESTION OF OWNERSHIP OF AUTOMOBILE IMMATERIAL.**

See REVENUE, No. 6.

**REGISTRATION.**

See TRADE MARK, No. 5.

**RETURNED SOLDIERS INSURANCE ACT, 10-11 GEO. V, c. 54.**

See CROWN, No. 2.

**REVENUE.**

1. ADMISSIBILITY OF ADMIRALTY CHARTS AND LIGHT LIST BOOK, No. 4.
2. AN ACT TO REVIVE AND AMEND THE BUSINESS PROFITS WAR TAX ACT, 1916, 1 GEO. VI, CHAP. 19, No. 2.
3. "ANNUAL NET PROFIT OR GAIN . . . DIRECTLY OR INDIRECTLY RECEIVED BY A PERSON . . . FROM ANY TRADE, MANUFACTURE OR BUSINESS," No. 7.
4. APPEAL ALLOWED, Nos. 1 and 2.
5. APPEAL DISMISSED, No. 5.
6. "ASSOCIATION", No. 7.
7. BURDEN OF PROOF, No. 6.
8. BUSINESS PROFITS WAR TAX ACT, 1916, 6-7 GEO. V., CHAP. 11, No. 2.
9. CHARGE AGAINST REVENUE, No. 1.
10. COMMISSION OR FEE, No. 3.
11. CUSTOMS ACT, R.S.C. 1927, c. 42, Nos. 4 and 6.
12. "DISBURSEMENTS OR EXPENSES NOT WHOLLY, EXCLUSIVELY AND NECESSARILY LAID OUT OR EXPENDED FOR THE PURPOSE OF EARNING THE INCOME", No. 1.
13. EVIDENCE, No. 4.
14. EVIDENCE OF VESSELS' POSITION, No. 4.
15. FORFEITURE, No. 6.
16. GIFT, No. 3.
17. HOVERING VESSEL, No. 4.
18. INCOME, Nos. 1, 3 and 7.
19. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, Nos. 1, 2, 3, 5 and 7.
20. "INNOCENT PASSAGE", No. 4.
21. LEGAL EXPENSES INCURRED IN DEFENDING ACTION AT LAW TO PROTECT FRANCHISE, No. 1.
22. LIABILITY FOR TAX, No. 5.
23. MISTAKE BY MASTER, No. 4.
24. MONEY ADVANCED BY CANADIAN COMPANY TO NON-RESIDENT PARENT CORPORATION AND REMAINING OUTSTANDING FOR ONE YEAR, NO INTEREST THEREON BEING PAID OR CREDITED TO THE CANADIAN COMPANY, No. 5.
25. "NET ROYALTIES" OR "UNITS OF PRODUCTION" SOLD TO INVESTORS BY A COMPANY ENGAGED IN THE BUSINESS OF DRILLING FOR AND TAKING OIL FROM CERTAIN SPECIFIED LANDS. PROCEEDS OF SUCH NET ROYALTIES OR UNITS OF PRODUCTION ARE NOT TAXABLE AS INCOME OF THE COMPANY, No. 7.
26. "OFFICERS", No. 4.

**REVENUE—Continued**

27. "OUTLAY, LOSS OR REPLACEMENT OF CAPITAL OR ANY PAYMENT ON ACCOUNT OF CAPITAL OR ANY DEPRECIATION, DEPLETION OR OBSOLESCENCE", No. 1.
28. PAYMENT FOR SERVICES OR AS PART OF PURCHASE PRICE, No. 3.
29. PURSUIT BEYOND TERRITORIAL LIMIT, No. 4.
30. QUESTION OF OWNERSHIP OF AUTOMOBILE IMMATERIAL, No. 6.
31. SEIZURES, No. 6.
32. SEIZURE AND FORFEITURE, No. 4.
33. SEIZURE ON HIGH SEAS, No. 4.
34. STATUTE NOT RETROACTIVE UNLESS EXPRESSLY SO PROVIDED, No. 2.
35. THREE-MILE LIMIT, No. 4.
36. USE OF AUTOMOBILE FOR TRANSPORTATION OF CONTRABAND LIQUOR, No. 6.
37. VALUATION OF CAPITAL STOCK OF COMPANY UNDER THE PROVISIONS OF THE BUSINESS PROFITS WAR TAX ACT, 1916, No. 2.

**REVENUE—Income—Income War Tax Act, R.S.C., 1927, c. 97, secs. 3, 5 and 6—**  
*"Outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence"*—*"Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income"*—*Legal expenses incurred in defending action at law to protect franchise—Charge against revenue—Appeal allowed.*—Appellant owned a franchise to supply gas to the inhabitants of the City of Hamilton and elsewhere. In 1931 an action at law was begun against appellant by the United Gas and Fuel Company of Hamilton Ltd., which company attacked the franchise rights and privileges of appellant. Appellant successfully defended the action and deducted from its taxable income for the year 1934 the sum of \$48,560.94 being the legal expenses incurred by it. This deduction was disallowed by the Commissioner of Income Tax whose decision was affirmed by the Minister of National Revenue. *Held:* That the advantages and benefits accruing from the successful defence of the action were of a revenue character, and the cost of the action was a necessary expense in carrying on the trade and in earning the annual net profit and gain of appellant. *DOMINION NATURAL GAS CO. LTD. v. MINISTER OF NATIONAL REVENUE.* . . . . 9

2.—*The Business Profits War Tax Act, 1916, 6-7 Geo. V, Chap. 11—An Act to revive and amend The Business Profits War Tax Act, 1916, 1 Geo. VI, Chap. 19—The Income War Tax Act, R.S.C. 1927, Chap. 97—Valuation of capital stock of*

## REVENUE—Continued

company under the provisions of The Business Profits War Tax Act, 1916—Statute not retroactive unless expressly so provided—Appeals allowed.]—Section 3 of The Business Profits War Tax Act, 1916, imposed a tax upon the profits earned in any business, owned by an incorporated company, in excess of 7 per cent per annum upon the capital employed in such business. The first accounting period thereunder began on January 1, 1915. S. 3 ceased to be in force after December 31, 1920. S. 7 of the Act also provided (ss. 1) "For the purpose of this Act the capital employed in the business of an incorporated company . . . shall be the amount paid up on its capital stock: (ss. 3) . . . the amount paid up on the capital stock of a company shall be the amount paid up in cash. Where stock was issued before the 1st day of January, 1915, for any consideration other than cash, the fair value of such stock on such date shall be deemed to be the amount paid up on such stock . . . In estimating the value of stock issued for any consideration other than cash, regard shall be had to the value of the assets, real and personal, movable and immovable, and to the liabilities of the company at the date as of which such value is to be determined. In no case shall the value of the stock be fixed at an amount exceeding the par value of such stock: (ss. 4). For the purposes of this Act, the actual unimpaired reserve, rest or accumulated profits, held at the commencement of an accounting period by an incorporated company shall be included as part of its capital as long as it is held and used by the company as capital, and dividends paid during an accounting period shall be considered as a reduction of unimpaired reserve, rest or accumulated profits." S. 13, ss. 3 of the Act as amended by Chap. 34 of the Statutes of Canada for the year 1923 reads as follows: "Any person liable to pay the tax shall continue to be so liable and in case any person so liable shall fail to make a return as required by this Act, or shall make an incorrect or false return, and does not pay the tax in whole or in part, the Minister may at any time assess such person for the tax, or such portion thereof as he may be liable to pay, and may prescribe the term within which any appeals may be made under the provisions of this Act from the assessment or from the decision of the Board." Appellant company was incorporated in 1905. The capital stock of appellant company was issued for a consideration other than cash. It was assessed for business profits tax for the years 1915 to 1919, both inclusive, and for income tax for the years 1920 to 1934,

## REVENUE—Continued

both inclusive. These taxes were paid by appellant. The company was further assessed in 1937, for the years mentioned, under the authority of Chap. 19 of the statutes of Canada for the year 1937, by which The Business Profits War Tax Act, 1916, and all amendments thereto, were revived and the provisions of The Income War Tax Act, R.S.C. 1927, Chap. 97, relating to appeals from assessments thereunder and the procedure connected therewith were made to apply *mutatis mutandis* to and in respect of appeals from assessments made under The Business Profits War Tax Act, 1916, and to the hearing and determination of such appeals. These assessments were confirmed by the Minister of National Revenue from whose decision the company appealed to this Court. The Court found that the fair value of the common shares of the company on January 1, 1915, was their par value; that there should be considered as part of the company's capital for the purposes of The Business Profits War Tax Act, 1916, the sum of \$829,379.65 to the credit of profit and loss account on March 31, 1914, together with \$500,000 put to reserve prior to March 31, 1914, and the further sum of \$759,822.79 which was an additional reserve created by reason of the readjustment of inventory values made by the Department of National Revenue in its 1937 assessments, and now the subject of agreement between the parties; that the sum of \$500,000 put to reserve by the company in the 1919 taxation period as a protection against inventory losses due to an expected decline in the price of raw cotton and which operated as a reduction in the net profits for that period, had been considered and allowed by the taxing authorities and could not now be disturbed. *Held*: That the value of the stock issued for a consideration other than cash should be estimated in a practical manner, with due regard to all the circumstances attending its issue, and on a basis not unfair, and perhaps even generous, to the taxpayer. 2. That where common shares issued as fully paid up are supported by net assets approximating their par value and have paid substantial dividends for eight consecutive years, at the same time leaving a substantial sum to the credit of profit and loss, such shares should be valued at their par value for the purpose of ascertaining the amount of capital employed in a business, under the provisions of The Business Profits War Tax Act, 1916. 3. That The Business Profits War Tax Act, 1916, as revived, has no retroactive effect. 4. That since the company made no inaccurate or false return and had fully paid any tax assessed upon it during

## REVENUE—Continued

any of the taxation periods in question, The Business Profits War Tax Act, 1916, s. 13 (3), did not authorize the assessments made by the Minister in 1937 pursuant to the provisions of an Act to revive and amend The Business Profits War Tax Act, 1916, being Chap. 19 of the Statutes of Canada for the year 1937. DOMINION TEXTILE CO. LTD. v. THE MINISTER OF NATIONAL REVENUE... 130

3.—*Income—Gift—Commission or fee—Payment for services or as part of purchase price—Income War Tax Act, R.S.C. 1927, c. 97, s. 3.*—Appellants are the executors of the will of T., who died in 1935. T. owned the majority of the stock of a company which operated a chain of gasoline service stations. Harry Snyder Ltd., a wholesale gasoline company, entered into an agreement with T. whereby he undertook to deliver or cause to be delivered to it all the shares of the operating company. To complete his part of the agreement T. had to purchase the remaining outstanding shares of the company and these, together with his own, he sold to Harry Snyder Ltd., for the sum of \$1,150,000 of which S. received a commission of \$150,000. T. had wished to receive \$1,000,000 net for his stock in the operating company. Later he performed certain services for Harry Snyder Ltd., designed, or so stated to be, for the purpose of assisting that company to acquire all the outstanding shares of two gasoline companies. T. accepted from Harry Snyder Ltd. cheques totalling \$25,000, which cheques had noted on them "Account of Services." T's estate was assessed for income tax on this sum of \$25,000, which assessment was affirmed by the Minister of National Revenue, from which decision an appeal was taken to this Court. Appellants contended that the payment of \$25,000 to T. was by way of a supplement to the consideration paid to him for his stock in the operating company. *Held:* That the \$25,000 payment was not part of the purchase price of T's stock but was a salary or commission for services rendered to Harry Snyder Ltd., and therefore income within the meaning of s. 3 of the Income War Tax Act. 2. That the \$25,000 received by T. was not a gift within the meaning of s. 3 (a) of the Act. DAME GRACE ELLIOTT, ET AL., EXECUTORS OF THE WILL OF JOSEPH CHARLES EMILE TRUDEAU (DECEASED) v. THE MINISTER OF NATIONAL REVENUE. . . . . 171

4.—*Seizure and forfeiture—Customs Act, R.S.C. 1927, c. 42, secs. 2, 151 & 208—Hovering vessel—"Officers"—Three-mile limit—Admissibility of admiralty charts and Light List Book—Pursuit beyond territorial limit—Seizure on high*

## REVENUE—Continued

*seas—Evidence—"Innocent passage"—Evidence of vessel's position—Mistake by master.*—Claimant's vessel the *Geneva Ethel*, registered at St. Johns, Newfoundland, was seized by the master of the Canadian revenue cutter *Laurier*, for alleged infraction of the revenue laws of Canada. The boat and liquor and cigarettes found thereon were declared forfeited. On the hearing of a reference by the Minister of National Revenue the Court found that the *Geneva Ethel* hovered in Canadian waters adjacent to Sylvester Point, on the north shore of Prince Edward Island, while having on board alcohol, liquors and cigarettes not included or described in the manifest of the vessel and, upon signals given by the revenue cutter *Laurier*, failed to come to a stop immediately but proceeded toward the high seas, where, after pursuit and shots from the cutter's gun, she hove to and was seized. *Held:* That as the *Laurier* was equipped with modern nautical instruments the evidence of the officers on board her touching on the position of the *Geneva Ethel* is more trustworthy and reliable than the uncorroborated testimony of the owner and master of the *Geneva Ethel*, lacking the proper nautical instruments, having kept no record whatever of his course and speaking entirely from memory. 2. That admiralty charts prepared and published under governmental authority are admissible in evidence as public documents. 3. That the Light List Book published by the Department of Transport in 1937 showing the heights of every lighthouse in Canada is admissible in evidence since it is a work made by officers of the Crown and it is presumed that they acted in accordance with their duty and have stated nothing in the survey contrary to the facts. 4. That the master and second officer of the revenue cutter *Laurier* are "officers" within the meaning of s. 2, ss. 1 (1) of the Customs Act, R.S.C. 1927, c. 42. 5. That the *Geneva Ethel*, having contraband goods on board, and having moved inside the three-mile zone by error, as alleged by her master, could not be considered as having made an "innocent passage" for which her master would not be responsible. 6. That since the *Geneva Ethel* was found violating the revenue laws of Canada within the three-mile limit she could be immediately pursued beyond the three-mile limit and lawfully seized on the high seas. JOHN M. FUDGE v. HIS MAJESTY THE KING . 187

5.—*Income War Tax Act, R.S.C. 1927, c. 97, secs. 9B (ss. 11), 18, 20 & 23A—Money advanced by Canadian company to non-resident parent corporation and remaining outstanding for one year, no interest thereon being paid or credited*



## REVENUE—Continued

to the Canadian company—Liability for tax—Appeal dismissed.]—Appellant is a limited company incorporated in Canada. All of its outstanding shares, except the directors' qualifying shares, are beneficially owned by a non-resident company. Appellant from time to time made advances of its funds to the parent company. The amount of such advances was shown as outstanding at the end of appellant's financial year, no interest thereon having been paid or credited to appellant. Appellant was assessed for income tax purposes, interest at the rate of 3 per cent on the money advanced to the parent company. This assessment was confirmed by the Minister of National Revenue. *Held*: That the money advanced to the parent company by appellant was paid out of undistributed income which the appellant had on hand at the time of such advance. 2. That the appellant having paid out its profits by means of advances to the parent company, rendered itself subject to the provisions of s. 23A of the Income War Tax Act and was properly assessed for income tax purposes at the rate of interest determined by the Minister of National Revenue. **JULIUS KAYSER & Co. LTD. v. MINISTER OF NATIONAL REVENUE. . . . . 66**

6.—*Customs Act, R.S.C. 1927, c. 42, secs. 176, 193 (1) & 262—Seizures—Forfeiture—Use of automobile for transportation of contraband liquor—Question of ownership of automobile immaterial—Burden of proof.*—An officer of the Royal Canadian Mounted Police seized an automobile at North Sydney, Cape Breton, N.S., for an alleged infraction of the Customs Act, R.S.C. 1927, c. 42. At the trial respondent admitted that on the date of the seizure the claimant was the registered owner and in possession of the automobile. The Court found that the automobile had been used for the transportation of contraband liquor. *Held*: That the question of ownership of the automobile is immaterial. 2. That pursuant to sec. 193 (1) of the Customs Act any vehicle which is used in the importation, removal or subsequent transportation of any goods liable to forfeiture by any one, with or without the knowledge and consent of the owner, is liable to seizure and forfeiture. *Sandness v. The King* (1933) Ex. C.R. 78. **RUTH McCORMICK v. HIS MAJESTY THE KING. . . . . 183**

7.—*Income—Income War Tax Act, R.S.C., 1927, c. 97, s. 2 (h) & s. 3—“Annual net profit or gain . . . directly or indirectly received by a person . . . from any trade, manufacture or business” —“Association” —“Net royalties” or*

## REVENUE—Concluded

*“units of production” sold to investors by a company engaged in the business of drilling for and taking oil from certain specified lands. Proceeds of such net royalties or units of production are not taxable as income of the company.*—Appellant is engaged in the business of drilling for and taking oil from certain land in the Province of Alberta. It sold to investors a specified percentage, share or interest, in the production or in the net proceeds of production of a certain tract of land. Such percentage share or interest is referred to as a “net royalty” or “unit of production” and is evidenced by written certificates issued to the investor by a Trustee to which appellant assigned 80% of all production from that particular tract of land. Payment for the sale of the oil produced was made to the Trustee and it accounted to the royalty certificate holders and to appellant therefor. There were in all 100 units of production and of these there were sold to the public 56½ units for which royalty certificates were issued to the purchasers thereof by the Trustee; 10 units were issued to the original lessee of the land drilled on and 13½ units were allotted to appellant. Appellant received from the Trustee, on account of its 13½ units, the sum of \$16,059 56, which amount it showed in its income tax return for the taxation period in question. The amount distributed by the Trustee to net royalty holders, other than appellant, was \$79,099 96. The net taxable income of appellant was assessed at \$52,762.02 by the Commissioner of Income Tax. This amount included the sum of \$79,099 96 paid to the other royalty certificate holders and was arrived at after allowing certain deductions for management expenses, depreciation and depletion. This assessment was affirmed by the Minister of National Revenue, from whose decision an appeal was taken to this Court. *Held*: That there was an irrevocable alienation by appellant to the Trustee, for a consideration paid, of a stated percentage of any production secured, or the proceeds of that production when sold, less certain deductions, and such percentage of production or the proceeds of that production was not a net profit or gain to appellant. 2. That the appellant and the owners of royalty interests do not form an “association” as defined by the Income War Tax Act. **B & B ROYALTIES LTD. v. THE MINISTER OF NATIONAL REVENUE. . . . . 90**

## SEIZURES.

See REVENUE, No. 6.

## SEIZURE AND FORFEITURE.

See REVENUE, No. 4.

**SEIZURE ON HIGH SEAS.**

*See* REVENUE, No. 4

**"SENIOR JUDGE" OF CIRCUIT COURT OF THE DISTRICT OF MONTREAL.**

*See* CROWN, No. 4.

**SENIOR JUDGE MUST RECEIVE TITLE AS SUCH BY HIS COMMISSION.**

*See* CROWN, No. 4.

**SHIPPING.**

1. APPEAL ALLOWED, No. 2.
2. APPEAL DISMISSED, No. 1.
3. APPEAL FROM DISTRICT JUDGE IN ADMIRALTY, No. 2.
4. DAMAGE DUE TO NEGLIGENT OPERATION OF RESPONDENT'S VESSEL, No. 2.
5. DAMAGE TO RESPONDENT'S VESSEL IN CORNWALL CANAL, No. 2.
6. DUTIES OF TUG AND TOW, No. 1.
7. GROUNDING OF TOW DUE TO NEGLIGENCE OF ITS OFFICERS, No. 1.
8. NO NEGLIGENCE ON PART OF APPELLANT SHIP, No. 2.
9. NO RESPONSIBILITY ACCEPTED BY TUG, No. 1.
10. NO RULE OF THE ROAD, CUSTOM OR PRACTICE REQUIRING AN UPBOUND SHIP PASSING THROUGH THE CORNWALL CANAL TO WAIT IN THE WIDE BAY FOR A VESSEL THAT HAS PASSED THROUGH LOCK 21 DOWNBOUND, No. 2.
11. TERMS OF HIRING, No. 1.
12. TUG AND TOW, No. 1.
13. TUG NOT LIABLE FOR DAMAGE SUFFERED BY TOW, No. 1.

**SHIPPING—Tug and tow—Terms of hiring—No responsibility accepted by tug—Duties of tug and tow—Grounding of tow due to negligence of its officers—Tug not liable for damage suffered by tow—Appeal dismissed.]**—On the morning of November 5, 1933, the *Gleneagles*, owned by the appellant, engaged the services of the tug *Rival*, owned by Sin-Mac Lines Limited of which respondent is the trustee under a deed of trust and mortgage, to move the *Gleneagles* out of Little Catarauqui Bay, near Kingston, Ontario, into Lake Ontario. During the carrying out of the operation the *Gleneagles* was grounded on Samson Point in Kingston Harbour and was damaged. The Court found that the terms of hiring were that the *Rival* would not assume any responsibility but that the *Gleneagles* would go out at her own risk, and that the *Gleneagles* alone was to blame for

**SHIPPING—Continued**

the grounding. *Held:* That the tug is the servant of the vessel towed or assisted, as the case may be, and is under the control and direction of the officers of the vessel. 2. That in the absence of definite and express limitation of the tug's responsibility such as is established in the present case, a contract of towage implies an engagement that each vessel will fulfil its duty in executing it; that proper skill and diligence will be used on board tug and tow and that neither vessel by neglect or misconduct, will create unnecessary risk to the other or increase any risk incidental to the service undertaken. CANADA STEAMSHIP LINES LTD. v. MONTREAL TRUST CO. .. **220**

2.—*Appeal from District Judge in Admiralty—Damage to respondent's vessel in Cornwall Canal—No negligence on part of appellant ship—Damage due to negligent operation of respondent's vessel—No rule of the road, custom or practice requiring an upbound ship passing through the Cornwall Canal to wait in the Wide Bay for a vessel that has passed through Lock 21 downbound—Appeal allowed.]*—Appellant steamship, westbound from Montreal, and the steamer *Rutenfjell*, owned by respondent, eastbound met and passed one another in the narrow stretch of the Cornwall Canal between Lock 21 and the Wide Bay. The *Rutenfjell*, after passing through Lock 21, proceeded downward, and, after observing that the appellant steamer was not holding back in the Wide Bay, but instead was proceeding upwards and through the narrow stretch of the Canal, put its engines full speed astern, allegedly to avoid a collision. The result of this operation was that the *Rutenfjell's* stern sheered towards the south bank of the Canal and her bow to the north bank and she went out of control, ending crosswise the Canal with her bow on the north bank and her stern on the south bank. Her lines were got ashore and she was pulled over against the south bank of the Canal and tied up. The *Newbrundoc*, having held back some four or five ship lengths below, then passed the *Rutenfjell* without difficulty and without damage to either ship. The owner of the *Rutenfjell* brought action against the *Newbrundoc* to recover for the loss of her rudder shoe alleged to have been broken off through striking some submerged object when the *Rutenfjell* was manoeuvring to avoid the collision anticipated by her pilot. *Held:* That it is not the custom or the usual practice for an upbound ship to hold up in the Wide Bay and there meet and pass a downbound ship after it is definitely ascertained that the downbound ship has passed through the lock and has

**SHIPPING—Concluded**

not stopped in the wider section just outside the lower end of the lock 2. That there is no Rule of the Road applicable to the Cornwall Canal which requires an upbound ship reaching the Wide Bay to hold back there until a downbound ship sighted in Lock 21, or after leaving the lock, reaches the Wide Bay 3. That the damage incurred by the *Rutenfjell* was solely attributable to the negligent handling of the *Rutenfjell* before the ships began to pass one another. *THE SHIP Newbrundoc v. A. S. RUDOLF* ..... 247

**STATUTE NOT RETROACTIVE UNLESS EXPRESSLY SO PROVIDED.**

See REVENUE, No. 2

**SUBJECT-MATTER.**

See PATENTS, No. 1

**TERMS OF HIRING.**

See SHIPPING, No. 1.

**THREE-MILE LIMIT.**

See REVENUE, No. 4

**TRADE MARK.**

1. APPEAL FROM REGISTRAR OF TRADE MARKS ALLOWED, No. 4.
2. APPEAL FROM REGISTRAR OF TRADE MARKS DISMISSED, Nos. 1 and 2.
3. "BELL BOY", No. 6.
4. "COUNTRY OF ORIGIN", No. 1.
5. CONVENTION OF THE HAGUE (1925), No. 1.
6. DELAYS, No. 5.
7. EXCLUSIVE USE OF TRADE MARK, No. 2
8. FAILURE TO REGISTER IN ACCORDANCE WITH PROVISIONS OF UNFAIR COMPETITION ACT, No. 2
9. INFRINGEMENT, No. 5.
10. MARK LIKELY TO LEAD TO CONFUSION, No. 6.
11. "PAGE BOY", No. 6.
12. PETITION TO EXPUNGE, No. 6.
13. PRIORITY OF USE, No. 2.
14. REGISTRATION, No. 5.
15. TRADE MARK "GRO-PUP" AS APPLIED TO DOG FOOD NEITHER DESCRIPTIVE NOR MISDESCRIPTIVE, No. 4.
16. TRADE MARK "WOODSMAN" AND "LUMBERMAN", No. 2.
17. UNFAIR COMPETITION ACT, 22-23 GEO. V, c. 38, Nos. 1, 2, 3, 4, 5 and 6.
18. VALIDITY OF REGISTRATION, No. 2.
19. WORD "TENDERIZED" NOT A DISTINCTIVE MARK, No. 1
20. WORDS "FRENCH ROOM" "DESCRIPTIVE OR MISDESCRIPTIVE OF THE CHARACTER OR QUALITY OF THE WARES IN ASSOCIATION WITH WHICH THEY ARE USED, OR OF THEIR PLACE OF ORIGIN", No. 3.
21. WORD MARK "TENDERIZED" DESCRIPTIVE OR MISDESCRIPTIVE, No. 1.

**TRADE MARK—Unfair Competition Act, 22-23 Geo. V, c. 38, secs. 26 (1) (c) and 28 (1) (d) and (2)—Convention of the Hague (1925)—Word mark "Tenderized" descriptive or misdescriptive—"Country of origin"—Word "Tenderized" not a distinctive mark—Appeal from Registrar of Trade Marks dismissed**—Appellant, a corporation organized under the laws of the State of New York, U.S.A., applied in Canada for registration of the word mark "Tenderized" to be applied to "hams, pork shoulders and picnics". The Registrar of Trade Marks refused registration on the ground that the proposed mark was considered descriptive or misdescriptive of the character or quality of the wares with which it was used. On appeal to this Court the appellant claimed the right to registration of the mark "Tenderized" on the grounds that prior to the Canadian application the mark had been registered in the U.S., the "country of origin" of such registration; that having regard to all the circumstances, including the length of time the mark had been used, the mark had acquired a distinctive character or was not wholly without distinctive character. *Held*: That the proposed mark "Tenderized" is descriptive of the character or quality of the products with which it is proposed to be used and therefore unregistrable under s. 26 (1) (c) of the Unfair Competition Act 2. That the "country of origin" as used in s. 28 (1) (d) and (2) of the Unfair Competition Act refers to a country, other than Canada, which has acceded to the Convention of the Hague (1925), and in which a person has registered a trade mark, which he now seeks to register in Canada under s. 28 (1) (d) and (2) of the Act. 3. That the appellant's registration in the United States is not one made in the "country of origin" as contemplated by s. 28 (1) (d) and (2) of the Unfair Competition Act since the mark was registered under the United States Act of 1920, the purpose of which was "to give effect to certain provisions of the Convention for the Protection of trade mark and commercial names, made and signed in the City of Buenos Aires, in the Argentine Republic, August 20, 1910, and for other purposes", to which Convention the United States was a signatory, but not Canada 4 That the mark "Tenderized" designates or describes a character or quality imparted to certain meat products by some process or treatment and the evidence does not establish that the mark by user or otherwise, has acquired a distinctive character as provided for in s. 28 (1) (d) (iv) of the Unfair Competition Act, the onus to establish such being on the applicant for registration. 5 That a word which is merely a description of the goods with which it is associated is not a distinctive mark, because it is not adapted to dis-

## TRADE MARK—Continued

tinguish the goods of one trader from those of other traders, and it cannot acquire a secondary signification by user to denote solely the goods of any particular trader. ALBANY PACKING CO. INC. v. THE REGISTRAR OF TRADE MARKS 256

2.—*Unfair Competition Act, 22-23 Geo. V, c. 38, s. 4, ss. 1, 2, 3 and 4, s. 18, ss. 2 and 3*—Trade marks “Woodsman” and “Lumberman”—*Validity of registrations—Priority of use—Failure to register in accordance with provisions of Unfair Competition Act—Exclusive use of trade mark.*—The action is one for infringement of the trade marks “Woodsman” and “Lumberman” owned by the plaintiffs and registered by them on October 30, 1936. The marks are used in connection with various tools, including saw blades. In the application for registration the plaintiffs claimed use of the mark “Woodsman” since July, 1935, and of the mark “Lumberman” since September, 1935. The defendant by way of counterclaim prayed that the registration of the words “Woodsman” and “Lumberman” be declared invalid and that they be expunged from the register of trade marks. The Court found that the use of the mark “Woodsman” in Canada, by the plaintiffs, was anterior to its use by the defendant, and that the defendant had first used the mark “Lumberman” in Canada in the year 1927. *Held:* That plaintiffs are entitled to the exclusive use, in Canada, of the trade mark “Woodsman” 2. That the plaintiff’s trade mark “Lumberman” is valid and must remain on the register, since the defendant failed to apply for registration of that mark within the time provided by the Unfair Competition Act. 3. That the plaintiffs are not entitled to the exclusive use, in Canada, of the trade mark “Lumberman,” since they were not the first to use or make known that mark in Canada. ISRAEL BURSHEIN ET AL. v. HENRY DISSTON & SONS LTD. . . . . . 79

3.—*Appeal from decision of Registrar of Trade Marks dismissed—Words “French Room” “descriptive or misdescriptive of the character or quality of the wares in association with which they are used, or of their place of origin”*—Unfair Competition Act, 22-23 Geo. V, c. 38, s. 26 (1) (c).]—Appellant’s application for registration of the words “French Room” as a word mark in association with wares ordinarily and commercially described as women’s and misses’ shoes, was refused by the Registrar of Trade Marks, from whose decision an appeal was taken to this Court. Evidence was adduced to show that the proposed word mark was a term extensively used in other stores to indicate a department devoted to the

## TRADE MARK—Continued

merchandizing of footwear and wearing apparel. *Held:* That the words “French Room” were “descriptive or misdescriptive of the character or quality of the wares in association with which they are used, or of their place of origin,” and therefore not registrable under the provisions of the Unfair Competition Act, 22-23 Geo. V, c. 38, s. 26 (1) (c). DOWER BROTHERS LTD. v. THE REGISTRAR OF TRADE MARKS. . . . . 73

4.—*Appeal from the Registrar of Trade Marks allowed—Unfair Competition Act, 22-23 Geo. V, c. 38, s. 26 (1) (c)*—Trade Mark “Gro-Pup” as applied to dog food neither descriptive nor misdescriptive.]—*Held:* That the word “Gro-Pup” is not descriptive or misdescriptive of the article to which it is to be applied, namely, dog food, within the meaning of s. 26 (1) (c) of the Unfair Competition Act, 22-23 Geo. V, c. 38, and is registrable as a trade mark. KELLOGG CO OF CANADA v. THE REGISTRAR OF TRADE MARKS. . . . . 163

5.—*Unfair Competition Act, 22-23 Geo. V, c. 38, secs. 2, 3, 4 and 5—Registration—Delays—Infringement.*—*Held:* Notwithstanding that plaintiff’s application for registration of its mark was made after the expiry of the various periods of six months mentioned in section 4 of the Act, and that the Registrar of Trade Marks had failed to wait for the expiry of six months from the date of the application before registering the same, such irregularity is not fatal to plaintiff’s action. 2. That though two marks may exhibit some differences of detail, yet where the main idea is the same, so that the purchaser knowing the first, and not having the second beside it for comparison, might, if the goods bore the second mark, be deceived into believing he was getting the goods which bore the mark with which he was acquainted, the second will constitute an infringement of the first. The Court in comparing the plaintiff’s and defendant’s marks must look to their ensemble and not to the difference of detail, to decide whether there is infringement. MYSTERIOUS CHEMICALS CO. LTD. v. PROTEX CORPORATION OF CANADA LTD. . . . . 240

6.—*Petition to expunge—“Bell Boy” “Page Boy”—Mark likely to lead to confusion—Unfair Competition Act, 22-23 Geo. V, c. 38, secs. 26 (g), 31 (3) & 38.*]—Petitioner applied for registration of design marks described as “the representation of the upper part of the body of a bell boy holding a package of cigarettes” and as “a medallion containing the representation of a bell-boy’s head.” The marks had been used by petitioner for some time in connection with the manufacture and sale of cigarettes prior to

**TRADE MARK—Concluded**

the date of the applications for registration. The Registrar of Trade Marks rejected the application on the grounds *inter alia* that the figure shown in one application represented a "page boy's head, and not that of a bell boy," and that in the other application the figure shown represented "a page boy and not that of a bell boy." Subsequent to the adoption of petitioner's design marks, the respondent J. O. Forest & Company began to use and applied for registration of the words "Bell Boy" as a trade mark to be used on leaf tobacco, cigarettes, cigars and cut tobacco. Petitioner, as required by the Registrar, amended its applications by substituting the word "page" for the word "bell" and the applications as so amended were allowed and the design marks were registered in November, 1938. On June 27, 1939, petitioner learned that the issue of the Canadian Patent Office Record of June 20, 1939, contained a notice of the registration of the word mark "Bell Boy" at the instance of the respondents. The petitioner prays that the word mark "Bell Boy" be expunged from the register of trade marks. *Held*: That the word mark "Bell Boy" should be expunged from the register of trade marks. 2. That the petitioner in its application might have described its design mark as a representation of either a "bell boy" or a "page boy," or both. 3. That the word mark "Bell Boy" on the goods of the respondents would be liable to lead to confusion, and would be calculated to permit of and encourage the passing off of the respondent's goods for those of the petitioner. 4. That the Registrar should have treated the application of J. O. Forest & Company as a fresh one, and that the petitioner, then the owner and registrant of the design marks in question, and there being no change in the state of facts since the first consideration of the case, should have been notified thereof in conformity with s. 38 of the Unfair Competition Act and should have been asked if it had any objection to the proposed registration of J. O. Forest & Company. **TUCKETT TOBACCO CO. LTD., v. ROMEO ST. GERMAIN, TRADING AS J. O. FOREST & CO., AND THE SAID J. O. FOREST & CO.** . . . . . **58**

**TRADE MARKS "WOODSMAN" AND "LUMBERMAN".**

See **TRADE MARK**, No. 2.

**TRAP.**

See **CROWN**, No. 1.

**TUG AND TOW.**

See **SHIPPING**, No. 1.

**TUG NOT LIABLE FOR DAMAGES SUFFERED BY TOW.**

See **SHIPPING**, No. 1.

**UNFAIR COMPETITION ACT, 22-23 GEO. V, c. 38.**

See **TRADE MARK**, Nos. 1, 2, 3, 4, 5 & 6.

**USE OF AUTOMOBILE FOR TRANSPORTATION OF CONTRABAND LIQUOR.**

See **REVENUE**, No. 6.

**UTILITY.**

See **PATENTS**, No. 1.

**VALIDITY OF REGISTRATIONS.**

See **TRADE MARK**, No. 2.

**VALUE OF LAND EXPROPRIATED.**

See **EXPROPRIATION**, No. 1.

**VALUE OF LAND AT DATE OF EXPROPRIATION NOT AFFECTED BY THE USE TO WHICH IT IS TO BE PUT.**

See **EXPROPRIATION**, No. 1.

**VALUATION OF CAPITAL STOCK OF COMPANY UNDER THE PROVISIONS OF THE BUSINESS PROFITS WAR TAX ACT, 1916.**

See **REVENUE**, No. 2.

**WORD "TENDERIZED" NOT A DISTINCTIVE MARK.**

See **TRADE MARK**, No. 1.

**WORDS "FRENCH ROOM" "DESCRIPTIVE OR MISDESCRIPTIVE OF THE CHARACTER OR QUALITY OF WARES IN ASSOCIATION WITH WHICH THEY ARE USED, OR OF THEIR PLACE OF ORIGIN".**

See **TRADE MARK**, No. 3.

**WORD MARK "TENDERIZED" DESCRIPTIVE OR MISDESCRIPTIVE.**

See **TRADE MARK**, No. 1.

## WORDS AND PHRASES.

- "Annual net profit or gain . . . directly or indirectly received by a person . . . from any trade, manufacture or business". See B. & B. ROYALTIES LTD. AND THE MINISTER OF NATIONAL REVENUE .. 90
- "Association". See B. & B. ROYALTIES LTD., AND THE MINISTER OF NATIONAL REVENUE ..... 90
- "Bell Boy". See TUCKETT TOBACCO CO. LTD., AND ROMEO ST. GERMAIN ET AL.. 58
- "Country of origin". See ALBANY PACKING Co., INC., AND REGISTRAR OF TRADE MARKS .... 256
- "Descriptive or misdescriptive of the character or quality of the wares in association with which they are used, or of their place of origin". See DOVER BROTHERS LTD., AND REGISTRAR OF TRADE MARKS .. 73
- "Disbursements or expenses not wholly exclusively and necessarily laid out or expended for the purpose of earning the income". See DOMINION NATIONAL GAS Co. LTD., AND MINISTER OF NATIONAL REVENUE ..... 9
- "French Room". See DOVER BROTHERS LIMITED AND REGISTRAR OF TRADE MARKS .. 73
- "Gro-Pup". See KELLOGG Co. OF CANADA LTD. AND REGISTRAR OF TRADE MARKS. 163

WORDS AND PHRASES—*Concluded*

- "Innocent passage". See JOHN M. FUDGE AND HIS MAJESTY THE KING.. ... 187
- "Lumberman". See ISRAEL BURNSTEIN ET AL. AND HENRY DISSTON & SONS LTD. .... 79
- "Net royalties". See B. & B. ROYALTIES LTD., AND THE MINISTER OF NATIONAL REVENUE .. ..... 90
- "Officers". See JOHN M. FUDGE AND HIS MAJESTY THE KING..... 187
- "Outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence". See DOMINION NATURAL GAS Co., LTD., AND MINISTER OF NATIONAL REVENUE .. ..... 9
- "Page Boy". See TUCKETT TOBACCO Co, LTD., AND ROMEO ST. GERMAIN ET AL. 58
- "Senior Judge". See RUSSELL T. STACKHOUSE AND HIS MAJESTY THE KING. 235
- "Tenderized". See ALBANY PACKING COMPANY INC., AND REGISTRAR OF TRADE MARKS .. ..... 256
- "Units of production" See B. & B. ROYALTIES LTD., AND THE MINISTER OF NATIONAL REVENUE .. ..... 90
- "Woodsman". See ISRAEL BURNSTEIN ET AL. AND HENRY DISSTON & SONS LTD. 79