

THE

# Eastern Law Reporter.

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VOL. IX.      TORONTO, DECEMBER 1, 1910.      No. 2

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## NOVA SCOTIA.

COUNTY COURT FOR DISTRICT No. 5.      SEPT. 24TH, 1910.

REX v. JOHNSON.

*Canada Temperance Act—Summons—Irregularity—Dismissal of Information—New Summons for Same Offence—Conviction—Validity.*

Vernon, for defendant, appellant.

Graham, K.C., for the Crown.

PATTERSON, Co.C.J.:—This is an appeal by the defendant from a conviction made against him by two Justices of the Peace, in proceedings under the Canada Temperance Act. The prosecution was for keeping liquor for sale between certain dates, and the offence was proved beyond a shadow of doubt. But it appears from the evidence that the same justices, perhaps upon the same information, certainly upon information for a keeping for sale between the same dates, had formerly issued a summons returnable at Westville on a particular day. On that day they met at the appointed place and hour, the defendant appeared and pleaded not guilty; and after hearing some evidence they “dismissed the case.” They explain now that they did this because the summons had been “tampered with.” meaning that some interlineations had been made in it after it left their hands. A new summons was then issued returnable at a subsequent day at New Glasgow. Whether this summons was issued in consequence of a new information then laid, or of the old information then re-sworn, or whether neither of these things was done and the new summons was issued without information, or upon the old one, does not appear. On

these points the evidence is silent. But however it was done, a new summons was issued, and on its return day the magistrates met again—defendant again appears with his counsel and pleads not guilty. Before any evidence is taken the defendant raised the objection (I am quoting from the evidence of one of the justices): “That as the matter had been previously dismissed we had no jurisdiction and asked for a certificate of dismissal.” The certificate was refused and the case proceeded with.

Defendant’s counsel took part in the trial by cross-examining the witnesses called for the prosecution. After hearing the evidence, the justices convicted defendant, and from their conviction he has taken this appeal.

Mr. Vernon asks me to quash the conviction because the matter was dismissed at the earlier hearing—in other words his defence is that of *autrefois acquit*. I should have thought and do think that the very well known decision in *ex parte Flanagan*, 3 Can. C. C. 82, settles this point. I cannot find that our own Court has ever been called upon to pronounce upon the soundness of that decision; but I do know that all well informed magistrates have been following it for more than ten years, and I imagine, if it were doubted or doubtful, our Court would have been called upon to disapprove of it long ago. Since it was decided, a defendant, before he can avail himself of such a defence, must shew that the two charges are identical—the mere fact that the dates between which the keeping for sale is alleged to have occurred are the same in both cases is not sufficient. There has been no attempt made here to shew that the charges are identical, and if this were the only difficulty in the way of the prosecution, I should not have much hesitation in confirming the conviction. But I suppose I must not, nor should not, shut my eyes to the outstanding difficulty that is here merely because defendant does not raise it.

That difficulty is in regard to the information, if any, for the second summons. Our Supreme Court has twice at least in similar proceedings to these, been called upon to deal with defective or improperly laid informations (*R. v. Ettinger*, 3 C. C. C. 287, *R. v. McNutt*, 3 Can. C. C. 184.) At first blush I felt the inference from these cases was so strong that I must quash the conviction here. But further consideration leads me to believe that the present case is clearly distinguishable from either *R. v. Ettinger* or *R. v. McNutt*, *supra*. As I have said, it does not appear from the evidence here what

was done in regard to the information. Whether the old information was taken and the second summons issued on it and nothing further done I cannot tell. There is nothing to shew that the old information was not laid. In the absence of any evidence one way or the other must I not presume in favour of the regularity of the proceedings? Should I not hold that either the old information was resworn or that a new one was laid rather than that nothing was done or that what was done was illegal and improper? If the old information was resworn, it undoubtedly was resworn before the two magistrates, and the defect that was fatal in *R. v. Ettinger* would be gone. Neither would *R. v. McNutt* apply. It was a case where a warrant was issued upon an information not upon oath. The Court held that there must be an information on oath where a warrant was issued. Here only a summons was issued, and for a summons information on oath is not required, so that if there were a new information here even though not on oath, it is enough. I can see no reason why I must assume that the old information was not resworn or a new one laid. On the contrary, having regard to the presumption I have referred to, and to the fact that the learned counsel for the defendant raised no objection to the information if there were one, or to the want of one if there were not, I think I may quite safely assume, either that the old information was duly and properly resworn or a new information duly and properly laid.

The conviction will be confirmed with costs here and below.

Taking the view I do it is unnecessary to discuss the question whether defendant by appearing and taking part in the trial as he did waived his objections. Following *R. v. McNutt*, I should have to hold he did not. Nor need I discuss section 753 of the Code on which prosecution relied. That section provides that effect is not to be given on appeal to any objection to an information unless that objection has been taken at the trial. The only objection taken at the trial here was, as I have stated, that the matter had been previously disposed of in defendant's favour; autrefois acquit, the serious objection was not taken. So far as I can find section 753 has had no judicial interpretation, and I may be entirely wrong in the view I take of it, but I should have great hesitation in extending it so far as to deprive defendant from any advantage there might be in this other objection I have dealt with, even though he had not raised it at the trial.

## NOVA SCOTIA.

SUPREME COURT.

TRIAL AT ANNAPOLIS.

OCTOBER 20TH, 1910.

TAYLOR v. McLAUGHLIN.

*Sale of Goods—Sale Note—Delivery—Refusal to Accept—  
Revocation of Contract—Date—Evidence.*

J. J. Ritchie, K.C., for plaintiff.

J. M. Owen, for defendant.

Action on a contract for goods sold and delivered.

GRAHAM, E.J.:—This is an action on a contract to purchase a safe to be manufactured by the plaintiffs and shipped at Toronto to the defendant at Annapolis, which the defendant refuses to take.

This is the contract entered into between the parties:—

“Toronto, 1st March, 1908.

“Messrs. J. & J. Taylor, Toronto Safe Works, will please furnish me with one of their No. 1 safes with combination lock to be shipped via C. P. R. & D. A. R. to Annapolis, N S., for which I agree to pay f.o.b. Toronto \$72 in one instalment at net cash without interest.

“I agree to forward you notes or cash within thirty days from date of invoice, and will not countermand this order, also if the above safe is not settled for according to terms of order within thirty days after shipment then the whole amount shall become due. I agree also that the title to said safe shall not pass until the whole price is paid, but shall remain your property till then, although notes or acceptances may have been given on account, and in case of default in any of the payments you are at liberty without process of law to remove said safe, and I hereby waive all claims for damages which I might sustain from such removal, and it is hereby also agreed that any money paid on account of said safe shall not be recoverable by law, but shall be forfeited as rental charge for the use of said safe,

and it is agreed that this order embodies all agreements between us, I hereby waiving all agreements not embodied in this order. This order taken subject to the approval of J. & J. Taylor. Copy left with me.

Witness:

(Sgd.) E. S. Wilband. (Sgd.) C. E. McLaughlin."

There are two questions raised by the defendant but the only question of any substance was whether the defendant having refused to take the safe at Annapolis the plaintiff should recover the price of the safe or damages for the refusal, in other words, whether the property passed to the defendant or not.

In the ordinary course the agreement to pay f.o.b. Toronto, net cash, would settle the question that it did pass. But this printed clause that the title should not pass until the whole price was paid was not struck out of the instrument, although I think its use was only intended for cases of credit or instalments. I think I cannot reject it. That it would have the effect of keeping the title in the plaintiff notwithstanding the expression f.o.b., I refer to the case of Polson v. Degeer, 12 O. R. 275.

The amended statement of claim covers a case for damages, and the plaintiff's argument that he was entitled to the price rather than damages does not at all affect his right to recover damages.

The other contention made by the defendant was that there was a rescission. The contract, by mistake of a new hand bears a wrong date, in fact the date on which the safe was to be delivered. As a fact plaintiff's agent took the order about the 10th of October, 1907. It was approved by the plaintiffs on the 14th of October, of which fact the defendant was notified by mail from Toronto. On the 16th of December, 1907, the defendant himself, from Annapolis, wrote to the plaintiff at Toronto:—

"Please cancel order of the 10/10/07 (i.e., the 10th of October, 1907), for safe. I do not want same, going to U. S. A. first of year." The plaintiff refused to do this, sending on the safe. But it is contended that as the date of this letter of the 16th December, 1907, is before the apparent date of the contract, March 1st, 1908, the letter of revocation was in time. The contention amounts to this, if you are bound by the apparent date of the instrument, that the contract was revoked by the defendant before it

was entered into. The date of the instrument is not material. The actual date may be shewn. In Leake on Contracts, 185, it is said: "Extrinsic evidence is also admissible to shew the time when the agreement was made, and such evidence is admissible although the written agreement itself contain a date." Hall v. Cazenove, 4 East. 477.

I have considered the evidence in respect to damages and I assess the same against the defendant at the sum of thirty-five dollars (\$35) with costs.

The costs will be on the higher scale.

But I think that the plaintiff really ought to be willing to accept the price and costs applicable to that sum, it being below \$80, that is, on the lower scale, and let the defendant have the safe if it is at this time worth taking out of the hands of the carrier and warehouseman.

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## NOVA SCOTIA.

SUPREME COURT.

TRIAL AT ANNAPOLIS.

OCTOBER 20TH, 1910.

THE LEHIGH VALLEY COAL CO. v. KING.

*Sale of Goods — Cargo of Coal — Expenses of Discharging  
Cargo—Liability for—Evidence.*

J. J. Ritchie, K.C., for plaintiff.

O. T. Daniels, K.C., for defendant.

Action for balance of an account for goods sold and delivered.

GRAHAM, E.J.:—The dispute in this case is in respect to a sum of \$66.48 which the defendant was obliged to pay in expenses for discharging a cargo of coal in order to obtain the cargo. The plaintiff—an American company—sold to him at Annapolis the coal, and was to charter the ship to carry it. By the contract, of April 30th, 1909, between plaintiff's agent and defendant, the freight was to be ninety cents per ton, afterwards varied by telegraph to \$1

per ton. But as to the cost of discharging at Annapolis the plaintiff's agent testifies that it was stipulated that it was to be a free discharge, while the defendant testifies that nothing was said about it; in which case both sides admit that the expense of discharging would be included in the freight and would be borne by the ship. The plaintiffs chartered the vessel at "\$1 and free discharging" and so the defendant had to pay the sum I have mentioned in order to get the coal.

The defendant has this circumstance in addition to his verbal testimony. He asked the plaintiff's agent at Annapolis just after the oral contract, to give him a memo of it. On the back of an envelope the agent wrote, "Vessel of about 250 tons" (Then the different kinds of coal with the amount of each) "90cts. rate of freight. Lehigh Valley Coal Co., 141 Milk St., Boston."

The price of the coal was not inserted and it was not in itself a complete contract, but apparently the defendant relied upon the mentioning of the rate of freight without mentioning the cost of discharging.

On the other hand the plaintiff's agent informing his principal of the contract the same day wrote, "Pay 90c. freight free discharge."

That is not really very convincing that it was so stipulated in the conversation.

But I think the memo I have mentioned does add weight to the defendant's testimony. He had, I think, a right to rely on it and that the 90c. included the discharging. Possibly he would not afterwards have consented to the variation from 90c. to \$1 in the rate of freight if he had known that it was to be free discharge. I must adopt the defendant's version. I find for the defendant. The action will be dismissed with costs on the lower scale, the sum being under \$80.

## NOVA SCOTIA.

SUPREME COURT.

TRIAL AT DIGBY.

OCTOBER 28TH, 1910.

BROOKES v. BROOKES.

*Deed of Lands — Description — Fraud—Delay—Laches—  
Statute of Frauds—Reforming contract.*

S. A. Chesley, K.C., for plaintiff.

W. E. Roscoe, K.C., and J. A. Grierson, for defendant.

Action to reform a deed.

GRAHAM, E.J.:—This action is brought in respect of 100 acres of woodland the eastern half of "lot No. 50 in the north range of the Hatfield grant" in the county of Digby.

The plaintiff and his mother and a brother, since deceased, in a deed dated the 3rd of April, 1883, conveyed with other lots the homestead, etc. (this land by this description) to the defendant, and this plaintiff is now seeking to have this lot struck out of the deed because it was not included in the sale and because the deed, as to this lot, was misread to the parties. That is, it was fraudulently omitted in the reading.

Lot 50 belonged originally to Peter Brookes. He by a will made before the 31st December, 1856, devised with other lands the eastern half of lot 50 to his widow for life and after her death "all the above said lots of land" to Harris Harding, this defendant. But by a deed made before, namely 23rd November, 1854, registered January 23rd, 1857, he conveyed all of lot 50 to the plaintiff's father, one Cornelius Brookes. Cornelius Brookes by will, in an event which happened, namely of the widow remarrying, left all of his property to his children and this plaintiff is the survivor.

The deed to the defendant was prepared by the late Charles Mc.C. Campbell, the registrar of deeds for that county, and all the parties present at that time who are now living agreed that the deed was read over before signature,

but the plaintiff and his mother say that the portion as to the lot 50 was not read. The defendant, on the other hand, says that this lot was included in the sale and was mentioned at the time when the conveyance was being prepared and that the clause was read.

After this lapse of time and in consequence of the presumed rectitude of Mr. Campbell, who appears to have been acting for all the parties, I must find in favour of the defendant. It would be difficult to succeed in carrying out a fraud like that. One of the parties was not there to execute it and he might wish to read it over for himself. It would be going very far to allow a person to say a particular part of a deed was not read to him.

But a new case was developed at the trial, and about that I must confess I have taken time to consider.

That case was this, that although the lot was included in the deed and the grantees knew it was, they did not at that time know that they owned it absolutely, that is, that they did not know of the existence of the deed from Peter Brookes to Cornelius and that it took effect rather than the will, but supposed it belonged to this defendant, and that the defendant did know this, having been told about it by Ephriam Brookes.

If the case had been launched in that way and was a recent transaction when witnesses would be forthcoming, and could be precise in their statements, the plaintiff, inasmuch as he and his brother were under twenty-one at the time, and the mother having remarried had really no interest, one possibly might grant some kind of relief.

But I think the facts as well as the pleadings fail.

The delay is very great and the plaintiff does not even state when he discovered that he actually had had title by virtue of the deed.

The Statute of Limitations is pleaded; it is twenty-seven years ago, and the only answer to it would be that the plaintiff did not discover it until the very eve of the action.

Then it appears that at some time or another the plaintiff gave a deed of the western half of lot 50 to Ephriam. One might be mistaken in drawing the inference, but as far as I can discover it is only by virtue of that deed from Peter to Cornelius that the plaintiff had the western half of lot 50 to give, and he should then have brought the action, when he did discover the existence of the deed. The defendant admits that he always claimed this eastern half of

lot 50 under the will and says that in consequence of the dispute about it he agreed to buy off the plaintiff when he was buying the other property.

I think that the plaintiff was very negligent, once it is admitted that there was a will and a deed in existence, and a question about it, that he did not find out what his rights were. It looks as though he consented to its going into the deed for what it was worth. He knew since he was 14 that the defendant claimed it as his own. Campbell wrote the deed as if there was a question, that is to say, while there was a warranty in the deed he qualified the description in respect to this lot by wording the deed so as to convey only the "interest" of the parties.

I think that there was not fraud on the part of the defendant, nor mutual mistake. And that if the plaintiff conveyed away something without knowing that he owned it he was negligent and that it is now too late to afford him relief.

Meanwhile, I may add, the defendant has sold 80 of the 100 acres to one Journeay, who took without notice.

The action will be dismissed and with costs.

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## DOMINION OF CANADA.

EXCHEQUER COURT.

NOVEMBER 18TH, 1910.

THE BARNETT McQUEEN COMPANY, LIMITED, v.  
CANADIAN STEWART COMPANY, LIMITED.

*Patents for Invention—Improvements in Storage Elevators—Anticipation—Prior Use and Sale—Canadian and Foreign Patent Law discussed—Smith v. Goldie discussed and explained.*

A. W. Anglin, K.C., and R. C. H. Cassel, for plaintiffs.

R. C. Smith, K.C., and Peers Davidson, K.C., for defendants.

CASSELS, J.:—This was an action by the plaintiffs asking for an injunction restraining the defendants from infringing two patents.

The case occupied, inclusive of the argument, the greater part of fourteen days, and was very ably and fully presented by counsel for both parties.

During the course of the trial I had an opportunity of considering the various questions in issue, but I thought it due to counsel, as they had spent so much time in presenting their various contentions, to postpone the delivery of judgment and to peruse the evidence transcribed and consider the various authorities cited. This I have done.

The first patent in suit is one dated 14th April, 1908, No. 111315. The application for this patent was filed on the 9th December, 1907.

The second patent in suit is one dated 18th August, 1908, No. 113624. The application for this patent was filed 6th April, 1908.

The defences raised to the right of the plaintiffs to recover are the usual defences—lack of subject matter—no invention—no infringement—abandonment, etc.

I propose to deal with the two patents separately.

The first patent, No. 111315, dated 14th April, 1908, was granted to Finlay R. McQueen, for improvements in grain storage elevators.

In his specification the patentee states:—

“My present invention relates to grain storage elevators and particularly to concrete or concrete steel, or other fire-proof structures, wherein a multiplicity of cylindrical bins are employed, the said bins being placed in close juxtaposition with the space between the cylindrical bins arranged to serve as supplementary storage bins.”

After referring to the drawings he proceeds:—

“The numeral 1 indicates the cylindrical grain bins, which bins are arranged in rows in two directions, and are formed monolithic, or otherwise rigidly united at their adjoining peripheral portions, so that there is left between each four bins, a supplementary bin or storage space.

“2. It will be noted that by arrangement of the cylindrical bins in rows in two directions, the intersecting rows extending approximately at right angles to each other, a four-sided supplementary bin is formed between each four adjoining cylindrical bins. The numeral 3 indicates a bifurcated elevator leg of the usual construction and in which works a power-driven, endless, cup-equipped belt 4. The branches of this elevator leg 3 are passed vertically through

the adjacent supplemental bins 2; and the said supplemental bins through which the said leg passes are formed with vertical webs or partitions 5 that form leg passages 6 from top to bottom of the bins, and separate the said leg passages from the respective supplemental bins 2. Any desired number of the supplemental bins may be thus formed with the leg passages 6.

“With the construction above described, the elevator leg is thoroughly protected from lateral pressure of the grain in the bins, and the said leg may be removed, at any time, or repaired without opening up any of the said grain bins. Furthermore, the vertical webs or partitions 5 increase the rigidity of the entire bin structure.

“It will of course be understood that the bins above described may be constructed either of concrete, brick or other material, and the same usually will, in practice, be reinforced by embedded steel members.

The term masonry is herein used in a sense broad enough to include either concrete, brick, tile, or similar material.

In the arrangement of the bins illustrated in the drawings, the said bins are assumed to be supported with their lower ends above the ground. The main bins 1, as well as the supplemental bins 2 will, of course, be provided with hopper bottoms of the usual or any suitable construction.”

The claims of the patent are as follows:—

“1. A plurality of grain bins 1 arranged in rows in two directions, and having their adjoining sides rigidly united so as to form supplemental bins 2, certain of said bins 1 being tied together by vertical partitions or webs 5 that extend across angular portions of certain of said supplemental bins 2, and form vertical leg passages 6, in combination with bifurcated elevator legs having their branches extended vertically through adjacent passages 6, substantially as described.

2. A plurality of cylindrical grain bins forming a monolithic structure and having their adjacent peripheral portions rigidly connected, and forming supplemental storage bins in the intervening spaces, vertical webs extending through adjacent supplemental bins to form leg passages, in combination with bifurcated elevator legs extending from below said bins through adjacent leg passages, substantially as described.”

It is conceded that the two claims are practically for the same invention, the difference apparently being that whereas in the first claim it is stated that the grain bins have their adjoining sides rigidly united, the words of the second claim refer to the bins as forming a monolithic structure and having their adjacent peripheral portions rigidly connected.

While contending that these claims are invalid for want of subject matter and lack of invention, the defendants claim that the structure erected by them does not infringe, as there is absent from their structure what is called the leg casing, an element of the claims as they contend. I will deal with this point later.

There are other reasons put forward on the part of the defendants as grounds in support of their defence of non-infringement in addition to the one mentioned above.

It must be borne in mind that in his specification the patentee assumes that the said bins will be supported with their lower ends above the ground. No particular form of support is referred to.

Mr. Wilhelm, the main expert witness on behalf of the plaintiffs, testifies that in his opinion the essence of the invention is the cutting off of the corner so as to allow free space for the leg. This cutting off is by what is termed vertical webs or partitions 5.

The specification states "furthermore the vertical webs or partitions 5 increase the rigidity of the entire bin structure."

While it has some effect in increasing the rigidity of the bin structure it is not required for that purpose, and this becomes apparent when it is perceived how few of the bins have this web wall. It is apparent that the only use and object of the web wall is to protect the elevator leg from the pressure of the grain in the bin. Power driven endless cup equipped belts were, long prior to the plaintiffs' alleged invention, used in the various workhouses and storage elevators, and wherever placed had to be protected from the pressure of the grain by a wall or partition of some kind.

In the plaintiffs' construction portions of two interstice bins are cut off by two walls, one in each interstice bin forming with a portion of the sides of the bin, protected chambers through which the elevator legs pass.

In the defendants' construction a portion of one interstice bin is cut off by two walls, both legs passing up through this

space and leaving on each side the remaining portion of the interstice bin for storage purposes.

It may be that the placing in position of the elevator legs where the plaintiffs place them saves some space, but to my mind this is not material from a patent standpoint.

There can be no contention that the elevator legs placed as they are by the patentee operate in any other manner or have any different function than elevator legs in other storage and workhouse elevators. It is merely a question of convenience of arrangement having regard to the class of construction. Cutting off a space by means of a wall to form a protection was well known in the art. If the claims in question are combination claims as distinguished from aggregations, then in my opinion there is no novelty whatever. Previous references to the art shew that such a combination, if such it can be termed, was well known long prior to the alleged invention.

To avoid repetition I will deal with the previous anticipations in considering the second patent in suit.

Before proceeding to discuss the second patent, the essential feature of which is the location of the column support, I repeat the dates. The application for the second patent was filed 6th April, 1908. The first patent was granted 14th April, 1908. The application for the second patent was prior to the grant of the first patent.

By the specification of the first patent the patentee had stated that "the said bins are assumed to be supported with their lower ends above the ground."

I agree with Mr. Anglin's view that having regard to the dates the patentee has the same right as a stranger would have to apply for and obtain a patent for a particular means of support, provided always that there was invention and subject matter.

The second patent, No. 113624, is dated 18th August, 1908. The statement in the grant is that McQueen has petitioned for the grant of a patent for an alleged new and useful improvement in "Storage Bins."

In his specification the patentee states:—

"My invention relates to so-called 'working' elevators, to wit, that type of elevator in which grain is not only adapted to be stored, but is adapted to be weighed, cleaned, graded or otherwise worked. In this type of elevator a workhouse is located below the storage bins. Particularly,

this invention relates to fire-proof elevator construction in which masonry work is reinforced with steel or iron."

The specification then states as follows:—

"The storage bins 1 are cylindrical with conical bottoms having discharge passages 2 that open through a reinforced floor 3. These bins are of masonry and may be either monolithic reinforced concrete or of reinforced brick or tile, and they are placed in parallel rows in two directions and are closely positioned so that their tangentially abutting portions are united by metal reinforced vertically extended connecting bodies of masonry 4, which, as will presently appear, constitute extensions or upward continuations of the bin supporting columns and serve to rigidly tie together the adjacent bins. The bin supporting floor 3 is preferably of monolithic concrete having formed as part thereof metal reinforced girders 5 and 6 that intersect each other at a right angle. At their points of intersection, the girders 5 and 6 unite with the upper ends of heavy metal reinforced columns 7, preferably of concrete, and the lower ends of which terminate in heavy footings 7a, which, as shewn, rest upon a heavy concrete basement floor 8 below which, when required, piles (not shewn), may be driven. These columns 7 are located directly in line one with each of the column extensions 4. As shewn, they are reinforced by longitudinally extended rods 9 and hoops 10. As best shewn in Fig. 4, the upper ends of the columns 7 are expanded at 7b so that they directly support and unite with quite large areas of the floor 3. The space under the bins is enclosed by side walls 11, preferably of concrete or other masonry, and this space is divided into a workhouse 12 and basement 13 by a suitable workhouse floor 14 shewn as made up of transversely extended I-beams and a suitable flooring, the said I-beams being supported by the columns 7 and walls 11. The bin space is enclosed by walls 11a that constitute extensions of the walls 11."

Having described the tower, he states:—

"With this arrangement, the main weight of the machine and other load within the tower, and of the tower itself, is transmitted directly through the column extensions 4 of the bin structure to the main supporting column 7 without adding weight to or putting additional strains upon the bins proper. Furthermore, by the arrangement of the columns 7 and column extensions 4, the bins are reinforced

and strengthened and are supported at their strongest portions by the said columns 7."

He then describes the bins and interspace bins with the elevator legs as described in his first patent.

Before dealing with the claims of the patent, it will be well to understand what the patentee asserts to be the invention described in the specification. Wilhelm, the main expert witness for the plaintiffs, states it in this way:—

"The bin arrangement which is shewn in the second patent is the same as shewn in the first patent. The bins are arranged in two rows at right angles to each other, and they are circular bins, and they have intermediate four-sided bins between the circular bins for the storage of grain, and the principal feature of this patent consists in the way in which the bins are supported. They are supported by columns which are arranged on the two diametrically opposite sides of each bin only. The general arrangement of the workinghouse structure is shewn in figure 1 of the patent, and the columns are there marked 7, and they are arranged as shewn in figure 6. Figure 6 is a plan of the bins with the columns shewn in cross-section, and they are arranged on diametrically opposite sides of each bin only, and there are no columns at any other points in the circumference of the bins. The column arrangement is shewn on the larger elevation on figure 2..

"His Lordship: Q. Is that not a patent purely for the method of support? A. It is mainly for supporting the bins in that way.

"Q. If his first patent is valid, if he has these bins and supplemental bins, with a space for the leg, it makes no difference how they are supported? A. So far as the first patent.

Q. Assume for the present he has a good patent, whether he chooses to utilize the space below does not make any difference; and the second patent is a method of support to give the greatest space below for that kind of structure?

A. Yes, and to not interfere in any way with the elevators. What is covered by the second patent, as it appears from the four claims, is first this method of support which your Lordship has mentioned there, and that is the subject matter of the first claim of the patent. Then the second claim of the patent combines with that method of support the construction of the elevator wells which are described

in the first patent. That is an element of the second claim, and the third and fourth claims deal with that method of support in connection with the girder construction, which is also used for supporting part of the weight. The last clause of the second claim recites the tie walls, which are the subject matter of the first patent. The first claim is for the method of support purely and simply, and the second claim is for that method of support in connection with the tie walls. The cylindrical bins, with the four-sided intermediate spaces, and the columns placed at diametrically opposite points, and furthermore there is an element "in that structure, and which is identified in that claim, and which is called the column extension; that is the extension which extends upwardly from the column between the bins, and extends up to the top of the bins."

Again he states:—

"His Lordship: Q. As I understand your evidence, it is simply this: Taking the circular bin, either steel or concrete reinforced or any other material, with the supplemental bins, whether you put the leg there or not, the patent relates simply to the support? A. Yes, and column extensions rising up from the —

"Q. The patent simply being the method of supporting it? A. Yes, that is my idea."

In his specification the patentee states:—

"As best shewn in Fig. 4 the upper ends of the columns 7" (the supporting columns) "are expanded at 7b so that they directly support and unite with quite large areas of the floor 3."

It has to be borne in mind that the load which has to be carried when the bins are filled is enormous. A certain portion of the load is carried by the bottom of the bin and a very large portion by the sides of the bin. The evidence of Ezra Wardell explains this.

What are called extension columns, therefore, not merely carry the weight of the cupola, but have also to so strengthen the parts of the two bins connected by the column extensions as to enable the side of the bins with the so-called column extensions to carry a great portion of the load.

The load is transmitted to the floor and girder construction and then transmitted to the column supports.

It is not correct to state that each bin receives its sole support from two columns, and I do not understand such a contention to be put forward on the part of the plaintiffs.

The first claim reads as follows:—

“1. The combination with a multiplicity of bins having their axes arranged in rows in two directions and on lines that intersect each other approximately at a right angle and having tangentially engaging sides united by vertically extended body portions, certain of which constitute column extensions, of supporting columns below said bins vertically aligned and united with said tangential column extension portions of said bins, and supporting the said bins only at two diametrically opposite points, substantially as described.”

The words “and supporting the said bins only at two diametrically opposite points” are repeated in the second and third claims.

Mr. Smith argued forcibly that this statement is untrue—that the sole support of each bin was not on two columns only; but I do not think this is the proper way to interpret the claim. I think it refers to the location of the columns. The load must be transmitted to the floor and the girder arrangement. The bins each rest on at least five girders. By means of the floor and girders the load is transmitted to the column supports.

The second claim is as follows:—

“2. The combination with a multiplicity of bins having their axes arranged in rows in two directions and on lines that intersect each other approximately at a right angle and having tangentially engaging sides united by vertically extended masonry body portions, certain of which constitute column extensions, of supporting columns below said bins, vertically aligned and united with said tangential column extension portions of said bins and supporting said bins at two diametrically opposite points only, and certain of which bins are further connected by transverse tie walls that extend from top to bottom of said bins and form, on opposite sides of the tangentially connected portions of the bins, spaces through which elevator legs may be passed, substantially as described.”

The third claim is as follows:—

“3. The combination with a multiplicity of masonry bins having their axes arranged in rows in two directions

and on lines that intersect approximately at a right angle, said bins having their tangentially engaged sides united by masonry body portions, certain of which constitute column extensions, of transversely intersecting metal reinforced concrete or masonry girders located below said bins, certain thereof being extended directly under and united with the tangential column extension forming portions thereof, and metal reinforced concrete or masonry columns below said bins united at their upper ends to said girders and to the said bins at points vertically below the joining portions of said girders and column extension portions of the bins, the said columns supporting said bins at two diametrically opposite points only, substantially as described."

The fourth claim is as follows:—

"4. The combination with a multiplicity of masonry bins having their axes arranged in rows in two directions and having their tangentially engaged sides united by masonry body portions, certain of which constitute column extensions, of metal reinforced concrete or masonry main girders extending tangentially below and united with the column extension forming portions of said bins, which latter are located at diametrically opposite points, and transverse metal reinforced concrete or masonry girders united with the said main girders, substantially as described."

As I understand, the rule to be adopted in construing claims of a patent is that where one combination claim embraces a particular element and a second combination claim omits the element, each claim should be construed by itself; and that the element omitted in the one claim cannot be drawn into the claim by reason of the words "substantially as described" being added to the end of the claim.

The girder and floor arrangement is omitted from the first claim. I do not think such a combination as described in this claim would be of any practical value. This claim also omits the elevator legs, assuming no doubt that they would be placed somewhere. The so-called web wall is not a feature.

The second claim also omits the floor and girder construction and inserts as an element the web wall to cut off the space for the elevator legs.

The third claim embraces the girder and floor construction, but omits the web wall.

Before dealing with the prior art, it should be pointed out that nowhere in the specification are any dimensions

given for the bins or for the column supports. Stress is laid on the benefit of the floor space below the bins. This space must depend to a great extent upon the size of the bins and the size of the supporting columns.

The patentee McQueen has, I think, as claimed by Mr. Anglin, established the date of his invention as being some time in the fall of 1905, or January, 1906. I will discuss this point later on.

In my opinion the supposed invention of the patentee is completely anticipated by what is called in the evidence the Montreal Harbour Elevator. This elevator was constructed during the years 1902 and 1903. It was in complete working order in 1903, and has been operated ever since with success. It may be that the elevators constructed by McQueen or his company, known as the Harlem & Peavy elevators shew better workmanship than in that of the Montreal Harbour Elevator, but as far as patentable design is concerned there is no difference.

Wait, a witness for the defence, describes this Montreal harbour elevator. He designed this elevator and superintended its construction. Plans are produced. Exhibit D-9 is a book shewing the structure, prepared from photographs taken at the instance of the Public Works Department. This elevator has a capacity of one million bushels. It comprises 78 bins—38 cylindrical bins with intersticed and outside spaces. The bins are arranged in rows at right angles. The bins are in close juxtaposition. The bins so arranged form supplementary bins. These supplementary bins, with the exception of four, are used for storage purposes. The four supplementary bins not used for storage are used for leg passages for the elevator legs. The two legs, the ascending and descending legs, are in the same supplementary bin. This difference seems to me not material. There is a working floor under the bins. This working floor is used for the passage of two car tracks, and on the working floor is located the cleaners, and the transformer room, and the belts that distribute the grain to the various carriers. The bins are of steel. They are supported above the working floor on a series of columns and girders. There is a system of girders and reinforced concrete floor supporting the bin structure. The supporting columns are placed on opposite sides of the circular bins at two diametrically opposite points and directly under the connection between the two bins. Superimposed upon the column is a column extension. It

extends up between the bins in precisely the same manner as the extension column claimed by the plaintiffs' patent. The construction of this extension column is slightly different but is there for the same purpose and performs the same function as the column extensions in the patent in suit.

This extension column in the Montreal harbour elevator consists of two rolled channels placed back to back, bolted through the trunk shell, connected by splice plates and angles at their joints and running continuously from the bottom of the bin walls to the top of the bin walls, the space between the two channels being filled with concrete. The concrete between these channels rests on the bin supporting floor and it rests directly over the centre column both ways. These column extensions of concrete and steel are utilized for carrying the column loads from the cupola structure, the cupola column coming down directly on these column extensions.

These column extensions necessarily assist in supporting the bins and must of necessity aid the bin walls in carrying a part of the load.

Metcalfe, another witness for the defence, corroborated Wait.

Wilhelm, the expert for the plaintiffs, in giving evidence in chief at the opening of the case, asked in reference to this Montreal harbour elevator, states as follows:—

“Q. Here is a book of plans of the Montreal Harbour Commissioners' elevator, constructed by the Steel Storage Construction and Elevator Company (Exhibit 9). Will you look at the printed pamphlet, containing a reprint of the drawings for the elevator in the Harbour of Montreal, which has been filed as exhibit D. 9, and look at sheet 12, and tell His Lordship what you find there with regard to arrangement of bin elevator leg passages, etc.?”

[Mr. Anglin.—This is subject to proof of date, of course.

Mr. Smith.—Yes.]

A. The bin arrangement is that of circular bins arranged in two rows at right angles to each other and of intermediate four-sided bins apparently, and apparently the elevator legs are arranged in certain of the intermediate bins. If those long rectangular figures indicate the elevator legs, and there are lines drawn across some of these that I do not know what they represent. They may be tie plates.

Q. You observe on the exterior rows of bins a web wall making an auxiliary bin in each case. A. Yes.

Q. You also observe that the elevator legs occupy the angular portions of certain of the intersticed bins? A. Yes, if those are legs, and I suppose they are.

Q. Then in this construction of the Harbour Commissioners, is it not a fact that you have identically the same arrangement of bins, the formation of the interstice bins and the legs passages in identically the same positions as the first patent in suit? A. Well, we have the legs in the same position, but no leg passages."

Later on in reply, Wilhelm states as follows:—

"Q. The bins in the Montreal elevator are cylindrical bins, arranged in two rows at right angles? A. They are.

Q. They are tied together? A. They are.

Q. And their legs are placed, as you have just told us, in the angular portion in each case between two cylindrical bins? A. I believe they are—yes, they are in the angular portion of the interspaced bins. "

"Q. At each of the tangential connections of the cylindrical bins there is a thickening, is there not, in the case of the Montreal elevator—call it a column or call it anything you like? A. Oh, there is an upright connection consisting of channel plates, which extend from one bin to the other and run up and down between the bins.

"Q. Through the whole bin section? A. Yes.

"Q. And they are filled with what? A. I understand some concrete and cement material, some rigid material.

"Q. So they form pillars or columns between the bins? A. They do.

"Q. It is not a fact that the columns are over the piers, or whatever you like to call it below? A. They are.

"Q. The foundation piers? A. Yes.

"Q. Now, if you had columns the same shape as the columns in the second patent you would then call these column extensions, would you not? A. These connections would at least stand where the column extensions stand in the second patent, although they might not be of the same proportion as the column extension of the second patent."

I fail to see any material difference from a patent point of view between this structure of the Montreal Harbour elevator and that of the plaintiff's patent. Stress seems to be laid on the fact that the plaintiffs' structure is monolithic. There was nothing new in the art as to monolithic structures. The patentee is not confined to what would be technically a

monolithic structure. The Montreal structure is for practical purposes monolithic; at all events the bins are rigidly united at their adjoining peripheral portions. The load is carried in the same manner—distributed by the floor and girders in the same manner, and the load is carried by column extensions or their equivalent, placed and situated in the same relative position in line with the column extension.

I have perused all the cases cited by Mr. Anglin. Each has to depend upon the facts of the particular case under review, and while it may be that very slight invention, especially where the result is beneficial and useful, will support a patent, I cannot think that in the case I am considering there is any invention.

I have not lost sight in considering the case, of the other previous anticipations which go a long way to destroy the plaintiffs' patents. Neither have I overlooked the contention of the defendants that having regard to the state of the art and prior disclosure the patents, even if valid, would have to receive such a restricted construction as to require me to hold that the defendants' construction is not an infringement.

In the view I take of this case it may be unnecessary to consider the other questions very fully and ably argued, but as I have been asked by counsel to do so, I will express my opinion on one or two of the points raised.

In dealing with combination claims a good deal of confusion has arisen, I think, from a misuse of language.

In England, prior to 1883, a claim was not requisite to the specification, although it was usual to insert a claim as part of the specification. Under our practice a claim is required. It is now also required by the English practice, although the House of Lords in one case held this provision to be declaratory only.

It is unnecessary in this particular case to deal with the question of the effect on a specification where no claim forms part of the specification. The purpose of the claim is (according to the late Sir George Jessel) to disclaim all that is not claimed. (See *Hinks v. Safety Lighting Co.*, L. R. 4 C. D. 613; *Plimpton v. Spiller*, L. R. 6 C. D. 412). This definition of Sir George Jessel has been found fault with by later Judges. The present view seems to be that the purpose of the claim is to delimit the scope of the patentee's invention. See *British United Shoe Machinery Co., Ltd. v. Fussell & Sons, Ltd.* (25 R. P. C. 631).

It is not of much consequence what language is used; the result is the same. The claim in the case before me is a claim for a combination of old elements; although being for a combination it is not of materiality so far as the construction of the claim is concerned, whether one element is new or not. If an element is new and the patentee is entitled to a patent for the novel element or elements he should claim this separately. Any new invention which the patentee sets out in his specification, if not claimed, is given to the public. It is the fault of the inventor in not claiming it and he must suffer. The combination of old elements is the invention, provided it is the subject matter of a patent, and the Court finds invention.

In construing the claim for a combination, reference must of course be had to the preceding specification and the state of the art, and the patentee is entitled to a fair and liberal construction. If, however, the patentee has chosen in unambiguous terms to incorporate an element as a part of his combination, then the mere fact that subsequently he may find out that he might have omitted this element does not help him. I venture to think that a careful consideration of the English authorities shew that in reality there is no distinction between the law as regards combination claims and the infringement thereof as decided in England, from the law as decided in the United States. The first question to ascertain is what is the combination claimed as the invention? If on a proper construction of the claim and specification, having regard to the state of the art, it be determined that an element forms part of the combination the patentee cannot get rid of this element as being an immaterial or non-essential element. No such thing as an immaterial or non-essential element in a combination is recognized in the patent law. Having regard to the essentials of a combination the admission that an element is not material is an admission that the combination claimed is an invalid combination and the claim is bad. It follows that if the alleged infringer omits one element of the combination he does not infringe the combination. Of course if instead of omitting an element he substitutes a well known equivalent he, in fact, uses the combination. I will deal later on with this latter aspect in considering the defendants' construction. Patent authorities are so numerous, it is impossible to cite more than a few.

Dealing first with the United States:—

Prouty v. Ruggles, a decision of the Supreme Court of the United States, is reported in 16 Peters, 341. It has been followed in numerous cases.

Vance v. Campbell (1 Black S. C. U. S.), decided in 1861, at page 427:—

“A combination is an entirety; if one of the elements be given up the thing claimed disappears. The patentee cannot prove any part of the combination immaterial or useless.”

Eames v. Godfrey (1863), S. C. U. S. 1 Wall. 78:—

“There is no infringement of a patent which claims mechanical powers in combination, unless all the parts have been substantially used.

“The use of a part less than the whole is not an infringement.”

Gould v. Rees (1872), S. C. U. S. (15 Wall. 187):—

“If three elements be claimed in combination, the use of two is not an infringement.”

Powell v. Lindsay (1884), 113 S. C. U. S. page 102:—

“The patent being for a combination there can be no infringement unless the combination is infringed.”

Adam v. Folger (1903), Circuit Court of Appeals, 7th Circuit (124 Fed. Rep. 263):—

“It is well settled that there is no infringement if any one of the material parts of the combination is omitted, and that a patentee will not be heard to deny the materiality of any element included in his combination claim. If a patentee claims eight elements to produce a certain result when seven will do, anybody may use the seven without infringing the claim, and the patentee has practically lost his invention by declaring the materiality of an element that was in fact immaterial.”

See also Walker on Patents (4th ed., 1904), sections 32 and 33.

In considering the English authorities, care must be exercised in dealing with authorities such as Foxwell v. Bostock (4 DeG. J. & S. 298), where there being no specific claim the patentee has set out in his specification his invention, and it is a question of fact what the invention is. If the specification be doubtful, and one element might be claimed but is non-essential, the Court might lean to a construction favourable to the patentee and conclude that this

element being non-essential did not form part of the combination claimed.

This case of *Foxwell v. Bostock* is probably overruled, Mr. Terrell, in his book on Patents (5th ed., 1909), page 134, discusses this case, and also the case of *Harrison v. Anderston Foundry Co.* (L. R. 1 App. Cas. 574), decided by the House of Lords in 1876. The law laid down by the House of Lords is the same as decided in the United States.

The case of *Consolidated Car Heating Co. v. Came* (1903 App. Cas. 509), has to be carefully considered. The claim sued upon in that case is as follows:—

“In a two-part hose coupling, composed of like halves or portions, each of which has a free and unobstructed passage through it from end to end, which passages co-operate together to form a longitudinal unobstructed passage directly through the hose coupling, combined with locking devices as described, upon each side to lock the said halves or portions together as set forth.”

It will be noticed that the wording of the claim is “combined with locking devices as described,” etc.

To get at the true meaning of the claim, and what formed the locking devices as described, resort was necessarily had to the previous part of the specification (of course having regard to the previous state of the art to assist in its construction), and placing a fair construction on the claim, their Lordships were of opinion that certain features were embraced in and formed part of the locking device, and the defendants not having used them, there was no infringement. There is nothing inconsistent between the decision in this case and the decision in the case of *Harrison v. Anderston Foundry Co.* (*supra*).

Reference may also be made to the following authors and authorities:—

Terrell on Patents (5th ed., 1909), pages 58, 59, 130; Fulton on Patents (4th ed., 1910), pages 43, 47, 53; and the case of *Bunge v. Higginbottom & Co., Ltd.* (19 R. P. C. 187, 1902 C. A.) This is a case holding that the plaintiff was limited by his specification, The brushes were fastened to the inner walls, and the Court held that the patentee had made this construction a part of his invention. The invention in this case was a meritorious one.

See also *Stone & Co. v. Broadfoot* (26 R. P. C. 379), a decision of the Court of Sessions, Scotland.

The Canadian Courts have, as a rule, invariably followed the decisions of the United States Supreme Court in dealing with this question.

There are a few decisions that give groundwork for an argument that an element in a combination which turns out to be a non-essential element may be discarded.

Generally speaking, these authorities were adjudged on the particular facts of the case under review.

There is also the case of *Gwynne v. Drysdale* (3 R. P. C. 65, Court of Sessions, Scotland). This case is referred to with approval in the case *Consolidated Car Heating Co. v. Came* (supra), at page 517. See also *Thornton on Patents* (1910), at page 21.

I think the patentee *McQueen* in his claims in the first patent must be held to have included as an element of his combination the leg passages 6. I do not see how any reasonable construction of the specification can lead to any other conclusion.

The drawings which are added are merely to illustrate the invention claimed. Figure 2 of the drawings makes it quite clear, and the specification on page 2 is equally unambiguous. I think, however, *Mr. Anglin's* contention put forward in reply is correct, and that the defendants have the leg passages or their equivalent. The model of the defendant's structure produced shews leg passages both below and above the bin, but does not shew the construction between the bins. The plan of the structure which is admitted shews a guide for any grain that may drop from the buckets directing such grain to the leg passage below. It is obvious that between the bins the only use of the leg casing is to guide the grain, and I think the defendants' structure is practically the same, the change being merely a change to a mechanical equivalent effecting the same result.

Another question of considerable importance was argued before me. Counsel for the defendants contend that the patentee, *McQueen*, was disentitled to a patent (if otherwise entitled) by reason of the fact that his invention was in public use or on sale in the United States of America for more than one year previous to his application for a patent in Canada.

The contention of the defendants is that the law as decided in the leading case of *Smith v. Goldie* (9 S. C. R. 46) has been changed by the Revised Statutes of 1886, and that now the words "public use" or "on sale" should not be

limited to "in Canada." I am informed by counsel on both sides that this question has not yet been decided by any Court. I am not aware of any decision.

In approaching the consideration of this question, I construe the statutes as if the punctuation were omitted. See Maxwell on Statutes (4th ed., 1905), page 62. *Duke of Devonshire v. O'Connor* (L. R. 24 Q. B. D. 478 (1890)). It is well to consider what was actually decided by *Smith v. Goldie*. This case is reported in 9 S. C. R. 46. Part of the head-note to this case reads as follows:—

"1. To be entitled to a patent in Canada, the patentee must be the first inventor in Canada or elsewhere. A prior patent to a person who is not the true inventor is no defence against an action by the true inventor under a patent issued to him subsequently, and does not require to be cancelled or repealed by *scire facias*, whether it is vested in the defendant or in a person not a party to the suit.

2. The words in the 6th section of the Patent Act, 1872, 'not being in public use or on sale for more than one year previous to his application in Canada,' are to read as meaning 'not being in public use or on sale in Canada for more than one year previous to his application.'"

A perusal of the written opinions of the Judges who composed the Supreme Court at the time of this decision, would fail to disclose the fact that these two important points stated in the head-note had been passed upon by the Court. None of the Judges who then composed the Supreme Court are now members of the Court.

As I was counsel in the case, and very familiar with the facts, I think it well to clear up the question.

Both the propositions of law stated in the head-note were in fact decided in the manner stated. They had to be so decided, otherwise the plaintiff *Smith* could not have succeeded. A careful consideration of the facts shew this.

The case was originally tried by the late Chancellor *Spragge*, who dismissed the suit on the ground that contrary to the terms of the statute the patentee had imported the patented invention into Canada.

The Court of Appeal dismissed the appeal on the ground that under the evidence adduced there was no invention. They were of opinion that the question of importation was not open as a defence. Apparently both in the Court of Appeal and in the Supreme Court the conclusion was that

the decision of Dr. Tache was one in rem and not open to revision. See *Power v. Griffin* (33 S. C. R. 39). While the appeal to the Court of Appeal was dismissed on the ground stated, the Judges of that Court, especially Mr. Justice Patterson, discussed fully and passed upon the question reported to have been decided by the head-note referred to.

The Supreme Court of Canada reversed the decision of the Court of Appeal and pronounced judgment in favour of the plaintiff.

As I have stated, the Court could not have decided in favour of the plaintiff unless they adopted the views of Mr. Justice Patterson on the two questions now under consideration. I extract the dates from the judgment of the Court of Appeal.

Smith's application for a patent in Canada was dated 11th January, 1873. His Canadian patent bears date 18th April, 1873. (See page 629, 7 Ont. A. R.). Sherman and Lacroix each had Canadian patents issued in 1872 (see page 635). The machine in question, the invention of Smith, was in complete working order in the United States in April, 1871 (see page 633). His application in the United States was in July, 1871 (see page 633). On page 641 Mr. Justice Patterson points out that had the law not been changed "the patentees of the rival machines who obtained their patents at Ottawa in 1872, must as against the plaintiff Smith have been held to be the first inventors."

At pages 640, 641, Mr. Justice Patterson reviews the changes in the Canadian law. Referring to the Consolidated Statutes of Canada, chap. 34, sec. 3, it is pointed out that under that law no one was entitled to a patent except a subject of Her Majesty. This Act authorizes the granting of a patent, etc., "the same not being known or used in this province by others before his discovery or invention thereof."

In 1869 by 32-33 Vict. chap. 11 the privilege was extended to any person who had been a resident of Canada for one year before his application. See section 6 of this statute.

In 1872 (not 1875 as erroneously printed on page 641 of the Appeal Court report), by 35 Vict. cap. 26 the restriction as to residence was removed, and quoting Mr. Justice Patterson, page 641 "thus in all respects placing foreigners on the same footing with subjects, but at the same time and as a complement of this extension of the privilege required abso-

lute novelty—not merely novelty within the Dominion, in the invention.”

This decision in *Smith v. Goldie* (supra) has been followed in all the cases subsequently decided, with the exception of one case, in which the learned Judge drew a distinction in favour of a Canadian inventor who had obtained a patent in Canada earlier in point of date than an American inventor who was held to be a prior inventor to the Canadian inventor, but who obtained his patent in Canada on a date subsequent to that of the Canadian inventor. (*The Queen v. Laforce*, 4 Ex. C. R. 14.) There is no justification for such a decision when the law as adjudged in *Smith v. Goldie* is understood. The case referred to was settled prior to the hearing of an appeal taken to the Supreme Court.

In considering the Canadian statutes, care must be exercised in reviewing the English and American authorities on this question to note the differences that exist between the English and the American statutes and the Canadian law.

In *Summers v. Abell* (15 Gr. pp. 532, 536, 537), the language of *VanKoughnet, C.*, and *Spragge, V.-C.*, may be referred to.

On this question of invention the Canadian statute is very similar to that of the United States prior to 1836. The statute of 1790 of the United States reads as follows:—

“Any person setting forth that he, she or they hath or have invented or discovered any useful art, manufacture, engine, machine or device, etc., not before known or used.”

This Act of 1790 was amended in 1793, which latter Act provided that the invention must have been one “not known or used before the application.”

Under the Act of 1790 there was no limit to the time or place of user. Under the Act of 1793 there was no limit of place. Under these two statutes the Courts held that the inventor must be the first inventor as to all the world in order to be entitled to a patent. This is practically what the present Canadian law requires. It was thought in the United States that this pressed hardly on inventors, and a change was made in 1836, providing that the Commissioner might grant a patent “if it shall not appear to the Commissioner that the same had been invented or discovered by any other person in this country prior to the alleged invention or discovery thereof by the applicant.”

Cases in which the American Courts dealt with the question of prior invention under the Acts prior to 1836 may be considered. *Gaylor v. Wilder* (10 How. 188); *Coffin v. Ogden* (18 Wall. 120).

Considering now the second question, namely, whether Parliament has altered the law as laid down in *Smith v. Goldie* (supra), and whether use or sale in the United States for more than a year prior to the application for a patent in Canada disentitles the applicant to a patent.

No doubt can exist that *Smith v. Goldie* distinctly laid down the law that use or sale under the statute then in force must be confined to use or sale in Canada. It was argued in that case that if the inventor must be the inventor the world over that use or sale with the consent of the inventor anywhere for more than a year prior to the application for a patent in Canada should defeat the right to a patent. It might be that the right of an inventor to a patent in the United States had been lost by a user or sale for more than two years in the United States. Nevertheless, he might apply for and obtain a patent in Canada with the result that it was public property in the United States, but a monopoly in Canada. The determination of this point depends on a construction of the statute then in force, and it was held that the words "in Canada" referred to the use or sale, and not to the application for a patent. See judgment in Court of Appeal, page 641.

The word of the statute of 1872 in the English version reads:

"And not being in public use or on sale for more than one year previous to his application in Canada," etc.

The words of the French version of this statute read:

"Et ne sera pas dans le domaine public ou en vente en Canada, du consentement ou par la tolérance de l'invention, depuis plus d'un an," etc., etc.

In the revision of 1886 (R. S. C. 1886), cap. 61, the English version reads:

"And which has not been in public use or on sale with the consent or allowance of the inventor thereof for more than one year previously to his application for a patent therefor in Canada," etc.

The French version reads as follows:—

"Et si elle n's pass été d'un usage public ou en vente, de son consentement ou par sa tolérance, pendant plus d'une année

avant sa demande de brevet pour cette invention en Canada," etc.

In the Revised Statutes of Canada, 1906, cap. 69, sec. 7, the language used in the English version is the same as quoted above from the Revised Statutes of Canada, 1886.

The French version in the Revised Statutes of Canada, 1906, is identical in language with that quoted above from the Revised Statutes of Canada, 1886.

It might be argued that as the statute is only dealing with patents and applications for patents in Canada, therefore the words "in Canada" should be taken to refer to public use or sale. The statute R. S. C. 1906, cap. 69, however, in other sections uses the words "in Canada" as referable to the application for a patent. For instance, in section 8 we find the following expressions:

"Before obtaining a patent for the same invention in Canada" . . . "may obtain a patent in Canada" . . .  
 "of his intention to apply for a patent in Canada" . . .  
 "after the inventor has obtained a patent therefor in Canada."

Section 8 of cap. 4, 49 Vict. respecting the Revised Statutes of Canada, 1886, reads as follows:—

"The said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Acts or parts of Acts so repealed, and for which the said Revised Statutes are substituted.

2. But if upon any point the provisions of the said Revised Statutes are not in effect the same as those of the repealed Acts and parts of Acts for which they are substituted, then as respects all transactions, matters and things subsequent to the time when the said Revised Statutes take effect the provisions contained in them shall prevail, but as respects all transactions, matters and things anterior to the said time the provisions of the said repealed Acts and parts of Acts shall prevail."

My opinion is that there is a marked difference between the provisions of the Revised Statutes of 1886 and the statute of 1872 under which *Smith v. Goldie* was decided. I do not think the words "in Canada" can be held under the later statute as referable to "the use or on sale," but are referable to the application for the patent.

Parliament has continued the policy differing from both English and American legislation of requiring an inventor

to be an inventor anywhere, and the same rule of construction as requires the words "not known or used by others" to be construed as applicable beyond the Dominion I think calls for the same construction to be placed on the words "not being in public use or on sale."

There is no reason why an inventor should have a monopoly in Canada for an invention which prior to his application for a patent in Canada he has abandoned to the public of the United States by user or sale.

This being the view I entertain as to the proper construction of the statute, it becomes necessary to consider the question whether the invention had been in public use or on sale with the consent of the inventor in the United States of America for more than one year previous to his application for a patent therefor in Canada.

The two cases put forward on behalf of the defendants in support of their contention that the patentee had abandoned his right to obtain a patent by reason of the invention having been in public use or on sale with the consent of the inventor are what are called in the evidence the Harlem elevator and the Peavey elevator in Duluth. The evidence in regard to the latter is meagre.

In considering this question care must be exercised in dealing with both the English and American authorities. The law of England differs from the law of the United States, as do the laws in England and in the United States differ from the Canadian statute. In the United States the statute provides:

"And not in public use or on sale in this country for more than two years prior to his application."

The following propositions are decided *In re Mills*, Court of Appeal, District of Columbia (Off. Gaz. U. S. Pat. Off. Vol. 117, page 904):—

1. A single unrestricted sale of the invention is a public sale and puts it on sale.
2. A single sale of the invention by the inventor for experimental purposes where he is unable otherwise to make proper tests does not put the invention on sale.
3. Where a clear case of on sale is made the onus is on the inventor to prove the sale was for the purpose of testing.

A further point must be borne in mind in considering the question, that is, the difference between what is called a "trader's" experiment and an "inventor's" experiment. *Smith v. Davis Mfg. Co.* (Circuit Court of Appeals, 8th Circuit, 1903; 58 Fed. Rep. 705).

The facts in each case have to be carefully considered to ascertain whether the inventor was in fact experimenting with the view of perfecting his invention. The decision in *Elizabeth v. Pavement Co.* (97 U. S. 126) (the pavement case) is relied on. The Court in that case held that use in public for several years did not prevent the patentee from obtaining a patent. The Court in that case, however, held that there was no question as to the bona fides of the inventor that it was merely experimental. They found that "Nicholson did not sell it nor allow others to use or sell it." "He did not let it go beyond his own control," etc.

In England it has been held that an offer to sell, even though no sale, is evidence of prior publication. *Terrell on Patents* (5th ed. 74); *Osley v. Holden* (8 C. B. N. S. 704).

It was also decided in England that an invention may be anticipated by a drawing unaccompanied by explanation, provided any machinist could understand it. *Terrell on Patents*, 5th ed., p. 80; *Electric Construction Co. v. Imperial Tramways Co.* (17 Cutler's R. P. C. 539).

In a case of *Wheat v. Brown* (L. R. 1 Q. B. D. 481 (1892)) the words of the statute are "exposed for sale by retail" (referring to margarine). The Court held that the words "exposed for sale" are well understood terms, and cannot be limited so as to only mean "exposed to view."

To deal with the facts of this case: It is contended by Mr. Anglin, and the contention is sustained, that McQueen's so called invention was not later than January, 1906. It was probably earlier by a few months. The contract for the Harlem elevator is dated 26th October, 1905. I will set out in full the evidence of McQueen relating to the Harlem elevator; also as to the Peavy elevator at Duluth:—

"Q. Now just to go on with your history of the development of the invention, at this time when you made this price of \$360,000 to the Chicago, Burlington & Quincey Railway for a fire-proof working house of equal capacity with the square bin steel house, which was to cost \$485,000 with the same machinery, did you furnish them plans with the proposi-

tion, or how was that? A. No, I made the proposition verbally to them.

Q. Just that you would do this? A. Yes.

Q. At that price? A. Yes.

Q. Did they or did they not accept the proposition? A. They accepted the proposition some days later with the outline plan.

Q. What date in 1905 was that, approximately? A. It was the latter part of the year 1905.

Q. Getting on in the fall of 1905? A. Yes.

Q. Were there any detail plans in existence. You said you had not submitted them. Were there any? A. No.

Q. How far had you got yourself with your ideas at that time? A. Just far enough to know that I could place the columns under the centre of the bins in one direction and support them with two columns only, and provide a passage-way for the legs up through the bins at the opposite contact point.

Q. And that progress to that point had been the result of your thinking out of the situation? A. Yes.

Q. But you had not committed that to plans at that time? A. In an outline that would not disclose to anyone but myself what it meant.

Q. Have we that outline here, do you know? A. I think we have; it is attached to the contract.

Q. Just go on with the story of the Harlem construction? A. My intention was—and our contract was drawn that way—to use a structural steel frame work of vertical columns and horizontal girders to support these masonry bins, but after getting into the calculations more deeply we found that it would not work good, and had our contract supplemented and changed to allow us to use a reinforced concrete column and frame work.

Q. So that down to the time of the making of this bargain with the C. B. & Q. people you had not arrived at a concrete construction below the bin floor? A. No; our first thought was steel frame.

Q. And after you had arrived at your bargain with them you got further on and got to the concrete throughout construction. A. Yes.

Q. Did you make plans, and if so, have you got them, shewing the whole of that construction? A. Yes, sir; some time three months later than the date of the contract.

Q. That would carry us on to the midwinter of 1905-6.  
A. Yes.

Q. These are the plans that you are now referring to as having been prepared in the midwinter of 1905-6? A. Yes.

Q. There are here three sheets? A. Yes.  
(Plans Exhibit 7a, 7b and 7c.)

Q. In this exhibit 7 will you shortly state to the Court what construction is shewn? A. These plans shew a reinforced concrete construction.

Q. These shew a reinforced concrete construction from top to bottom? A. They shew a reinforced concrete construction of columns, girders and supports for the tile bins.

Q. Were the bins subsequently built of tile? A. Yes.

Q. So that what is shewn here and what was afterwards built is a structure of concrete, except as to the bins, which are of tile? A. Yes.

Q. Then when were these plans 7a, b and c made? A. They were made along in the first part of 1906.

Q. I see one of them has December 12th, 1906, with 'January' written over; what is the fact as to that? A. January would be proper on that. There was a mistake made in that. The lettering was done by the railway engineers. They have initialled those plans and they have corrected that.

Q. That was corrected by the railway engineers, and what is this in ink written upon the plan? A. Approved C. H. Cartledge, bridge engineer C. B. & Q.

Q. What date? A. Approved January 30th, 1906, Calvert, Chief Engineer.

His Lordship: Q. When was that built? A. 1906 and 1907.

Q. What date were they finished? A. We got an acceptance about August, 1907.

His Lordship: What was the date of your application for the patent?

Mr. Anglin: There were two applications. The last of them was April, 1906; one December, 1907, and the other April, 1908.

His Lordship: The first patent had no connection with the storage?

Mr. Anglin: Neither patent has any connection with what is strictly called storage house. The second is for the working house.

His Lordship:—The first is not for a working house?

Mr. Anglin: Yes, it is also for a working house.

His Lordship: It does not say so.

Mr. Anglin: It is incidentally shewn. I do not want to anticipate it. Q. So that these plans were made in January, 1906, or December, 1905, and were approved in January, 1906? A. Approved January 30th, 1906.

Q. All three of them? A. Yes.

Q. His Lordship asked a question as to the construction of the elevator that you mentioned, that it was accepted some time in 1907. We might get the record of that. You have here, I understand, the letter to your company, the Barnett & Record Company, asking for acceptance, and their letter in reply, and a subsequent letter from you, and the letter in reply to that; the last, which is the letter of the railway company, stating that 'it now seems to be finished up in satisfactory shape,' being dated October 11th, 1907? A. Yes.

Mr. Davidson: I suppose those copies will be taken under reserve.

His Lordship: Yes, if you wish.

Mr. Davidson: I have not seen them. I do not know what they contain.

Mr. Anglin: Q. Two of these are the actual original letters? A. Yes.

Q. The letter of August 23rd, 1907, and the letter of October 11th, 1907, are the original letters written by the railway company to your American company? A. Yes.

Q. And the others, I believe, are carbon copies? A. Copies of our letters to them.

Q. Are they duplicates made at the time, or are they carbon copies? A. They are carbon copies made at the time.

Mr. Anglin: There are two original letters, with two copies. (Exhibit 8). Q. What was your reason for going

into this construction of this Harlem house in the way you did, without plans of development, and then working it out later? A. I was very anxious to be given a chance to demonstrate this type of construction; that was one of the principal reasons, and I made a proposition to the railway officials that was so favourable, that they thought so favourably of, that they accepted and let me go under contract.

Q. Did they impose any special terms upon you in connection with the work? A. Yes, with our company; they made the company guarantee the construction.

Q. In what direction? A. Guarantee it as to stability and performing the services of a grain elevator for two years after their acceptance.

Q. Is that the ordinary time? A. No; we had a six months' guarantee on the machinery and equipment, and two years on the building structure governing this particular type of construction; they also exacted surety companies' bonds covering the guarantee.

Q. Why was that? A. They did not know what type of an elevator or kind of construction we proposed giving them, and went entirely on our reputation that we would do as we agreed to do.

Q. Now, as you got on with the work of this plan, you had explained to me your change in plans from a steel construction below the bins to concrete construction, as you got on with the working out of these plans, did other changes occur, and if so, what and why? A. We did not get the house worked out in all its details for some time after the date of those plans. It required a study clear to the end of the construction, and we found it necessary or advisable to change some from this type of construction to the next design we made.

Q. That is the next work? A. Yes.

Q. But so far as the construction is concerned, that went through on these plans that are filed, with various detail plans which were worked out, as you went to make a complete construction of it in detail? A. Yes.

Q. But the general construction is shewn by these three plans? A. Yes.

Q. And you say the changes you were referring to a moment ago, which resulted from this, were carried into other subsequent structures? A. Yes.

Q. Did these changes which were carried into subsequent structures result from your observation of the results which flowed from the working out of the structure under the plans of the Harlem elevator and the operation of that structure when it was operated? A. Yes.

Q. What was your next design of house, or rather what house did you next design? A. The Peavey Duluth Terminal at Duluth.

Q. I understand the Peavey people are about the largest handlers of grain in the west? A. They are one of the largest.

Q. And this was their terminal elevator at Duluth? A. Yes.

Q. When was that? Have you the papers relating to that? A. The contract and outline plan.

Q. Does that plan shew the Peavey Duluth construction? A. Yes, in an outline manner; some changes in it. (Contract Exhibit 9).

Q. Does it shew it sufficiently for the purpose of permitting the Court to say from it that the patented inventions were embodied in the structure? A. Yes.

Q. We do not require to put in any more? A. No.

Q. This plan is dated March 6th, 1906? A. Yes.

Q. And was prepared at that time? A. Yes.

His Lordship: Q. Where are the legs in that plan? A. They do not shew in that plan. That just shews the details of the girder and column construction.

Q. Where do the legs go in the construction? A. It is shewn in the Peavey plan.

His Lordship: What is the date of the earlier patent?

Mr. Anglin: December 7th, 1907.

Q. Look on the Peavey Duluth Plan, Exhibit 9, and point out where the legs go? A. They are here.

Q. This elevator for the Peavey Duluth Company was constructed, I believe? A. Yes.

Q. And you spoke of some changes which your experimental work on the Harlem construction induced you to introduce into the Peavey construction; what were those? A. Principally in the girder and column frame. We found by actual calculations that we had a heavier construction at the Harlem than we required.

Q. What do you say? A. We found we had a heavier construction than we required.

Q. You found you had put a heavier substructure into the Harlem elevator than was really required? A. Yes.

Q. What changes did you make following on what your Harlem work shewed you? A. We reduced the section of girder, and I think the shape of the columns somewhat.

Q. The shape of the columns under the girders? A. Yes, and some other features of the construction.

Q. These were all structural details which, as I understand it, did not affect the question of the patent invention? A. No.

Q. Except in the working out of it in the actual practical structure? A. Yes.

Q. Nothing else that you remember of in the way of change in this? A. No.

Q. This elevator was built, I understand, but not completed, until along in 1907? A. Some time in 1907, June or July, somewhere along 1907."

The contract for the construction of the Harlem elevator is produced. It is very specific and complete. The plans referred to, Exhibits 7a, 7b, 7c, were substituted so far as material of a portion of the work was concerned. These were approved on 30th January, 1906. It is clear and so contended that these plans were a complete disclosure of the invention, and the elevator was to be constructed according to the plans.

The specifications refer to various matters.

#### *Commencement and Completion.*

Contractor shall commence the work on being given possession of the site, and shall so conduct his work as to give the plant to the owner ready to operate at full capacity in receiving and shipping or cleaning of grain, on or before July 1st, 1906.

#### *Testing and Accepting Elevator Plant.*

Everything necessary to make the plant complete as hereinafter described having been put in place, the plant shall

be turned over to the owner for business, and he shall at once place a competent superintendent in charge with the full operating force, and proceed to operate the same for a period of fifteen days or such time as may be required to test the different parts of the plant, and the contractor shall keep an experienced man in charge of the building. During this time any reasonable test may be required by the owner to prove the efficiency of the work. If everything about the plant performs its office as intended by these specifications the plant shall then be accepted. If any points of the building or machinery are found defective during the test, the contractor shall at once proceed to make such corrections as may be necessary. After such corrections shall have been properly made the plant shall then be accepted.

The work house shall be 60 x 180 feet on the ground divided into fifteen bays. The construction of this house will be, outside brick walls resting on the concrete foundation up to the bin bottoms. The bins will be supported with a frame work of steel columns and girders and on top of these steel girders will be a slab of re-inforced concrete covering the entire area. On top of this concrete slab will start the bin walls. They shall consist of forty-eight circular tile bins and thirty-three intermediate bins, making a total of eighty-one bins and a storage capacity of 450,000 bushels.

#### *Elevator Frame.*

This will consist of steel columns, beams and girders as shewn on plan. The steel columns shall be provided with cast iron base plates and have steel knee braces.

#### *Leg Casings.*

Leg casings for the receiving and shipping elevators will be made of No. 14 steel and put together with angle iron at the corners. These legs will be equipped with proper openings for getting at the belts. The leg casings of the small standard elevators will be made from No. 16 steel.

#### *Elevator Legs.*

There will be four stands of receiving elevator legs and four stands of shipping elevator legs. These elevators will be

equipped with 20 in. x 7½ in. x 7 in. buckets, made in accordance with the detail drawings. Each one of the stands of elevator legs will be supplied with a 1,600 bushel garner and a 1,600 bushel scale. The other ten stands of small elevators will be equipped with 12 in. x 6 in. x 6 in. buckets.

Clause 5 of the contract reads as follows:—

“5. It is mutually agreed that the chief engineer for the owner shall be the arbitrator to decide as to the quality of material furnished and work performed by the contractor under this contract, and as to any extension of time claimed by the contractor, and his decision shall have the force of an award and be final and conclusive to both parties. But as the contractor is the originator and designer of the aforesaid works, he shall have the right to decide all matters pertaining to design or form of construction of the work and be responsible to the owner for the correctness of the same.”

Clauses 8 and 9 of the contract are as follows:—

“8. The contractor shall execute and deliver to the owner a bond to secure the owner in the faithful performance of this contract by said contractor, in the penal sum of thirty thousand dollars (\$30,000) with a surety company as security thereon, by use of the bond hereto attached, the surety to be such as may be approved by the treasurer of the owner.”

“9. The owner shall pay and the contractor shall accept, the sum of three hundred and sixty thousand dollars (\$360,000) in full payment for the materials and labour herein agreed to be furnished by the contractor for the construction and completion of the works hereinbefore described, and for the full and complete performance by the contractor of all the covenants herein contained and specifications herein referred to; payment thereof to be made in the manner and within the time set forth in the attached specifications under the head of ‘estimates and payments,’ except as the same may be modified by the foregoing provisions of this indenture.”

The work was proceeded with and sums on account amounting to over \$280,000 paid prior to 23rd October, 1906.

A second contract was entered into between the same parties bearing date 26th November, 1906, for the erection

of a storage house, as stated in the contract "adjoining their present elevator and connected thereto at Harlem."

In the specifications under "General Description" is the following:—

"The work shall consist of a tile storage house resting on a reinforced concrete foundation and connected to present working elevator with three concrete tunnels to basement and three enclosed steel bridges at cupola."

The final payment for the Harlem elevator was made on the 21st January, 1907. The application for the second patent was on the 6th April, 1908.

Certain correspondence was produced from which it was contended that there was no acceptance of the Harlem elevator until August, 1907. This correspondence relates to the storage elevator, the subject matter of the second contract of 26th November, 1906.

The Peavey plan for the elevator at Duluth is dated 6th March, 1906, and in the evidence quoted it is stated that this plan shewed the whole invention. I think the Harlem elevator was constructed and in use prior to the 26th November, 1906. It was paid for in full more than a year prior to the application for a patent in Canada for the main patent.

It is said guarantee bonds were executed. One such bond is attached to the contract. It is merely to guarantee the performance of the work. If a further bond was given it is not produced, and in my opinion does not affect the case.

I think it cannot be held that the inventor was experimenting with the view to perfecting his invention. The fact that he took a contract for the erection of the Peavey structure would demonstrate this. However, I think it was on sale within the meaning of the statute. If an inventor attended a fair and produced a model of his invention soliciting orders for its construction, would it not be on sale? In this case, in lieu of a model complete plans were exhibited and contracts entered into for its erection. He could not manufacture a grain storage elevator and have it on view.

See a very recent case, *Dittgen v. Racine Paper Goods Co.* (181 Fed. R. 394), where the Circuit Court of the Eastern

District of Wisconsin had occasion to construe the provisions of sec. 4886 of the Revised Statutes of the United States (see U. S. Comp. St. 1901, p. 3382).

I think the plaintiffs' action fails. There will be the usual declaration, declaring the patents invalid; the plaintiffs to pay defendants' costs.

Judgment accordingly.

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