Number 12 of 1951.

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL FOR ONTARIO

BETWEEN

THE McKINNON INDUSTRIES LIMITED
(Defendant) - - - - - - - *Appellant*

AND

WILLIAM WALLACE WALKER
(Plaintiff) - - - - - - - *Respondent*

Case

FOR THE McKINNON INDUSTRIES LIMITED — RECORD

1. This is an appeal under the Privy Council Appeals Act (Revised Statutes of Ontario 1937, Chap. 98) from the Order of the Court of Appeal for Ontario (Henderson, Roach and Bowlby, JJ.) dated the 30th day of March, 1950, affirming, with a slight variation in the form of the Injunction, the Judgment of The Honourable the Chief Justice of the High Court (McRuer, J.) dated the 15th day of June, 1949, by which it was adjudged that the appellant, its servants and agents be restrained from discharging from its works any substance, gas or matter in such manner or to such an extent as to occasion damage to the respondent's property or the buildings thereon and/or the plants, shrubs and flowers thereupon or therein. By the said Judgment a Reference was directed to the County Judge of the County of Lincoln to enquire and assess the amount of damages the respondent has sustained during the years 1945-1949 (both inclusive) "and down to the date the said Injunction comes into operation." p. 1160 p. 1129 p. 1130

2. Except for slight variations in the wording of the Injunction, which did not materially change the substance thereof, the Court of Appeal for Ontario unanimously dismissed the appeal to it by the appellant from the said Judgment.

3. The Reference as to damages directed by the Trial Judge has not yet been held as it was postponed until the disposition of this appeal by Paragraph 6 of the Order admitting this appeal under the said Act, which Order was pronounced by the Honourable Mr. Justice Aylesworth on the 21st June, 1950. p. 1164

4. The Injunction as varied by the Court of Appeal for Ontario has not yet gone into operation as it was suspended until the determination of this appeal by Paragraph 2 of a further Order of the Court of Appeal for Ontario dated the 19th day of October, 1950.

p. 1226

5. The appellant's right to maintain this appeal under the provisions of the Privy Council Appeals Act was questioned by the respondent before the Court of Appeal for Ontario on the appellant's Motion on the 19th of October, 1950, to suspend the Injunction, although such right was not questioned by the respondent in the earlier proceedings before the Honourable Mr. Justice Aylesworth. Accordingly, it will be convenient at this point to deal with the right to appeal.

6. Sections 1, 2 and 10 of the Privy Council Appeals Act (Revised Statutes of Ontario 1937, Chap. 98) read as follows:

"1. Where the matter in controversy in any case exceeds the sum or value of $4,000, as well as in any case where the matter in question relates to the taking of any annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature affecting future rights, of what value or amount soever the same may be, an appeal shall lie to His Majesty in His Privy Council, and, except as aforesaid, no appeal shall lie to His Majesty in His Privy Council. R.S.O. 1927, c.86, s.1."

"2. No such appeal shall be allowed until the appellant has given security in $2,000, to the satisfaction of the court appealed from, that he will effectually prosecute the appeal, and pay such costs and damages as may be awarded in case the judgment appealed from is confirmed. R.S.O. 1927, c.86, S.2."

"10. A judge of the Supreme Court shall have authority to approve of and allow the security to be given by a party who intends to appeal to His Majesty in His Privy Council, whether the application for such allowance be made during the sittings of the Court, or at any other time. R.S.O. 1927, c.86, s.10."

The above Privy Council Appeals Act was repealed as of June 5th, 1950, by Sections 1 and 5 of the Privy Council Appeals Act 1950 (Ontario Statutes 1950, Chap. 57) which came into force on that date by virtue of Section 4 of The Statutes Act (Revised Statutes of Ontario, 1937, Chap. 2). These Sections read as follows:

"Assented to March 24th, 1950.

Session Prorogued April 6th, 1950.

1. The Privy Council Appeals Act is repealed.

5. Any appeal to His Majesty in His Privy Council that

is permitted under the law of Canada may be taken as if this Act had not been passed and for the purposes of any such appeal the provisions repealed by this Act shall remain in force."

The Statutes Act.

"4. (1) The Clerk of the Assembly shall endorse on every Act, immediately after the title of such Act, the day, month and year when the same was by the Lieutenant-Governor assented to, or reserved, and the day, month and year of the prorogation of the session of the Legislature at which the Act was passed, and where the Act is reserved the Clerk shall also endorse thereon the day, month and year when the Lieutenant-Governor has signified, either by speech or message to the Assembly, or by proclamation, that the same was laid before the Governor-General in Council, and that the Governor-General was pleased to assent thereto.

(2) Such endorsements shall be taken to be a part of the Act and unless otherwise provided therein the Act shall come into force and take effect on the sixtieth day after the prorogation of the session of the Legislature at which the Act was passed or on the sixtieth day after the day of signification, whichever is the later date. 1937, c.73, s.2."

7. Section 5 of the Privy Council Appeals Act, it is submitted, preserved the appellant's right to appeal, when read in conjunction with the Canadian Statute, an Act to amend the Supreme Court Act (Statutes of Canada, 1949, 2nd Session Chap. 37) Sections 3, 7 and 8 thereof, and particularly Section 7:—

"3. Section fifty-four of the said Act is repealed and the following substituted therefor:

"54. (1) The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada; and the judgment of the Court, shall, in all cases, be final and conclusive.

(2) Notwithstanding any royal prerogative or anything contained in any Act of the Parliament of the United Kingdom or any Act of the Parliament of Canada or any Act of the legislature of any province of Canada or any other statute or law, no appeal lies or shall be brought from or in respect of the judgment of any court, judge or judicial officer in Canada to any court of appeal, tribunal or authority by which, in the United Kingdom, appeals or petitions to His Majesty in Council may be ordered to be heard.

(3) The Judicial Committee Act, 1833, chapter forty-one of the statutes of the United Kingdom of Great Britain and Ireland, 1833, and The Judicial Committee Act, 1844, chapter sixty-nine of the statutes of the United Kingdom of Great

Britain and Ireland, 1844, and all orders, rules or regulations made under the said Acts are hereby repealed in so far as the same are part of the law of Canada."

"7. Notwithstanding anything in section three of this Act, an appeal from or in respect of a judgment pronounced in

(a) a judicial proceeding that was commenced prior to the coming into force of this Act, or

(b) a reference made by the Governor in Council or by the Lieutenant-Governor in Council of a province prior to the coming into force of this Act,

lies or may be brought as if that section had not been enacted.

8. This Act shall come into force on a day to be fixed by proclamation of the Governor in Council."

8. This Act to amend the Supreme Court Act was brought into force on the 23rd of December, 1949, by the proclamation of the Governor-General-in-Council, which proclamation is referred to at Page vii of the 1949 (2nd Session) Statutes of Canada.

9. This action was commenced by the respondent by a Writ p. 1 of Summons issued on the 19th day of March, 1946.

10. The above Statutes were, it is submitted, validly enacted. *Attorney-General of Ontario et al* v. *Attorney-General of Canada et al (1947) A.C. 127* at 152, 153 and 155; *Affirming (1940) S.C.R. 49* at 68, 69, 70, 73-74, and 118-119.
The British North America Act (1867) 30-31 Victoria, Chap. 3, Sections 101 and 129:

"101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time, provide for the Constitution, Maintenance and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers and Authorities, and all Officers, Judicial, Administrative and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act."

The Statute of Westminster (1931) 22 George V, Chap. 4, Sections 2 and 3:

"2. (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra territorial operation."

The Colonial Laws Validity Act, (1865), 28 and 29, Victoria, Chap. 63, Sections 2 and 3:

"2. Any Colonial Law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

3. No Colonial Law shall be or be deemed to have been void or inoperative on the Ground of Repugnancy to the Law of England unless the same shall be repugnant to the provisions of some such Act of Parliament, Order or Regulation as aforesaid."

The Judicature Act, Revised Statutes of Ontario, 1937, Chap. 100, Section 32:

"32. (1) Where in any action or other proceeding, the constitutional validity of any Act or enactment of the Parliament of Canada or of this Legislature is brought in question, the same shall not be adjudged to be invalid until after notice has been given to the Attorney-General for Canada, and the Attorney-General for Ontario.

(2) The notice shall state what Act or part of an Act is in question, and the day on which the question is to be argued,

and shall give such other particulars as are necessary to show the constitutional point proposed to be argued.

(3) Subject to the rules, the notice shall be served six days before the day named for the argument.

(4) The Attorney-General for Canada and the Attorney-General for Ontario shall be entitled, as of right, to be heard, either in person or by counsel, notwithstanding that the Crown is not a party to the action or proceeding. R.S.O. 1927, c.88, s.32."

11. Even if the saving proviso, Section 5 of the Privy Council Appeals Act, 1950, had not been enacted by the Ontario Legislature, it is submitted that this Act, not being expressed to be retroactive, would not apply to an action and to an appeal pending when it was enacted.

The Interpretation Act, Revised Statutes of Ontario, 1937, Chap. 1, Section 14, and particularly Clauses (c) and (e) thereof:

"14. Where an Act is repealed or wherever any regulation is revoked, such repeal or revocation shall not, save as in this section otherwise provided,

(a) revive any Act, enactment, regulation or thing not in force or existing at the time at which the repeal or revocation takes effect;

(b) affect the previous operation of any Act, enactment, regulation or thing so repealed or revoked;

(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, enactment, regulation or thing so repealed or revoked;

(d) affect any offence committed against any Act, enactment, regulation or thing so repealed or revoked, or any penalty or forfeiture or punishment incurred in respect thereof;

(e) affect any investigation, legal proceeding or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture or punishment;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture, or punishment may be imposed as if the Act, enactment, regulation or thing had not been repealed or revoked. R.S.O. 1927, c.1, s.13."

Colonial Sugar Refining Co. Ltd. v. *Irving (1905) A.C. 369* at 372-373;

Boyer v. *The King (1949) S.C.R. 89* at 94, 95 and 99.

12. Furthermore, the respondent did not challenge the appellant's right to appeal under the Privy Council Appeals Act before the Honourable Mr. Justice Aylesworth when he made the Order admitting this appeal, and such Order was not appealed against by the respondent. The respondent did challenge the appellant's p. 1162
right to appeal and the validity of Section 5 of the 1950 Ontario
10 Act before the Court of Appeal for Ontario on the appellant's Motion to that Court on the 19th October, 1950, to further suspend the Injunction pending the determination of this appeal. The Court of Appeal disagreed with these contentions of the respondent and granted the suspension asked for by the appellant at the conclusion of the argument, without delivering any written Reasons for Judgment. p. 1225

13. For the above reasons, therefore, it is respectfully submitted that the appellant has a valid and proper appeal under the above provisions of the Privy Council Appeals Act of Ontario not-
20 withstanding the repeal of that Act on the 5th day of June, 1950 as above.

14. Returning now to the facts and matters involved in this appeal, the appellant is an incorporated Company engaged in the manufacture of steel and iron products for the automotive industry in the vicinity of the intersection of Carlton and Ontario Streets in the City of St. Catharines, Ontario, Canada. On this property the appellant has, since the year 1925, operated a forge shop and foundry, the foundry having four cupolas and being on
Ontario Street, and being situated about 600 feet in a South- p. 1131
30 westerly direction from the respondent's property on Carlton Street, and the forge shop, also on Ontario Street, and situate about 400 feet in a westerly direction from the respondent's property. Prior to 1925 a somewhat similar though much smaller foundry business was operated in approximately the same location by predecessor corporations of the appellant, since the year p. 52 & 989
1903.

15. The respondent is a commercial florist who grows flowers and shrubs for the trade, which he sells wholesale to other florists and also to retail customers through a retail store which he oper-
40 ates in another part of St. Catharines. He purchased and took possession of his property on Carlton Street in the City of St. Catharines, on which he grows his flowers and shrubs and which is the property in question in this action, in 1904, in which year he was employed part time as a moulder in McKinnon Dash and Metal Works Limited, which was one of the earlier corporations of which the appellant is the successor. He built his first green- p. 52
house in 1905 and since that time has carried on his business of

p. 1131 growing flowers and shrubs and enlarged his greenhouse space from time to time.

16. This action was commenced by the respondent on the 19th of March, 1946, in the Supreme Court of Ontario against the appellant to recover damages and for an Injunction against the emission from the appellant's manufacturing plant, smoke stacks, forge shop and foundry of "offensive, poisonous and unwholesome
p. 4 smoke, vapours, noxious matter, oil smudge, ash, gases, vapour or other substances, causing loss or damage to the plaintiff . . . "which spread and are diffused into the respondent's said house and over his said lands and greenhouses, and settle and are deposited in and upon the same . . . whereby the said house and greenhouses and the flowers growing therein and thereabout have been rendered unwholesome, dirty, uncomfortable, and the trees, hedges, herbage, crops and shrubs and the flowers growing on the Plaintiff's land and in his greenhouses are damaged or killed or are made to sicken and die and are covered with oil smudge, dirt,
p. 2 dust and ashes." (Paragraph 5 of the Statement of Claim). There
p. 3 was also a further claim by the respondent for vibration from drop hammers in the appellant's forge shop, but the claim for vibration damage was dismissed by the Trial Judge following
p. 1151 the abandonment of such claim by counsel for the respondent on the argument before the Trial Judge after the conclusion of the trial.

17. In its defence the appellant pleaded that at all material times it operated its foundry, forge and machine shop, its heating plant and the smoke stacks and drop hammers thereof in a reasonable and proper manner with the most modern equipment, in
p. 5 accordance with the best modern practice and without any actionable nuisance or breach of any legal duty on its part. It also pleaded (among other defences not now material) that if any smoke, oil smudge, ash, gases or other substances issued from its smoke stacks (which it did not admit) the same did not issue in excessive or harmful quantities, having regard to the standard of the locality, did not damage or unreasonably interfere with the respondent's flowers, greenhouses, dwelling house, business or property or his reasonable operation or enjoyment of the same and did not
p. 5 cause the same to deteriorate.

18. The action was tried in the Supreme Court of Ontario without a Jury by the Honourable the Chief Justice of the High Court who, after a trial which continued for 15 days and an argument for two days following the trial, which argument concluded on 17th May, 1949, reserved Judgment and delivered lengthy
p. 1131 Reasons for Judgment on the 15th day of June, 1949. In these Reasons for Judgment which will be referred to in more detail later, the Honourable the Chief Justice of the High Court found that heavy fumes and smoke issuing from the defendant's cupolas, foundry and forge shop passed over the property of the respondent
p. 1139 when the wind was in the south-west and made a deposit on the

glass of the respondent's greenhouses which was a material injury to his property, impairing their usefulness for the purpose for which they were constructed. The Chief Justice also found that certain plants on the respondent's property suffered both acute and chronic injury from sulphur dioxide gas emanating from the appellant's works and that this deterioration in the respondent's plants did him a material injury. p. 1140 p. 1150

19. On the above findings the Chief Justice of the High Court directed an injunction restraining the appellant from discharging or permitting to be discharged from its works into the air any substance, gas or matter so as to occasion damage to the respondent as the owner or occupier of the property mentioned in the pleadings, or injury or damage to the said property and suspended the operation of such injunction until the 1st day of November, 1949. The actual wording of the injunction as issued appears in Paragraph 1 of the formal judgment at the trial. p. 1157 p. 1129-30

20. The Chief Justice also directed a Reference to the County Judge of the County of Lincoln to ascertain and assess the damages sustained by the respondent during the years 1945 to 1949, both inclusive, "down to the date on which the injunction becomes effective." p. 1157 & 1130

21. From this judgment of the Chief Justice of the High Court the appellant appealed to the Court of Appeal for Ontario. Such Court of Appeal (consisting of Henderson, Roach and Bowlby, JJ.A.) unanimously held that it should not disturb the findings of fact as made by the Trial Judge, directed a slight variation in the wording of the injunction as set forth in its formal judgment, suspended the operation of the injunction until the 1st day of October, 1950 and otherwise dismissed the appellant's appeal. p. 1158 p. 1160

22. The appellant then applied to the Honourable Mr. Justice Aylesworth for an Order admitting its appeal direct from the Court of Appeal for Ontario under the provisions of The Privy Council Appeals Act (Revised Statutes of Ontario 1937, Chap. 98 quoted above) and such an order was made by the Honourable Mr. Justice Aylesworth on the 21st day of June, 1950. In this Order the Honourable Mr. Justice Aylesworth also directed that upon the filing of the bonds directed by him in the said Order as security for this appeal, the Reference as to damages directed by the Trial Judge should be postponed until the disposition of this appeal. p. 1162 p. 1164

The appellant has fully complied with the filing of all the bonds as security directed by the said Order admitting this appeal and has otherwise fully complied with all the provisions of the same.

23. The principal questions of law which, amongst others, arise in this case, are:—

(1) Whether any Injunction should have been awarded in view of the agreements for money compensation for past damages entered into by the respondent with the appellant? p. 1133-34 p. 1156

(2) Whether the advice of the respondent's then solicitor that he could not obtain an injunction against the appellant in wartime was correct and if wrong, whether such advice was a sufficient reason for the Trial Judge "considering the case irrespective of the aforesaid agreements" and awarding an injunction instead of damages? p. 1134 p. 1156-57 p. 1157

(3) Whether the Trial Judge in exercising his discretion to award an injunction proceeded on improper principles and whether the exercise of such discretion should accordingly be reversed? p. 1157

(4) Whether damages were an appropriate and adequate remedy in lieu of an injunction and ought to have been awarded in lieu thereof by the Trial Judge in all of the circumstances of the case;

(5) Whether the respondent was entitled to any injunction in respect of his growing of orchids which it is submitted, is an unusually delicate and difficult trade?

(6) Whether damages ought to have been awarded in lieu of an injunction in view of the length of time the alleged nuisance had existed?

(7) Whether the Court of Appeal for Ontario erred in affirming the injunction (with a slight variation in its terms) on the ground "that the evidence supports a finding that it is feasible for the defendant to prevent the discharge onto the respondent's land of the deleterious matter complained of, and in that circumstance this is eminently a proper case for the granting of an injunction."

(8) Alternatively whether the injunction as varied by the Court of Appeal for Ontario is still too wide and oppressive and ought to have been further amended by that Court. p. 1160

(9) Alternatively whether the operation of the said injunction should be further suspended by your Lordships in the Privy Council.

24. In view of your Lordships well known rule against interfering with concurrent findings of fact in the Courts below, for the purpose of this appeal only, the appellant does not attack the general findings of fact of the Trial Judge or his findings as

to the credibility of witnesses and will confine its submissions on this appeal to the questions of law mentioned above.

25. Under date of the 1st day of January, 1942, the respondent entered into an agreement with the appellant (Exhibit 9) whereby he granted to the appellant for $600.00 per annum for the 3 years 1942, 1943 and 1944 the right to discharge over and upon his lands "smoke of whatsoever nature and kind and the constituent parts and ingredients thereof, oil smudge, gases, ash vapours and noxious fumes — and to do and create over, along and upon the said lands and premises for the purposes of the manufacturing operations of the said McKinnon, such other acts which, but for the existence of this agreement, might be deemed to constitute a nuisance thereon —." This agreement is pleaded in the respondent's second reply. (Record Page 11, lines 20-25). p. 1237 p. 1239 p. 1238 p. 11

26. Under date of the 2nd day of January, 1942, the respondent entered into a further agreement or release with the appellant (Exhibit 8) whereby, for $1225.00 paid to him by the appellant, he released and discharged it from all claims, causes of action and demands of the respondent against it up to that date "by reason of any cause, matter or thing whatsoever," and "particularly by reason of the — discharge over, along and upon any of the premises —" of the respondent "of any smoke, oil smudge, ash, gases and other substances whatever and/or by reason of any nuisance or alleged nuisance —" to the respondent "his lands, premises, chattels and effects occasioned or claimed to have been occasioned by the operations of —" the appellant. p. 1234 p. 1235

27. The appellant duly paid to the respondent the $3025.00 which was the total consideration payable by it under the two aforesaid agreements. This payment was admitted by the respondent. In 1945 the respondent negotiated with the appellant but could not make a settlement. The opening address of the respondent's counsel at trial (Record p.30, lines 4-7). The evidence of the respondent (Record p.63, lines 10-47). p. 62 p. 30 p. 63

28. No application to the court for any injunction was made by or on behalf of the respondent until the time of the commencement of the trial thereof on the 11th day of April, 1949. Under the practice of the Supreme Court of Ontario, the respondent immediately upon the issue of his writ, could have applied to a judge of the Court ex parte for an interim injunction for up to 7 days; following which he could have made a motion, before a judge of the same Court, on notice to the appellant, to continue such interim injunction until the trial of the action. The fact that the respondent adopted neither of these courses, shows, it is submitted, that he was not anxious to obtain, and did not need an injunction prior to the trial but was chiefly looking to his remedy

p. 1242 in damages. In Exhibit 10 on September 7th, 1945, the respondent's then solicitor said in a letter to the appellant:

> "Now that the War is over there is no reason why we could not get an injunction."

29. The respondent's above agreements with the appellant for $3025.00 compensation for his damages up to the end of 1944, show conclusively, it is submitted, that his damages had been and could be adequately and properly compensated for by a money payment, and that an injunction ought not to have been directed.

30. This was the first view of the learned trial judge, when he says in his reasons for judgment:— 10

p. 1156-57 > "My first view was that there was much weight in the argument presented on behalf of the defendant, but on further consideration I have concluded that when the plaintiff was advised by a competent solicitor acting in good faith, that a Court would not under these circumstances grant an injunction, he could not have been expected to have insisted on that remedy at that time and ought not to be prejudiced in claiming his full rights now that his action is before the Court for determination. I therefore consider the case irrespective of 20 these agreements."

31. The "circumstances" referred to by the trial judge are
p. 1156 explained in his reasons on the previous page. They were that the respondent was advised by his then solicitor that in his opinion a court would not grant an injunction against the appellant during the last war because it was then engaged in the manufacture of munitions of war. Such solicitor had sent a letter to the appellant
p. 1242 to this effect on September 7th, 1945 (Exhibit 10) in which he said "We could not effectively claim an injunction during the war period . . ." This letter, however, was written 3 years and 8 months 30 after the respondent's agreement and release of January 1st and 2nd, 1942, and in explaining why he entered into these agreements, the respondent, in his evidence at the trial, did not say that **at the time he entered into those agreements** he was advisd by his solicitor that a court would not grant an injunction against the defendant, as suggested by the trial judge. What the respond-
p. 62 ent actually said appears in the Record at page 62, lines 14-19:

> "The war was on then and things were very uncertain. I knew they were in war production and taking it up with my lawyer **at that time,** we thought that we had better concede along 40 the lines that we might get **better consideration,** that, when once the war was over, but we could not expect **more at that time."**

The respondent was then replying to a question by his counsel about payment of money to him by the appellant, and it is sub-

mitted that his above evidence refers to getting more consideration, or more money from the appellant, after the War. He was, it is suggested, explaining to his counsel why he agreed in Exhibit 9, which had just been filed, to accept $600.00 a year for his damages. The agreement Exhibit 8 recites that it was entered into "for the purposes of avoiding the expense of litigation." p. 1239 p. 1234-35

32. The respondent did say that he instructed his solicitor to write the letter, Exhibit 10, but this was nearly 4 years after the agreements in question. p. 63

33. It is submitted, therefore, that the learned trial judge misinterpreted the evidence of the respondent on this point and confused his instructions for the letter with the respondent's reasons for entering into the agreements. Accordingly, it is respectfully submitted, the learned trial judge erred in this respect, and had therefore no right to "consider the case irrespective of these agreements." Had the trial judge "considered" the agreements, it is obvious that his "first view" would have prevailed, and that he would have refused the injunction. p. 1157 p. 1156

34. This point is not dealt with at all in the reasons for judgment of the Court of Appeal for Ontario, which do not mention the agreements and support the injunction on the sole ground that it was "feasible for the defendant to prevent the discharge onto the plaintiff's land of the deleterious matter complained of." This was not the ground on which the appellant contended before the Court of Appeal that no injunction ought to have been awarded by the trial judge. p. 1158

The appellant's notice of appeal, ground No. 4. p. 12

The appellant's Statement of Points of Fact and Law, paragraph No. 1. p. 1165

35. It is further respectfully submitted, therefore, that the Court of Appeal erred in either overlooking or misapprehending the ground of the appellant's attack upon the injunction, or erred in accepting the trial judge's misinterpretation of the respondent's evidence, as above set forth. p. 1158

36. In support of the above submissions, the appellant will refer to the following authorities:

Senior v. *Pawson (1866) L.R. 3 Eq. 330* at 335-336.

Ormerod v. *Todmorden Mill Co. (1883) 11 Q.B.D. 155* at 162.

Wood v. *Sutcliffe (1851) 2 Simons (N.S.) 163* at 168-169.

Jordenson v. *Sutton (etc.) Gas Co. (1899) 2 Ch. 217* at 259-260.

The Industrial and Mining Lands Compensation Act
(Revised Statutes of Ontario, Chapter 162)

Sections 1 and 4:

"1. It shall be lawful for any owner or operator of a mine, industry or factory or works in connection therewith, or any person contemplating, acquiring or operating a mine, factory, industry or works, to make an agreement with the owner or lessee of any land for payment to the owner or lessee of the land of compensation for any damage or injury relating or likely to result to the land or to its use and enjoyment from the operation of the mine, industry, factory or works in connection therewith. R.S.O. 1937, c.162, s.1.

4. The payment of compensation under such agreement shall afford a complete answer to any action which may be brought for damages or for an injunction in respect of any matter for which compensation has been made. R.S.O. 1937, c.162, S.4."

37. The learned trial judge gives his main reason for awarding an injunction against the appellant in these words:

"But on further consideration I have concluded that when the plaintiff was advised by a competent solicitor acting in good faith, that a Court would not under these circumstances grant an injunction, he could not have been expected to have insisted on that remedy **at that time,** and ought not to be prejudiced in claiming his full rights now that his action is before the Court for determination."

p. 1157

The use of the words "at that time" by the trial judge indicates that he was referring back to the date of the agreements entered into by the appellant on the 1st and 2nd of January, 1942 as above-mentioned. There was no evidence that the respondent was given any such advice by his then solicitor at the time he entered into these agreements. His then solicitor, the late Mr. Schiller was dead at the time of the trial of this action and there is only inferential evidence from the letter which he wrote on behalf of the respondent dated September 7th, 1945 (Exhibit 10), and for which letter the respondent says he gave the instructions. Even such inferential evidence as may be garnered from this letter is evidence only as to the advice of such solicitor on or about the date of such letter. In using the words "at that time" in the above quotation from his reasons for judgment it is submitted that the trial judge is referring back to the words "at this time" earlier in the same paragraph of his judgment on the previous page, and in so doing has again, it is submitted, misdirected himself as to the evidence.

p. 1242

p. 63

p. 1156

38. Even if there was evidence sufficient to entitle the trial judge to conclude that the respondent entered into the said agreements under the advice of his then solicitor that the Court would not grant an injunction against the manufacturing of munitions of war in Wartime (and the appellant submits there was no such

evidence) the appellant respectfully submits that such solicitor's advice, if then given in such form, was not correct legal advice. The Supreme Court of Ontario has, in the past, granted injunctions against manufacturers of munitions of war in Wartime; an example of such a case in which such an injunction was granted is:

Cotton v. *Ontario Motor Co. (1916) 11 O.W.N. 100* at 101.

39. Accordingly, it is respectfully submitted that such solicitor's advice, if given to the respondent, was wrong in law and was, therefore, not a sufficient reason for the trial judge "considering the case irrespective of these agreements" and awarding an injunction instead of damages. It is submitted that a solicitor's advice in favour of a party doing or not doing any particular act or commencing any special form of Court proceedings, does not excuse the party who acts on such advice if the advice turned out to be wrong in law:

Carter v. *M'Laren (1871) L.R. 2 H.L. (Scotch Appeals) 120* at 126.

Pentney v. *Lynn Paving Commissioners, (1865) 12 L.T. 818* at 821.

Faithful v. *Kestevan 103 L.T. 56* at 57.

40. It is, therefore, respectfully submitted that such wrong advice of the respondent's solicitor (if given at the time the respondent entered into the aforesaid agreements, which is denied), was not a sufficient reason for the learned trial judge awarding an injunction in this case, and if so, as this appears to have been his only reason for changing from his "first view," it is suggested that had he appreciated that such solicitor's advice was not given at the date of these agreements but was, in fact, given nearly four years later, and had the learned trial judge also appreciated that such solicitor's advice was wrong in law, he would not have awarded any injunction at the trial of this action.

41. During the course of the argument before the learned trial judge on the 16th and 17th days of May, 1949, at Toronto, following the conclusion of the trial at St. Catharines on the 10th of May, counsel for the appellant cited the Cotton case mentioned above to the learned trial judge and submited that such alleged advice of the respondent's then solicitor was wrong in law, but in his reasons for judgment delivered subsequently the trial judge does not expressly deal with the Cotton case or this submission of counsel and appears to have overlooked this point when he delivered his reasons for judgment about one month later on the 15th June, 1949.

42. It is further respectfully submitted that the learned trial judge in exercising his discretion to award an injunction proceeded on improper judicial principles in failing apparently

to consider other relevant matters and in considering further matters either incorrectly or which were not relevant.

43. For instance, the trial judge makes no mention in his reasons of the fact that although the respondent commenced his action against the appellant on the 19th day of March, 1946, he made no application to the Court for any injunction, interim or interlocutory, until the trial of this action commenced on the 11th day of April, 1949. The trial judge misdirected himself as to the amount of the total consideration payable by the appellant to the
p. 1237 respondent under the Agreement of the 1st January 1942 (Ex- 10
hibit 9). The learned trial judge notes the consideration for this
p. 1156 agreement as "six hundred dollars" (Record Page 1156, Line 30). Whereas the correct consideration under this agreement was $600.00 for each of the three years of the term which it covered
p. 1239 or a total of $1,800.00. Furthermore the learned trial judge states in his reasons for judgment:

p. 1157 . . . "No evidence was given by the defendant that if fumes were being emitted from their works they were beyond their control."

It is submitted that this is not a proper test for the granting or 20
withholding of an injunction. It is submitted, apart from any evidence that an iron foundry with four cupolas which are melting furnaces open to the air at the top can not be operated without the discharge of some fumes into the air. If the tops of these cupolas were sealed up so as to prevent the discharge of any fumes into the atmosphere, there would be no draft to provide combustion for the coke fires which melt the iron pigs at the bottom of each cupola stack and without an opening at the top, it is submitted that the cupolas could not be operated. Furthermore, the trial judge him-
p. 1126-27 self inspected the appellant's cupolas, iron foundry and forge shop 30
following the conclusion of the trial on the invitation of counsel for the appellant extended during the trial and concurred in by counsel for the respondent, and the foregoing should have been obvious to him from his inspection of the cupolas. In addition to the above, evidence was given by engineers called by the respondent and by employees of the appellant that the water curtain which is maintaind over the inside cone at the top of each cupola stack and through which curtain the fumes from the cupolas must pass before reaching the upper atmosphere (see the photographs, Exhibit 200-A and 200-B, Record Page 1908 and 1909) was the 40
latest type of cupola smoke and fume control, was the most modern equipment and that the appellant's foundry was the only foundry in the province of Ontario on the cupolas of which, such equipment had yet been installed.

Reference to the evidence of the following witnesses:—

Name of Witness	*Called by*	*Page*	*Lines*
Beaumont	Respondent	341	30-42
Beaumont	Respondent	342	1-7
Beaumont	Respondent	343	33-40
Beaumont	Respondent	353	14-24
Beaumont	Respondent	1125	8-15
Beaumont	Respondent	1125	24-34
Beaumont	Respondent	1126	17-26
Edwards	Respondent	379	1-32
MacAulay	Appellant	1038	2-10
MacAulay	Appellant	1038	24-43
MacAulay	Appellant	1048	6-16
MacAulay	Appellant	1062	18-35
MacAulay	Appellant	1063	1-16
MacAulay	Appellant	1064	17-26

44. In addition the learned trial judge states in his reasons:

"there is, in fact, no standard against which monetary loss can be measured." (Record Page 1157, Lines 22 to 23). p. 1157

The respondent set out his own standard of monetary loss in his Statement of Claim, Paragraphs 7 to 9 thereof where he sets forth p. 3 in great detail his losses for the year 1945 totalling $5140.00; for the year 1946 totalling $4770.00, and where, in Paragraph 9 he says "the plaintiff has suffered or will suffer in the year 1947 the sum of $4,500.00 damages." Presumably the respondent could have given at the trial similar evidence as to the details of his alleged similar losses in the year 1948 and in the early part of the year 1949, had the trial judge not indicated early in the trial that he intended to direct an assessment of damages. p. 28 and 30-31

Statement of learned trial judge at Record Page 116, Lines 12-13 and 24-25. p. 116

45. Also the trial judge so far as is disclosed by his reasons for judgment in awarding an injunction did not consider or give any weight to the fact that an iron foundry (much smaller than that of the appellant, it is true) had been operated in the approximate location of the appellant's present foundry by predecessor corporations of the appellant since the year 1903 and that the p. 52 & 989 respondent built his first greenhouse about 600 feet away from such foundry in the year 1905, and has since continued to enlarge p. 52 his greenhouse premises and to erect some six additional greenhouses in the subsequent period during which the foundry was also p. 1131 rebuilt and enlarged. It is submitted that this length of time was a further circumstance which the learned trial judge ought to have considered in deciding whether or not to award an injunction, whereas in his reasons for judgment (Record Page 1131, p. 1131 Lines 28 to 32) the trial judge says, "the property now owned and occupied by the defendant was previously owned and occupied

by predecessor corporations, the history of which for the purpose of this action, it is unnecessary to detail. It is sufficient to say that from 1925 until the present time it has carried on its works at the present location."

The appellant agrees that the foregoing length of time is not by reason of the aforesaid agreements any bar to the respondent's claim on the ground of acquiescence or laches. At the same time the appellant respectfully submits that such lapse of time would have been a proper reason for the trial judge refusing an injunction in all the circumstances of this case, that he did not consider this point in determining this question as shown by his words "the **only** matter that has given me concern with this aspect of the case is, etc.," when he continues referring to the aforesaid agreements (Record Page 1156, lines 24-25). On this point, the appellant will refer to:

p. 1156

Sayers v. *Collyer (1884) 28 Ch.D. 103* at 110.

46. For the foregoing reasons, therefore, it is respectfully submitted that the learned trial judge did not properly exercise his discretion in awarding an injunction, that the Court of Appeal for Ontario ought to have interfered with such discretion and reversed the judgment of the trial judge awarding an injunction and that now Your Lordships are entitled to do so and ought to reverse the award of any injunction. In support of this submission, the appellant will refer to the following authorities:

Carter v. *M'Laren (1871) L.R. 2 H.L. (Scotch Appeals) 120* at 123.

Evans v. *Bartlam (1937) A.C. 473* at 480-481 and 486-487.

47. It is further submitted that damages were an appropriate and adequate remedy in all the circumstances of this case and ought to have been awarded in lieu of any injunction by the trial judge. As has already been mentioned, the respondent set forth his damages in money in great detail in his Statement of Claim, and also in his Statement of Law and Fact which he filed in opposition to the appellant's appeal to the Court of Appeal for Ontario. This point was also raised by the appellant before the Court of Appeal for Ontario (See appellant's Statement of Law and Fact — Record Page 1170, Lines 16-21); and the appellant's Notice of Appeal to the Court of Appeal for Ontario, ground No. 12 (Record Page 13, Lines 19 and 20). In support of this submission, the appellant will refer to the following authorities:

p. 1223

p. 1170

p. 13

The Judicature Act (Revised Statutes of Ontario, 1937, Chap. 100, S. 17), which reads as follows:

"17. Where the Court has jurisdiction to entertain an application for an injunction against a breach of a covenant, contract or agreement or against the commission or continuance of a wrongful act, or for the specific performance of a coven-

ant, contract or agreement, the Court may award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be ascertained in such manner as the Court may direct, or the Court may grant such other relief as may be deemed just. R.S.O. 1927, c.88, s.17."

Fishenden v. *Higgs & Hill Ltd. (1935) 153 L.T. 128* at 139.

Leeds Industrial Co-Op. Society v. *Slack (1924) A.C. 851* at 857 and 860; *(1924) 2 Ch. 475* at 486-489, 494 and 496.

Stollmeyer v. *Trinidad Lake Petroleum Co. (1918) A.C. 485* at 494 and 497-498.

Holland v. *Worley (1884) 46 Ch.D. 578* at 584-585 and 587.

Colls v. *Home and Colonial Stores Ltd. (1904) A.C. 179* at 193.

48. In any event it is respectfully submitted that the respondent was not entitled to any injunction in respect of his growing of orchids which, it is submitted, is an unusually delicate and difficult trade. At the trial the respondent and his expert witnesses, McAlpine and Tienken stressed the damage to the respondent's orchids as being very serious and the most serious head of the respondent's damages. The respondent and his witnesses gave considerable evidence at the trial indicating that the growing of orchids was a delicate and difficult operation, that they were flowers which were very sensitive to fumes and soot damage and needed exceptionally large amounts of sunlight in the climate at St. Catharines, Ontario.

Reference to the evidence of the following witnesses for the respondent:

Name of Witness	*Called by*	*Page*	*Lines*
Respondent	Respondent	113	28-32
Respondent	Respondent	115	19-31
McAlpine	Respondent	218	17-36
McAlpine	Respondent	219	1-10
McAlpine	Respondent	219	29-36
McAlpine	Respondent	229	9-23
McAlpine	Respondent	235	7-33
McAlpine	Respondent	244	15-23
Tienken	Respondent	384	1-37
Tienken	Respondent	389	17-20
Tienken	Respondent	393	38-41
Tienken	Respondent	394	16-29
Gautby	Respondent	477	38-44
Gautby	Respondent	478	1-4
Gautby	Respondent	480	27-35

"Specializing in Orchids" (Statement of Claim — Record Page 1, Lines 16-17).

"Orchids a Specialty" (Exhibit 199 — Record Page 1907, Line 7).

49. On the respondent's own showing, therefore, it is submitted that his growing of orchids was an excessively delicate and difficult trade which ought not to be entitled to the protection of the extraordinary remedy of an injunction. In support of this submission, the appellant will refer to the following authorities:

Eastern and South African Telegraph Co. v. *Capetown Tramways (1902) A.C. 381* at 393.

Robinson v. *Kilvert (1889) 41 Ch.D. 88* at 97.

50. Alternatively the appellant further submits that the
p. 1160 injunction as varied by the Court of Appeal for Ontario is still too wide and oppressive and ought to have been further amended by that Court. No damage to the respondent's lands or buildings was proved at the trial as having been caused by any fumes or any deleterious substances emitted from the appellant's foundry and forge shop. Only damage to the respondent's flowers and light was proved by the respondent and his witnesses at the trial. Accordingly, it is respectfully submitted that if any injunction is to be awarded the words, "the plaintiff's property (as described in the pleadings) or the buildings thereon and/or" should be deleted from the injunction as varied by the Court of Appeal for Ontario where they appear in the formal Order of that Court
p. 1160 (Record Page 1160, lines 31 and 32). However, it is also submitted that even in such modified form the injunction is still too wide and oppressive and "likely to put the appellant out of business." (Notice of Appeal of Appellant to the Court of Appeal for Ontario
p. 12 Ground No. 5 — Record Page 12, lines 34-36). As submitted above it is impossible to operate foundry cupolas without discharging some gases and soot into the air and so the practical effect of the injunction awarded in this action, if it is allowed to stand, will be to compel the appellant to close its foundry rather than run the risk of possible contempt proceedings against it and its officers by the respondent under the present wide terms of the injunction.

Bottom v. *Ontario Leaf Tobacco Co. (1935) O.R. 205* at 206 and 209-211.

In further support of this submission the appellant will also refer to:

Evans v. *Manchester etc. Railway (1887) 36 Ch.D. 626* at 639-640.

51. On the hearing of the appellant's appeal to the Court of Appeal for Ontario, counsel for the appellant was asked by the

Court to submit an alternative form of injunction which he did in the form quoted below:

> "1. THIS COURT DOTH ORDER AND ADJUDGE that the defendant, its servants and agents be restrained from operating its cupolas or any of them on the foundry in its plant in the City of St. Catharines without using thereon a complete curtain of water and without using water for such curtain from the municipal water mains of the City of St. Catharines or from the old Welland Canal.
>
> 2. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the defendant, its servants and agents be restrained from operating its forge shop in its plant in the City of St. Catharines unless the fuel oil used therein has been preheated and unless the burners therein are automatically controlled with respect to the mixture of air and oil."

52. The Court of Appeal for Ontario, however, did not accept the alternative form of Injunction so submitted to it and such form is not mentioned in the reasons for judgment of that Court. As an alternative suggestion to the form quoted above, the appellant further respectfully submits that if the words:

> "any harmful quantities of sulphur dioxide gas, iron oxide, oil fumes, oil globules, fly ash or soot"

were substituted for the words in the injunction as varied by the Court of Appeal,

> "any substance, gas or matter" p. 1160

the injunction in its present form, if it is to be continued, would be made much less oppressive as the foregoing were the only harmful gases or substances which were proved by the respondent and his witnesses at the trial of this action.

53. As a final alternative the appellant further respectfully asks that if, contrary to the above submissions, your Lordships should not see your way clear to granting to the appellant relief in accordance therewith, the operation of the present injunction should be further suspended by your Lordships for a further period of 12 months from the determination of this appeal by your Lordships to enable the appellant to remove its foundry from the City of St. Catharines. As the Record indicates, the Injunction has already been suspended on the following dates by the following Courts to the following dates:—

June 15, 1949	The Honourable the Chief Justice of the High Court (McRuer, J) the trial judge, to	Nov. 1, 1949 p. 1130

p. 15	Oct. 17, 1949	The Honourable Mr. Justice Roach, to the disposition of the appeal by the Court of Appeal for Ontario, to	Mar. 30, 1950
p. 1160	Mar. 30, 1950	The Court of Appeal for Ontario, to	Oct. 1, 1950
	Sept. 28, 1950	Further Order of the Honourable Mr. Justice Roach further postponing the injunction until the appellant's further appeal to the Court of Appeal for Ontario from an Order of the Honourable Mr. Justice Aylesworth pronounced on September 21, 1950 dismissing the appellant's application for an Order further suspending the injunction until the disposition of the appellant's present appeal to His Majesty in His Privy Council (these Orders not printed in the Record).	
p. 1226	Oct. 19, 1950	The Court of Appeal for Ontario allowing the appellant's appeal from the above Order of the Honourable Mr. Justice Aylesworth and further suspending the injunction until the determination by your Lordships of the appellant's present appeal.	

54. In view of the several previous suspensions of this injunction as set forth above, the appellant respectfully submits that a further suspension of the injunction by your Lordships as respectfully asked above would not do the respondent any irreparable harm which could not be compensated for in money damages on the reference to assess damages in this action, as the terms of the Order of the Court of Appeal for Ontario herein appealed from
p. 1160 provide that such reference is to assess the damages "down to the date the said injunction goes into operation." In support of this request for such alternative relief by way of a further twelve months' suspension of the injunction the appellant will refer to the following authorities:

Stollmeyer v. *Petroleum Development Co. Ltd. (1918) A.C. 498* at 500.

Farnworth v. *Manchester Corporation (1929) 1 K.B. 533* at 548.

The K.V.P. Co. Ltd. v. *McKie et al (1949) S.C.R. 698* at 705.

55. The appellant accordingly submits that the judgments of the Court of Appeal for Ontario and of the Honourable the Chief Justice of the High Court should be set aside and reversed in so far as they awarded any injunction against the appellant; or alternatively, that the said injunction should be amended or suspended as above set forth for the following amongst other

REASONS

(A) BECAUSE the respondent, by accepting compensation in money under formal agreements with the appellant for his earlier damages, showed that his damages claimed in this action could be similarly compensated for;

(B) BECAUSE the learned trial judge misapprehended and misdirected himself as to the evidence concerning the respondent's reason for entering into the said agreements, and therefor had no right to "consider the case irrespective of these agreements";

(C) BECAUSE had the learned trial judge "considered" these agreements, his reasons for judgment indicate that his "first view" would have prevailed and that he would not have awarded an injunction;

(D) BECAUSE the learned trial judge, improperly considered the solicitor's advice alleged to have been given to the respondent, which was incorrect in law;

(E) BECAUSE the learned trial judge, in awarding an injunction, improperly considered other matters, and failed to consider further matters which were proper;

(F) BECAUSE damages were an appropriate and adequate remedy, in lieu of an injunction;

(G) BECAUSE an injunction ought not to have been awarded by the trial judge in all the circumstances;

(H) BECAUSE the Court of Appeal for Ontario erred in refusing to set aside the said injunction, and upheld it on an improper ground;

(I) BECAUSE in the alternative, the injunction is too wide and oppressive, and ought to be amended, or suspended.

J. L. G. KEOGH