1952

CANADA LAW REPORTS

Exchequer Court of Canada

RALPH M. SPANKIE, Q.C.
GABRIEL BELLEAU, Q.C.
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JUDGES

OF THE

EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

THE HONOURABLE JOSEPH T. THORSON
(Appointed, October 6, 1942)

PUISNE JUDGES:

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

THE HONOURABLE J. C. A. CAMERON
(Appointed, September 4, 1946)

THE HONOURABLE MAYNARD B. ARCHIBALD
(Appointed, July 1, 1948)

THE HONOURABLE JOHN DOHERTY KEARNEY
(Appointed, November 1, 1951)

DISTRICT JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

THE HONOURABLE FRED H. BARLOW, Ontario Admiralty District—appointed October 18, 1938.

The Honourable SIDNEY ALEXANDER SMITH, British Columbia Admiralty District—appointed January 2, 1942.

The Honourable W. ARTHUR I. ANGLIN, New Brunswick Admiralty District—appointed June 9, 1945.

His Honour HAROLD L. PALMER, Prince Edward Island Admiralty District—appointed August 3, 1948.

The Honourable Sir BRIAN DUNFIELD, Newfoundland Admiralty District—appointed May 9, 1949.

The Honourable HENRY ANDERSON WINTER, Newfoundland Admiralty District—appointed May 9, 1949.

The Honourable Sir ALBERT JOSEPH WALSH, Newfoundland Admiralty District—appointed September 13, 1949.

His Honour VINCENT JOSEPH POTTIER, Nova Scotia Admiralty District—appointed February 8, 1950.

The Honourable ARTHUR IVES SMITH, Quebec Admiralty District—appointed June 16,1950.

The Honourable ESTEN KENNETH WILLIAMS, Manitoba Admiralty District—appointed February 26, 1952.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:
The Honourable STUART S. GARSON, Q.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:
The Honourable R. O. CAMPNEY, Q.C.

CORRIGENDA

At page 176, line 4 for the word "respondent" read "plaintiff".
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60663—4½

IN THE EXCHEQUER COURT OF CANADA

GENERAL RULES AND ORDERS

In pursuance of the provisions contained in the 87th section of the Exchequer Court Act (R.S.C. 1927, c. 34) and amendments thereto, it is ordered that the General Rules and Orders of the Court be amended:

Accordingly that portion of Tariff B in the appendix to the said Rules between the heading "Shorthand writers" and the heading "Sheriff" is amended as follows:

1. In paragraph two the fee per folio under the first section, namely 0.20, is repealed and the fee 0.30 substituted therefor;
2. In paragraph two the fee to be paid under the third section, namely 2.00 is repealed and the fee of 3.00 substituted therefor;
3. Paragraphs 3 and 4 are repealed.
4. Paragraph 5 is re-numbered paragraph 3.

DATED this 7th day of July A.D. 1952.

J. T. THORSON
President.

EUGENE R. ANGERS
J. CHAS. A. CAMERON
M. B. ARCHIBALD
JOHN D. KEARNEY
Puisne Judges.

57892—1a

CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

1951
Oct. 2 & 4
Dec. 11

AND

WILLIAM S. WALKER ..... RESPONDENT;

AND BETWEEN:

WILLIAM S. WALKER ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Revenue—Income—Income tax—Practice—Date of service of notice of appeal—Service effected by mailing notice within time limit set by the Act—Income Tax Act, S. of C. 1948, c. 52, s. 55(1) and s. 89(2)—Taxpayer betting on horse races—Whether betting activities carried on as a hobby or for profit—Taxpayer liable for tax—"From a trade or commercial or financial or other business or calling".

Taxpayer contends that certain income upon which he was assessed income tax was derived from bets won on horse races and therefore not taxable. The Court found that the evidence to support his contention was insufficient. He also contends and the Court found that he had $10,000 in cash in his safety deposit box on the 1st day of January, 1941, the first of the taxation years under review, and that such sum could not be income received during those years.

Held: That service of a notice of appeal under s. 89(2) of the Income Tax Act, Statutes of 1948, c. 52, is effected when the notice of appeal is sent by registered mail on a date within the time limit established by s. 55(1) of the Act.

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2. That the date of service of the notice of appeal is the date on which it was sent pursuant to s. 89(2) of the Income Tax Act.

3. That the onus is on the taxpayer to show exactly what he received from betting and to discharge that onus there should be satisfactory corroboration of his own testimony.

4. That if the taxpayer engaged in his betting activities with the intention of making profits out of them rather than as a hobby or for amusement his winnings would be assessable for income tax as having been directly or indirectly received "from a trade or commercial or financial or other business or calling . . .".

APPEAL under the Income Tax Act.

The appeal was heard before the Honourable Mr. Justice Hyndman, Deputy Judge of the Court, at Edmonton.

Eldon D. Foote for William S. Walker.

Arnold F. Moir and *F. J. Cross* for the Minister of National Revenue.

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

HYNDMAN, D.J. now (December 11, 1951) delivered the following judgment:

These two appeals were heard together. The appeal of the Minister (No. (1) above) is from a decision of the Income Tax Appeal Board which allowed the appeal of the respondent Walker. The second appeal (No. (2) above) is by the taxpayer from an assessment by the Minister.

In regard to the appeal from the Tax Appeal Board, counsel for the respondent in his pleadings objected to the jurisdiction of the Court, and moved that the appeal be dismissed, on the ground that the service of the notice of appeal by the Minister was too late.

Section 55(1) of the Income Tax Act reads as follows:

55(1) The Minister or the taxpayer, may, within 120 days from the day on which the Registrar of the Income Tax Appeal Board mails the decision on an appeal under section 54 to the Minister and the taxpayer, appeal to the Exchequer Court of Canada.

Section 89(2) of the said Act reads as follows:

89(2) A notice of appeal should be served upon the Minister by being sent by registered mail to the Deputy Minister of National Revenue for Taxation at Ottawa and may be served upon the taxpayer either personally or by being sent to him at his last known address by registered mail.

The facts with respect to this objection are that the notice of appeal by the Minister was sent by registered mail addressed to the taxpayer at Winterburn, Alberta, on the 22nd September, 1950, exactly on the 120th day from the date on which the Registrar of the Income Tax Appeal Board mailed a decision on the appeal to the Minister. It was submitted that in law the 120th day should have been the day when the taxpayer in the ordinary course of mail would have received it. If that is the law, then the notice was out of time as it would likely have taken at least three days from the date of mailing before its receipt by the taxpayer in Alberta, which would then have been about three days late. As there is no rule of the Court, or provision in the Act covering this precise point, it was argued that the practice in England is to be followed, (see, Sec. 36 of the Exchequer Court Act, R.S.C. 1927, c. 34, as amended by Statutes of Canada, 1928, c. 23, s. 4) which provides that where service is made by registered post, the time at which the document so posted would be delivered in the ordinary course of post shall be considered as the time of service. See Annual Practice, 1928, at p. 1446.

However, one must examine carefully the language of section 89(2) above set out. The wording is, "may be served upon the taxpayer either personally or by being "sent" to him at his last known address by registered mail." My interpretation of this wording is that it is not the receipt of the notice by the taxpayer which is important, but its "being sent"; and the date on which it was "sent," should be regarded as the date of service.

If I am right in this interpretation of section 89(2), then the service was in time, and this objection fails.

The issues on the appeal from the Appeal Board, that is for the years 1946 and 1947, are similar to those on the appeal by the taxpayer from the assessment by the Minister for the years 1941 to 1945, inclusive, and the evidence and the points raised apply equally in both cases.

The taxpayer set up the further objection that the case was *res judicata* so far as the findings of fact by the Appeal Board were concerned. However, it has been held in this Court that an appeal from the Tax Appeal Board is a trial *de novo,* and consequently this Court must find the facts in the same manner as did the Board. The Board found

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as a fact, and this is the main issue to be determined, that the sum of $17,863 shown in the net worth statement of the taxpayer were moneys made in betting at the race course, and, not being a part of the taxpayer's business or calling, are not taxable; and also the further fact that the taxpayer had $10,000 in his safety deposit box on the 1st January, 1941, which therefore could not have been profits in the subsequent years.

The facts and circumstances of the case are substantially as follows: the appellant came to Alberta from Scotland in 1906 and is seventy-two years of age. His education ended at the fifth grade in school, and he claims to know practically nothing of bookkeeping. His principal occupation is farming a few miles west of Edmonton, Alberta. His farm consists of about 560 acres, and of these, with the help of his son, he cultivates about 400. The largest part of his revenue he states is from grain. He also keeps some milk cows and hogs. His wife is an invalid, and he employs a housekeeper, and in the heavy season engages hired help. He states that the racing season does not interfere with his farm operations, as it takes place in the interval between putting in the crops and the harvest.

For about ten years or more the taxpayer has regularly attended the horse races during the racing season at Edmonton, Calgary, and sometimes at Saskatoon and Regina, the periods taken up being about six weeks. He states that he is an enthusiast with respect to horse racing, and that it is his hobby. He spends about twenty-three days at the Edmonton races, twenty days at Calgary, Saskatoon six days and Regina six days. In all, when he attends all events, therefore, about fifty-three days in the year. He also has an interest in at least three horses and possibly five, and races them under the name of Burrows and Walker. Mrs. Burrows was the owner of some of these horses and gave him a third interest in them in consideration of his taking care of them between seasons. One horse, Silent Flame, made $2,600 the first year and this money was divided as follows: one-half to the trainer, and the balance divided between Mrs. Burrows and Walker in equal shares. It is not very clear what other moneys were made with the horses, but he claims that actually very little, if any, was made when all expenses were paid,

and made no returns with regard to this particular business. He did his betting through the Pari-Mutuels and testified that each night he would make a memo on the program of the day, or pieces of paper, in his hotel, as to his winnings for the day; take them all home at the end of the racing period, and at the conclusion of the racing season would enter in his little black book, Exhibit 3, the exact amount of his winnings for the year. None of these memos were produced as he states he did not keep them, the only entries being the year's earnings shown in said Exhibit 3.

Examination of Exhibit 3 would make it appear that all these entries might or could well have been made at the same time. They are the only entries in the book. It is not the kind of corroboration which one would or should expect in a matter of this character. It may or may not be correct, but for my part I feel that I cannot be satisfied with it. They are really not original entries at all in the true sense, but merely the total of the figures gathered from alleged original entries.

Several witnesses testified that Walker was habitually at the races and betting on nearly every race, and some of them saw him actually winning, and with money in his hands. But of course they could not say how much he might have won or lost. He no doubt did win many times and he probably lost many times. Stress was laid on the fact that he was known as "Lucky Walker", but that is hardly acceptable evidence as to the extent of his winnings. In order to satisfy any Court that these large amounts were the result of betting, I think much more satisfactory evidence should be required. If any definite amount could have been established, then, subject to what I shall say later, credit might be given him therefor, but in the absence of such proof it is impossible to say what that amount should be, and as the responsibility is on the taxpayer to show exactly what part of these items are from betting, and what from his regular business of farming, his appeal in that respect must fail. In reality, the only evidence on this point is the taxpayer's own word. More satisfactory corroboration I think should be required in such circumstances than that adduced at the trial.

As to whether or not the taxpayer's operations on the race courses amounted to the carrying on of a business or calling, and assuming the fact that he did make said moneys

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in betting, such sums are taxable, on the authorities I am left in some doubt. The crucial point seems to be, was he betting as a hobby, or for pure amusement, or was he systematically carrying on with a view to making money?

There are many decisions on this subject in the English, Australian and New Zealand courts gathered in Gordon's Digest of Income Tax cases. I deduce from an examination of these decisions that each case must depend on its own particular facts, the important feature being whether or not there was an intention on the bettor's part to make profit, and not as a form of amusement or hobby. Although in view of my finding above it is not necessary to decide this latter point, nevertheless when it is considered that the taxpayer did have an interest in several race horses; had the benefit of inside information from jockeys and other interested persons on the probable outcome of races, which he admits he had due to the fact that he was running some horses which he owned or had an interest in; and the further fact that for ten years or more he systematically attended all the races in sometimes four different cities and bet on most of the events, one is almost driven to the conclusion that this set of facts constitutes a business or calling within the meaning of the tax Acts, and the moneys made thereby would therefore be taxable. There does not seem to be any doubt that money made on casual bets made for pure amusement, or a hobby, are not assessable. Where to draw the line is the difficulty, but should I be compelled to make a decision on this aspect of the case, I think I would have to find on the facts and circumstances of the case that such winnings are assessable to tax.

In *Partridge* v. *Mallandaine,* (1), Lord Denman said:

> The words in 5 & 6 Vict. c. 35, s. 100, Sched. D, second case, are "professions, employments, or vocations." I am not disposed to put so limited a construction on the word "employment" as that suggested in argument. I do not think that employment means only where one man is set to work by others to earn money; a man may employ himself so as to earn profits in many ways. But the word "vocation" is analogous to "calling" a word of wide signification, meaning the way in which a man passes his life. The appellants attend races, make bets, and earn profits. Is it to be said that, under these circumstances, they are not to be assessed to the income tax, although every year they may have bets paid which put a thousand pounds into their pockets . . . I think that the case comes within the word "vocation," and therefore the Commissioners were right.

(1) (1887) 18 Q.B.D. 276 at 277.

The words in our Act are "from a trade or commercial or financial or other business or 'calling,' directly or indirectly received by a person from any office or employment or from any profession or 'calling' etc. etc." It will be noted that Lord Denman says " 'vocation' is analogous to 'calling.' "

Other decisions which might be referred to are found in Gordon's Digest, e.g., *Trautwein* v. *Federal Commissioners of Taxation,* (1); *Jones* v. *Federal Commissioner of Taxation,* (2).

In the *Jones* case where there was a conspicuous absence of system, and the element of sport, excitement and amusement were the main attractions, the decision was that Jones was not engaged in betting as a business. Evatt, J. said: "All that I have said can best be summed up by saying that, during the relevant period, the appellant acquired and developed a bad habit which he was in the special position to gratify. I do not think that the gratification of this habit was a carrying on of any business on his part, despite his many bets and his heavy losses."

It is notorious that many people, usually well off, who keep and run horses as a sideline, for excitement or amusement, lose money which they know or believe they can afford to lose. In the present case, I do not think that in Walker's circumstances he could reasonably believe he could afford to lose much money on a hobby of this kind, from which I infer that his intention in embarking on this business was to make profits out of it. If that was his intention, then I think it can be said he was engaged in a scheme other than a hobby, or for amusement, and any winnings would be assessable to tax. This, then disposes of the item of $17,863.

As to whether or not the taxpayer had $10,000 or more in his safety deposit box on the 1st of January, 1941, whilst the evidence is not very satisfactory, I am inclined to give him the benefit of the doubt, and to hold that he had.

With the greatest deference to the learned member of the Tax Appeal Board, I feel compelled to conclude that the appeal from the Board with respect to the $17,863

(1) (1936) 56 C.L.R. 196. (2) (1932) 2 Aus. Tax Dec. 16.

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ought to be allowed; but agree with them as to the findings regarding the above mentioned $10,000 item, and the appeal of the Minister in this respect is dismissed. The assessment will therefore be adjusted accordingly for the years 1946 and 1947.

The appeal of the taxpayer with respect to the years 1941 to 1945, inclusive, with regard to the item of $17,863, is dismissed, but allowed as to the $10,000 item above mentioned, and the assessment will also be adjusted accordingly.

As the Minister is successful in the major part of both appeals, and the taxpayer successful in the less important item in dispute, I think the best disposition of costs is to allow one half the taxable costs to the Minister, and no costs to the taxpayer.

Judgment accordingly.

1951

Nov. 29
Nov. 30

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

HAROLD McKAY BOLSBY ..... RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 2(1), 2 (s), 9, 34—Income Tax Act, S.C. 1948, c. 52, s. 15(3)—Section 34 a departure from section 9—Meanings of "year" and "fiscal period".

The appellant was the proprietor of a business the fiscal period of which ended on March 31 in each year. On April 30, 1946, he sold his business and retired. In his income tax return for 1946 he reported the income from his business only for the fiscal period ending March 31, 1946, but the Minister re-assessed him for 1946 and added the income from his business for April, 1946, to the amount reported by him. He appealed to the Income Tax Appeal Board which allowed his appeal and the Minister appealed from its decision.

Held: That section 34 is a departure from the general charging section of the Act and a taxpayer cannot be affected by it unless he comes within its express terms.

2. That in 1947 the taxpayer was not the proprietor of a business at all and section 34 had no application to him and that the income from his business for April, 1946, had no place in his income tax return for 1947 but must be included in his taxable income for 1946.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Thorson, President of the Court, at Toronto.

G. B. Bagwell, K.C. and *J. S. Forsyth* for appellant.

P. J. Bolsby K.C. and *P. B. C. Pepper* for respondent.

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

On the conclusion of the argument the President (November 30, 1951) delivered the following judgment.

This is an appeal from the decision of the Income Tax Appeal Board (1) allowing the respondent's appeal from his income tax assessment for the year 1946.

The facts are not in dispute. It was agreed between the parties that they are correctly set out in the reasons for judgment of the Assistant Chairman of the Income Tax Appeal Board. Prior to April 30, 1946, the respondent was the sole proprietor of a business in the City of Toronto known as the Bolsby Coal Company. He had carried on this business for more than 20 years and throughout the whole of this time the fiscal period of his business ended on the 31st day of March in each year. On April 30, 1946, due to ill health, he sold his business and retired. In his income tax return for the year 1946 he reported his income from his business for the fiscal period ending March 31, 1946. His net taxable income for that year, including such income, amounted to $5,050.85, on which a tax of $944.02 was levied and paid. The income from his business for the month of April, 1946, amounting to $2,664.43, was reported in his income tax return for 1947. The amount of taxable income reported by him in this return, including this sum, came to $3,527.26. The Minister re-assessed the respondent for the year 1946, adding the sum of $2,664.43, being the income from his business for the month of April, 1946, to the amount of $5,050.85 which he had reported in his return for 1946. From this assessment the respondent appealed to the Income Tax Appeal Board, contending that the income from his business for April, 1946, was properly

(1) (1951) 3 Tax A.B.C. 248.

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Thorson P.

included in his income tax return for the year 1947 and should not have been included in his assessment for the year 1946. The Board allowed the appeal, vacated the assessment and referred it back to the Minister to deduct the sum of $2,664.43 from the respondent's taxable income for 1946, and to re-assess accordingly. From this decision the Minister appealed to this Court.

I am unable to see how the decision of the Board can stand. The appeal turns on the construction of section 34 of the Income War Tax Act, R.S.C. 1927, chap. 97, which reads as follows:

> 34. A member of a partnership or the proprietor of a business whose fiscal period or periods is other than the calendar year shall make a return of his income and have the tax payable computed upon the income from the business for the fiscal period or periods ending within the calendar year for which the return is being made, but his return of income derived from sources other than his business shall be made for the calendar year.

This section is a departure from the general charging section of the Act, section 9, which provides that in the case of a person other than a corporation or joint stock company the tax shall be assessed, levied and paid upon the income "during the preceeding year" of such person. According to section 2(1), "year" means the calendar year. Thus, if it were not for section 34 the respondent, like every other individual person, would have been assessable only upon his income for the calendar year. It follows, since the section is a departure from the general rule, that a taxpayer cannot be affected by it unless he comes within its express term.

As I read the section, I am unable to see how the respondent's income from his business for April, 1946, could possibly be properly included in his income tax return for 1947. It was not income from the business for a fiscal period ending within the calendar year for which the return was being made, for the respondent had no fiscal period ending in 1947. Moreover, he had no business after he sold it on April 30, 1946. He then retired from business. Consequently, in 1947 he was not the proprietor of a business at all. He had ceased to be such on April 30, 1946. The conclusion seems plain that in 1947 he did not come within the terms of section 34 at all and that it had no application to him. He, therefore, fell back under

the general charging section of the Act. The income from his business for April, 1946, thus had no place in his return for 1947 and could not have been validly included in his assessment for 1947. That being so, the Minister was right in determining that the amount of the respondent's April, 1946, business income had no place in his return or assessment for 1947 and must be added to the amount reported by him in his return for 1946 as an item of taxable income for 1946.

Since the respondent's April, 1946, business income cannot be included in his income tax assessment for 1947, it must be included in his taxable income for 1946. It cannot fall anywhere else. It was income earned in 1946 and must be considered as subject to the general charging of section 9, to the extent that it was not covered by section 34. The term "fiscal period" is defined by section 2(*s*) as follows:

> 2. In this Act, and in any regulations made hereunder, unless the context otherwise requires,
>
> (*s*) "fiscal period" means the period for which the accounts of the business of the taxpayer have been, or are ordinarily made up and accepted for purposes of assessment under this Act, and in the absence of such an established practice the fiscal period shall be that which the taxpayer adopts:
>
> Provided, however,
>
> (i) that such fiscal period shall not in any case exceed a period of twelve months; and
>
> (ii) that if a taxpayer purports to change his or its usual and accepted fiscal period, the Minister may, in his discretion, disallow such change.

In view of this definition I do not see how it could be held, as counsel for the appellant contended, that the respondent had two fiscal periods ending in 1946, one at March 31, 1946, and the other at April 30, 1946. He had only one fiscal period for which the accounts of his business had been or were "ordinarily made up and accepted for purposes of assessment under the Act" and that was the period ending on March 31, 1946. Consequently, it was only the income from the business for that fiscal period that could be included in his taxable income for 1946 under the authority of section 34. That was, therefore, the whole of the extent to which the section applied to him. Any other income, whether from his business, to

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the extent to which section 34 did not apply to it, or from other sources, received during the taxation year 1946 was liable to assessment for that year.

In my opinion, the language of section 34 clearly supports the conclusion I have reached and I find no ambiguity in it. The Court must, therefore, give effect to it without regard to the effect it may have on the respondent. It may well be that there was a deficiency in the section and a failure to provide fairly for the case of a proprietor of a business who ceased to be such before the end of an ordinary fiscal period. That there was such a deficiency seems to be recognized by section 15(3) of the Income Tax Act, Statutes of Canada, 1948, chap. 52, which does make provision for such a contingency. But section 15(3) of the Income Tax Act is not the law governing this case and the Court must apply the law as it is with whatever deficiency there may be in it.

For the reasons given, I find that the assessment for 1946 against which the appellant appealed was valid. The appeal from the decision of the Board must, therefore, be allowed, and the assessment restored. The appellant is also entitled to costs.

Judgment accordingly.

1951

May 17
May 18

BETWEEN:

HIS MAJESTY THE KING, on the Information of the Deputy Attorney General of Canada ..... } PLAINTIFF;

AND

WILFRED LIGHTHEART .....DEFENDANT.

Crown—Negligence—Negligence Act, R.S.O. 1937, c. 115—The Highway Traffic Act, R.S.O. 1937, c. 288, ss. 39(15), 60(1)—Action for damages for injury to Crown's motor vehicle and for loss of services of member of reserve army due to negligence of defendant—Concurrent negligence of servant of Crown—Crown action not barred by Provincial Act.

The action was brought to recover damages for loss and injury sustained by the Crown as the result of a collision between a motor vehicle owned and driven by the defendant and a motor vehicle owned by the Crown and driven in the course of duty by a member of the armed forces of Canada. The Crown's vehicle was damaged

and a member of the reserve army was seriously injured, involving loss of his services and pay and allowances, hospitalization and medical expenses.

Held: That the defendant was negligent in driving his car on the highway in the dark without lights.

2. That the servant of the Crown was negligent in attempting to pass the vehicle in front of him without making sure that the road ahead of him was free from on-coming traffic.

3. That the Crown is able to take advantage of the Negligence Act of Ontario. *Toronto Transportation Commission* v. *The King* (1949) S.C.R. 510 followed.

4. That when the Crown has lost the services of a member of its armed forces it may bring an action *per quod servitium amisit* in the same way as any other master and that the amount of pay to which the member of the armed forces is entitled is evidence of the value of his services. *The King* v. *Richardson* (1948) S.C.R. 57 followed.

5. That it is impossible to measure the value of the loss of services of a soldier of a reserve unit differently from those of a soldier of the regular army.

6. That the Crown's claim was not barred by section 60(1) of The Highway Traffic Act of Ontario.

INFORMATION to recover damages for loss and injury due to negligence of the defendant.

The action was tried before the Honourable Mr. Justice Thorson, President of the Court, at Guelph.

J. McNab and *S. Samuels* for plaintiff.

C. Grant K.C. for defendant.

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

On the conclusion of the trial (May 18, 1951) the President delivered the following judgment:

This action is for damages for loss and injury sustained by His Majesty as the result of a collision between a motor vehicle owned and driven by the defendant and a motor vehicle owned by His Majesty and driven in the course of duty by Sergeant-Major Harold Joseph Keating, a member of the armed forces of Canada.

The collision occurred a few miles south of the Town of Arthur in Ontario at about 7.30 p.m. on October 16, 1949. His Majesty's vehicle was one of two army jeeps that formed part of a convoy of army vehicles of the 11th Field Battery of the Royal Canadian Artillery, a reserve

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unit of the Canadian Army, that was travelling south on provincial highway No. 6 on its way back to its headquarters at Guelph after a fire practice field exercise at Meaford. The defendant's car was proceeding north. Sergeant-Major Keating was one of two dispatch riders whose duty was to patrol the convoy to see that the vehicles kept at the proper distance of approximately 100 feet from one another and to control traffic at intersections so that the convoy might safely cross. The convoy had stopped a few miles north of Arthur and the vehicles in it were ordered to turn on their lights as it was getting dark. After it had started again and passed through Arthur, Sergeant-Major Keating, who was then at the rear of the convoy, was proceeding in stages towards the front to be ready to control east and west traffic at the next cross-road. He had just pulled out from behind one of the vehicles in the convoy in order to pass vehicles in front of it when his jeep was struck by the defendant's car that had come from the south and was travelling north. The jeep was damaged and Warrant Officer Joseph Bernard Lamont, who was riding in it with Sergeant-Major Keating, was seriously injured involving loss of his services and pay and allowances, hospitalization and medical expenses.

The Crown's claim is for damages for the cost of repairing the army jeep, amounting to $313.95, loss of the services of Warrant Officer Lamont during the period of his incapacitation for which he was paid pay and allowances of $774.04 and his hospitalization and medical expenses amounting to $332.50, making a total of $1,420.49.

The plaintiff's claim is based on negligence on the part of the defendant, several particulars of which are alleged in the statement of claim. It is necessary to deal only with the allegations that are supported by the evidence. The most important allegation of negligence is that at the time of the accident and immediately prior thereto the defendant was driving without lights, although it was dark and after dusk. I am satisfied from the evidence as a whole that this allegation is well founded and I so find. The defendant said that his lights were on, that he had stopped at Alma for gas and had turned his lights on there, that they were in good shape, that when he saw the convoy he dimmed his lights but did not put them out

and that they were both on immediately prior to the collision but that after the collision he had turned them off. Russell O'Neil, who was in the front seat of the defendant's car beside him, gave evidence to the same effect. I do not accept these statements but prefer the evidence on this point given by the witnesses for the plaintiff. Officer Cadet Vernon H. Porter, who was in charge of the lead vehicle of the convoy, said that he saw a car approaching from the south. It was then 200 feet away. He dimmed the lights of his vehicle and the lights of the approaching car went out. They were out as the car passed his vehicle. It was dark at the time and impossible to see ahead without lights. Mr. Porter's evidence is confirmed by other witnesses. Warrant Officer Lamont, who was sitting in the jeep beside Sergeant-Major Keating, got a glimpse of the defendant's car just before it struck the jeep and he was positive that its head lights were out. Sergeant-Major Keating stated that he pulled out from behind one of the vehicles in the convoy to proceed to the front and that when he had straightened out he saw a car coming directly in front of him with no lights on. It was then about 30 or 40 feet away and he swung his jeep sharply to the left in order to try to avoid it. He was certain that the oncoming car had no lights on and said that if its lights had been on he would have seen it and would not have attempted to pass the vehicles in the convoy that were ahead of him. After the collision Sergeant-Major Keating questioned the defendant why he did not have his lights on and the defendant asserted that they were on, whereas they were not. I have no hesitation in preferring the evidence of Sergeant-Major Keating that the lights on the defendant's car were out to that of the defendant that they were on. There is confirmation of Sergeant-Major Keating's evidence in the statements of Sergeant-Major Jack Radcliffe. He went to the defendant's car after the collision and saw that its lights were out. He asked the defendant why he was driving without lights and the defendant said that they were on but they were not. Sergeant-Major Radcliffe then reached into the car and turned on the light switch. The lights then went on except the right front light which had been broken in the collision. There is, in my opinion, no doubt that the

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defendant was driving his car in the dark without any lights and that this was the main cause of the collision and its resultant damage.

Under these circumstances it is not necessary to deal at any length with the other allegations of negligence. It was said that the defendant was not in a fit condition to drive a car by reason of the consumption of an excessive amount of alcohol. Sergeant-Major Keating said that after the defendant got out of his car he smelt liquor on his breath, and Sergeant-Major Radcliffe went even further. He said that the defendant was drunk. His evidence was that the defendant smelt of liquor, that his speech was thick and that he staggered when he was talking to him. There were full and empty bottles of beer in the car. As further evidence of the defendant's condition, Sergeant-Major Radcliffe referred to the defendant's insistence that his lights were on when they were off and said that he did not believe that the defendant realized what had happened; he kept laughing as if it were a great joke. I am not required to find whether the defendant was drunk or not. There is no doubt that he had been drinking earlier in the day, and probably he drank more than he said he did. It may well be that this affected his judgment and that when he first saw the convoy he put his lights out instead of dimming them, but, whatever may have been the cause, the fact is that he was driving his car on the highway in the dark without lights. This was negligent.

While I have no hesitation in finding negligence on his part, I have had more difficulty in determining whether there was concurrent negligence on the part of Sergeant-Major Keating, but I have come to the conclusion that he was not wholly free from blame. His evidence was that after the convoy had passed the junction of highways No. 6 and No. 9 he fell in behind the last vehicle in the convoy and then proceeded towards its head gradually passing the vehicles ahead of him. He had got about half way up the convoy when he had to pull in between two vehicles in it to let two north-bound vehicles pass. He then pulled out from behind one of the vehicles to proceed to the front and when his jeep had straightened out on the highway and he had travelled about 22 feet alongside the vehicle from behind which he had pulled out he

saw the oncoming car about 30 or 40 feet ahead of him and dangerously close. It appeared to be travelling towards the centre of the road and the vehicle beside which he was travelling. He then swung his jeep sharply to the left in order to avoid a collision. He was so close to the vehicle on his right that he had only the alternatives of a head-on collision or a sharp swerve to his left. While he was making this swerve the right front fender of the defendant's car struck the right rear wheel of the jeep and swung it half-way around so that when it came to a stop it was on the shoulder east of the pavement and pointing south with all four wheels off the pavement. The defendant's car came to a stop 50 to 75 feet farther north. It was also all off the pavement and facing north.

While there is no doubt that Sergeant-Major Keating did all that was possible to avoid the collision once that it was imminent it is also clear from his cross-examination that all the vehicles in the convoy ahead of him had their bright lights on and would, to that extent, light up the road ahead. The vehicles were travelling about 100 feet or 100 yards apart and the lights would show up about 150 to 200 feet. Section 39(15) of The Highway Traffic Act of Ontario, R.S.O. 1937, Chap. 288, provides:

> 39. (15) No person in charge of a vehicle shall pass, or attempt to pass, another vehicle going in the same direction on a highway, unless and until the travelled portion of the highway in front of, and to the left of the vehicle to be passed is safely free from approaching traffic.

Under all the circumstances, I have come to the conclusion that Sergeant-Major Keating did not satisfy this requirement of the law. He was, I think, too close to the vehicle ahead of him and made too sharp a turn to pull out from behind it. This did not give him the chance which he should have had of making sure that the portion of the highway in front of and to the left of the vehicles he was intending to pass was safely free from approaching traffic. If he had been farther behind and had started to pull out at a less sharp angle he would, I think, with the aid of the lights of the convoy vehicles ahead of him have been able to see the oncoming car even without its lights sooner than he did and could then have pulled back in safety behind the vehicle from which he had pulled out. This view is supported by the evidence of the defendant that the jeep was 10 or 15 feet behind one of the vehicles

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when it turned out on the highway. The defendant said that he then swung to his left to avoid hitting the jeep since he could not turn to his right because the jeep had swerved to its left. Russell O'Neill confirmed this evidence. He said that the defendant's car was about 60 feet away when the jeep pulled out from the vehicle in front of it. It was about 15 feet behind that vehicle. I, therefore, find that Sergeant-Major Keating failed to make sure that the road ahead of him was free from oncoming traffic.

On the evidence I find that the defendant was 75 per cent to blame for the collision and Sergeant-Major Keating 25 per cent.

It is established by the judgment of the Supreme Court of Canada in *Toronto Transportation Commission* v. *The King* (1) that the Crown is able to take advantage of the Negligence Act of Ontario, R.S.O. 1937, Chap. 115, and that it should, therefore, be entitled to the percentage of damage found by the Court to be attributable to the other party. I, therefore, find that the plaintiff is entitled to 75 per cent of the proved damages.

There is no dispute as to the damage to the jeep. The cost of repairing it was proved by Warrant Officer John E. Kerr to amount to $313.95.

It is also established that the Crown paid Warrant Officer Lamont the sum of $774.04 by way of pay and allowances during the period of his incapacitation. This amount was paid pursuant to the pay and allowance regulations applicable to members of reserve units. Counsel for the defendant sought to draw a distinction between the services of a member of a reserve unit and those of the members of the regular army, but I am unable to draw any such distinction. It is established by the judgment of the Supreme Court of Canada in *The King* v. *Richardson* (2) that when the Crown has lost the services of a member of its armed forces it may bring an action *per quod servitium amisit* in the same way as any other master and that the amount of pay to which the member of the armed forces is entitled, although he cannot bring an action for it, is evidence of the value of his services. This was the view of Kerwin J., speaking also for Taschereau J. Rand J., in a characteristic judgment, recognized that it

(1) (1949) S.C.R. 510. (2) (1948) S.C.R. 57.

was impossible to measure in monetary units the value of national liberty or the maintenance of social order and well being. He could see no reason why, *prima facie* at least, the value to the Crown of the services lost, to the benefit of which, in the circumstances and without more, the Crown was at all times exclusively entitled should not be measured by the remuneration. The reasons for judgment of Estey J. support this view. Counsel for the defendant sought to establish that there was a difference between members of the regular army and members of reserve units but I am unable to see any such difference in principle. It is, in my judgment, impossible to measure the value of the loss of services of a soldier of a reserve unit differently from those of a soldier of the regular army, and I find the claim of $774.04 for loss of services, being the amount of pay and allowances paid, is well established.

The Crown also claims the sum of $332.50 for hospitalization and medical expenses. This amount, although not proved by counsel for the plaintiff, was generously and properly admitted by counsel for the defendant.

It was alleged in the statement of defence that the plaintiff's claim was barred by reason of Section 60(1) of The Highway Traffic Act, R.S.O. 1937, Chap. 288. This was not argued by counsel for the defendant. The contention is not allowed by the judgment of the Supreme Court of Canada in *The King* v. *Richardson* (*supra*).

In the result there will be judgment in favour of the plaintiff for 75 per cent of the plaintiff's claim, established at $1,420.49, amounting to $1,062.48.

It is settled by the practice of this Court that the plaintiff who succeeds in an action for damages based on negligence is entitled to his costs irrespective of the fact that his claim may have been reduced by reason of concurrent negligence on the part of the defendant or his servant.

There will, therefore, be judgment for the plaintiff for $1,062.48 and costs to be taxed in the usual way.

Judgment accordingly.

1951
Oct. 5, 6
Nov. 30

BETWEEN:

MISS N. ..... APPELLANT;

AND

MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

Revenue—Income—Income tax—Income War Tax Act 1927, c. 97, s. 3(1) —Excess Profits Tax Act—Carrying on a business—Dealings in real estate—Intention to buy and sell real estate to realize profits—Profits taxable—Appeal dismissed.

Held: That where transactions in real estate are carried on merely for the purpose of investment with casual profits accruing to the investor such profits are not taxable but where the intention is to buy and sell with the view of earning profits such profits are taxable as being the net profit or gain from a business.

APPEAL under the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Hyndman, Deputy Judge of the Court, at Edmonton.

Geo. H. Steer, K.C. for appellant.

H. W. Riley, K.C. and *F. J. Cross* for respondent.

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

HYNDMAN D. J. now (November 30, 1951) delivered the following judgment:

This is an appeal by the taxpayer from an assessment by the Minister of National Revenue for income and excess profits taxes for the years 1943, 1944 and 1945, in the amount of $5,832.50, $6,721.93, and $6,872.96, respectively; less amounts paid, namely, $2,530.51, $2,313.28, and $4,232.55, for the years 1943, 1944 and 1945, respectively, leaving a balance of taxes unpaid as at the 5th September, 1948, for the said years, of $4,170.74, $5,184.67, and $2,989.73.

Notice of dissatisfaction was filed with the Minister, dated 2nd September, 1949, but on the 15th December, 1949, such assessment was confirmed.

The difference between the amounts paid as above mentioned and the present assessment, are claimed by the Minister to be taxes on profits or gains made by the taxpayer, the appellant, from the purchase and sale of real

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Hyndman, D.J.

estate transactions in the City of Edmonton in each of the years 1943 to 1945, inclusive.

The appellant submits that such profits are not taxable inasmuch as they are capital profits from investments of money which she had saved over a great many years and that she was not carrying on any trade or business, within the meaning of the Income War Tax Act, so far as these transactions were concerned, but merely investing her capital saving in securities which appreciated in value in a normal manner.

The issue then is, was the appellant or was she not carrying on a trade or business with a view to profit or gain in respect of these transactions within the meaning of section 3(1) of the Income War Tax Act? Section 3(1) of the Income War Tax Act reads as follows:

"Income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business.

The facts of the case as disclosed in the record and evidence at the trial are substantially as follows: The appellant stated that as a young girl she worked in a laundry at a wage of $20 per week for three years, then for four and one-half years was in partnership with her brother in the laundry business, and when that business ceased she had $1,600 saved up. Then in 1927 she worked in the Ponoka Mental Hospital for a year and three months at $45 a month, with board and lodging. After that she worked in her father's store, first at $40 a week and later at $50 a week, until 1938 when the father transferred his meat business to her and her two brothers in equal shares, and since then to the present time she says she spends all her working days in the store from 7.30 a.m. to 6 or 7 p.m. During all her life in Edmonton she has lived at home with her father at no cost to her and saved practically all her earnings when on wages, and afterwards as a partner with her brothers.

Her first investment was in 1930—a loan of $2,000; in 1931, $1,600 on a mortgage; $500 purchase of an agreement for sale; loan of $200 to her brother. In 1933 loan to

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brother $5,000; in 1934 agreements of sale of about $1,500; 1935 loan $860; 1936 loan $376; purchase of oil stock $500 which proved worthless; agreement of sale $307; 1937 loan $110; May 21, 1937, she purchased a house for $1,400 and in June of same year sold same for $2,200. On February 9 she purchased a house for $2,118.82 and in May 1940, sold same for $4,550. Loaned $207, bought an agreement of sale for $165.16. In May, 1938, she purchased a property for $3,200 and sold same in 1943 for $7,500; and another house for $1,772.70 and sold it in December, 1941, for $1,800. On 1st October, 1938, she purchased a house for $1,600 and on December 1, 1938, sold it for $2,088.52. In 1939 she had seven separate transactions in buying and selling houses, making substantial profits, and in intervals between purchases and sales, rented some of them. In 1940 and 1941 seven similar transactions occurred each year: in 1942 three transactions; in 1943 twenty-six; and in 1944 thirteen; in 1945 ten and in 1946 three. In only two instances were the properties sold for cash. In most cases the terms were a comparatively small down-payment and the balance in monthly instalments, some with interest and others without interest, and it would take several years to fully pay for the purchase price.

The appellant made returns as income, and paid taxes thereon, on all profits in the said meat business, and on all rents received by her for rented premises, and on all interest paid her under agreements of sale, or otherwise; but not on profits realized from the sale of the real estate purchased and sold, which she regarded as capital accretions and profits and non-taxable. I might add that at different times she bought Victory Bonds, three of them at $5,000 each, which, I think, she sold in 1943.

That she had accumulated very substantial savings over the years does not admit of doubt, and had she invested same from time to time in properties with the sole purpose of securing an income such as rents, I do not think she should be considered as a trader or in business. She had no office and did all necessary work in relation to these transactions at her home at night, after shop hours, and on Sundays. Her evidence is that on the advice of her father in the year 1938 she acquired two or three properties as investments for the rent which they rendered, as she wanted to provide independence for herself in case of

sickness or other need. Later, she purchased more and more with her former savings and the profits on the sales she had effected. Her thrift and industry cannot but excite one's admiration, and it is likely that she never regarded such profits as other than capital accretions, and not subject to income tax. But examining and considering all the facts and circumstances as a whole, I cannot escape the conclusion that in purchasing at least most of these properties, her object was to sell again and reap profits, and were not transactions with the sole view of leasing and holding as investments. I quote from her Examination for Discovery:

48. Q. Did you study the real estate market?

A. Well, I worked at it very hard; I had no experience to study it from, I couldn't study it from books—I studied it from my own practical experience.

49. Q. When you say you worked very hard, what type of work did you do in connection with this real estate affair?

A. Well, before I would buy a home I probably had to inspect thirty before I could see one that was what I thought was a fairly decent buy.

50. Q. Did you improve some of them for purposes of sale?

A. Some of them, yes.

76. Q. And that changed, you tell me, about 1940. You didn't think it was such a good idea. Now, what was your purpose in acquiring houses from then on?

A. Well, I had capital gain in view, of course.

77. Q. And capital gain is the business of making money, isn't it?

A. My idea was to make investments and get enough money together so I would have enough to live on should I fall ill.

95. Q. Yes, and you tell me that you didn't keep in mind the desirability of the house from a resale standpoint?

A. Not necessarily so. I might have changed my mind at any time and wanted to rent it for ten or fifteen years, if times had changed. The market was very unsure at that time. No one knew what it would do and I might have been forced to rent them for fifteen or twenty years. I might not have been able to sell them at all. I took a big chance there.

I think the only reasonable inference from her evidence at the trial and Examination for Discovery, is that during the years in question she followed a course or system which had in view making profit or gain from the purchases which she made. Apart from her evidence, I think the number of transactions, and the close proximity of sales to purchases, compel one to the conclusion that her idea in purchasing involved the intention of selling with the object of profit, and not for investment purposes only.

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The principle of law underlying cases of this nature seems to be that where the transactions are merely for the purpose of investment with casual profits, such profits are not taxable; but where the intention is to buy and sell with the view to profits, such are taxable. In *California Copper Syndicate* v. *Harris* (1), at p. 165 Lord Justice Clerk said:

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But, it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable, where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realization, the gain they make is liable to be assessed for Income Tax.
>
> What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realizing a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

This decision was approved in the Judicial Committee by Lord Dunedin in *Commissioner of Taxes* v. *Melbourne Trust Ltd.* (2) at p. 1010, and was followed by Duff, J. in *Anderson Logging Company* v. *The King* (3).

Mr. Steer for the appellant relied largely on the decision of Locke, J. in *Argue* v. *Minister of National Revenue* (4). That was the case of an individual investing his money in mortgages, promissory notes and other securities, and selling and reinvesting. The point at issue was as to whether or not he was carrying on a business as a money lender, thus rendering himself subject to the provisions of the Excess Profits Tax Act. Locke J., as I understand it, found as a fact that he was merely investing his own money and was not buying and selling with a view to profit, and therefore was not carrying on a trade or business. He quotes the

(1) (1904) 5 T.C. 159 at p. 165.
(2) (1914) A.C. 1001.
(3) (1924) S.C.R. 45.
(4) (1948) S.C.R. 468.

remarks of Jessel, M.R., in *Smith* v. *Anderson* (1), in deciding the meaning of business, as follows:

> So in the ordinary case of investments, a man who has money to invest, invests his money and he may occasionally sell the investments and buy others, but he is not carrying on a business.

Locke, J. makes it plain that questions of this nature must be decided upon the facts of the particular case under consideration. Other decisions I might mention as having a bearing on the case are *The Commissioner of Inland Revenue* v. *The Scottish Automobile and General Insurance Co. Ltd.* (2), *Pickford* v. *Quirke* (3), *Morrison* v. *Minister of National Revenue* (4).

Exception was taken in the pleadings and on the argument as to the correctness of the principle upon which such taxes were calculated and Mr. Steer relied on the decision of the President in *Trapp* v. *Minister of National Revenue* (5). However, on a close examination of that decision, I am led to the conclusion that it is applicable to the facts and circumstances of that particular case only, the point being as to whether or not the taxpayer was entitled to charge as an expense interest on a mortgage which was due in the taxation year, but not paid until the following year.

In the present instance, the situation is to my mind entirely different. On a net worth basis the cost of the securities sold by the appellant would be set off against the value of the securities received on the transactions, the difference being the profit or gain to her. I apprehend that in the assessment the present worth or value of such securities received by her would be the basis thereof. However, as no evidence was adduced to the effect that proper regard was not had to this feature of the assessment, and the responsibility is on the appellant to show error in this respect, I am compelled to find that the appeal on this aspect of the case must fail.

I therefore find that the appellant is liable for income and excess profits taxes in respect of the years 1943, 1944, and 1945 on the profits or gains from the transactions above mentioned, and the appeal must therefore be dismissed with costs.

Judgment accordingly.

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(1) (1880) 15 Ch. D. 247 at 261.
(2) (1931) 16 T.C. 381.
(3) (1927) 13 T.C. 251.
(4) (1928) Ex. C.R. 75.
(5) (1946) Ex. C.R. 245.

1951
Nov. 20
Dec. 6

BETWEEN:

THE PERRY KNITTING CO. .....APPLICANT;

AND

HARLEY MANUFACTURING CO. LTD. ..... } RESPONDENT.

Practice—Trade Marks—Motion to expunge—Alternative motion for an order for pleadings and directing that issues of fact be determined on oral evidence—The Unfair Competition Act, 1932, 22-23 Geo. V, c. 38, ss. 52, 53, 54—Proceedings under s. 52 of a summary nature and determined on affidavit evidence—Issues of fact required by either party to be determined on oral evidence should be specific issues settled by the Court after hearing both parties—Originating notice of motion to state clearly issues raised and include particulars as to why entry in the Register does not accurately express or define existing rights of registrant—Rules 167 and 168 of Exchequer Court—Affidavit contrary to provisions of Rule 168 disregarded—The Court in proper circumstances may adjourn hearing of motion to enable applicant to perfect his case.

In an originating notice of motion under section 52 of the Unfair Competition Act, 1932, Statutes of Canada, chap. 38, for an order expunging the respondents mark "Nitey Nite" from the Register, the applicant included a further notice in the alternative, namely, that if the respondent should appear and oppose the application, the Court would be asked to order pleadings and to direct that issues of fact be determined on oral evidence. On the return of the motion respondent appeared and opposed the motion.

Held: That proceedings under section 52 of the Unfair Competition Act, 1932, should be of a summary nature and heard on affidavit evidence except on specific issues required to be determined on oral evidence and which issues should be settled by the Court after hearing both parties.

2. That an originating notice of motion should state clearly the issues raised by the applicant and include the particulars as to why the entry in the Register does not accurately express or define the existing rights of the registrant.

3. That the affidavit in support of a motion under section 52 of the Act in which the deponent has no personal knowledge of the matters sworn to or in which statements are made as being on information and belief, without stating the grounds thereof, or the source of the information, is contrary to the provisions of Rule 168 of the General Rules and Orders of the Court and should be disregarded.

4. That the Court in proper circumstances has the power to grant an adjournment of the hearing of the motion in order to enable the applicant to perfect his case.

MOTION under s. 52 of the Unfair Competition Act to expunge from the Register the respondent's mark "Nitey Nite".

The motion was heard before the Honourable Mr. Justice Cameron at Ottawa.

J. C. Osborne for the motion.

M. B. K. Gordon, K.C. contra.

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

CAMERON J. now (December 6, 1951) delivered the following judgment:

In this matter the applicant is a New York corporation and is said to be the owner of the trade mark "Nitey Nite" which it caused to be registered in the U.S. Patent Office as of August 18, 1925, under No. 202164. It claims to have used the word in the United States as a trade mark in association with wares described as children's sleeping garments since June 27, 1924, and to have made the trade mark known in Canada by advertisements in publications having a circulation in Canada since 1941. Its mark is not registered in Canada. The defendant is a Quebec corporation and on or about October 10, 1947, it first commenced to use the trade mark "Nitey Nite" on children's night gowns, sleepers and pyjamas; on January 8, 1948, it applied for registration of that trade mark in Canada and such registration was granted under No. 109N.S.28112.

On October 20, 1951, the applicant instituted proceedings by way of an Originating Notice of Motion, asking for an order expunging the respondent's mark from the Register "on the ground that the said entry does not accurately express or define the existing rights of the person appearing from the Register to be the registered owner of the said registration." These proceedings were taken under the provisions of sections 52 and 53 of the Unfair Competition Act, 1932.

The first paragraph of the Originating Notice of Motion is in the usual form and gives notice that on the 20th day of November, 1951, the applicant would ask for an order expunging the respondent's mark. Then follows a second paragraph as follows:

OR, in the alternative, if the Respondent appears on the return of the Motion and objects to the granting of an Order expunging the said registration, this Honourable Court will be requested to order that

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Pleadings be filed setting forth the particulars of the claim and defence of the parties hereto and directing that the issues of fact be determined on oral evidence.

The final paragraph gives notice of the material to be used on the application, including the affidavit of Frederick George Aubrey—a patent agent associated with the applicant's solicitors.

On the return of the motion, Mr. Osborne appeared for the applicant. Mr. Gordon appeared for the respondent and intimated that he was opposing the motion to expunge and was prepared to proceed with the hearing of that application, having previously filed the affidavit of J. A. Chamandy, President of the respondent company. Mr. Gordon further submitted that as notice had been given that the Court would on that date be asked for an order to expunge the respondent's mark, that motion should be proceeded with on the basis of the material then before the Court; that the alternative motion was improper, that it was the clear intention of the Act that the proceedings should be of a summary nature and issues of fact should be determined on affidavit evidence unless the Court had made an order directing that some issue or issues of fact—but not all of such issues—be determined on oral evidence; and that there was no power in the Court to direct pleadings on motions for expungement under section 52. He relied in part on section 54 of the Unfair Competition Act, which is as follows:

> 54. Every such application and every appeal from any decision of the Registrar shall, unless either party requires some issue of fact to be determined on oral evidence, be heard and determined summarily on evidence adduced by affidavit.

Mr. Osborne took the position that as the motion to expunge was being opposed, he wished to proceed with the alternative part of his motion, namely, for an order that pleadings be directed and that the issues of fact be determined on oral evidence.

The procedure as to rectification and alteration under the preceding Act—the Trade Mark and Design Act—was provided by section 45 thereof and was instituted by the information of the Attorney General or at the suit of "any person aggrieved." Under that Act the issues would be defined by pleadings in the ordinary way, but when the

Unfair Competition Act, 1932, came into effect, that procedure was changed. By section 53, every application under section 52 must be made by filing an Originating Notice of Motion or by counter claim in an action for the infringement of the mark. The provisions of the new Act and particularly section 54, make it clear that the new procedure was to be of a summary nature and except where either party requires some issue of fact to be determined by oral evidence, would be heard and determined summarily on affidavit evidence.

The difficulties that have arisen in this case have been brought about because the Rules make no provision for the practical difficulties that are bound to arise in many cases in proceedings of this nature. The proceedings are instituted by an Originating Notice of Motion. No provision is made for the entry of an appearance by a respondent who, under the Rules, may file his affidavits immediately before the application comes on to be heard (Rule 167). The applicant, therefore, is placed in a difficult position inasmuch as he may not know until the motion is about to be heard whether the matter is to be opposed or not; or whether the respondent will require an adjournment or request that some issue of fact be determined an oral evidence; or what the respondent may admit; or whether the respondent may desire to cross-examine on the applicant's affidavits. Faced with these uncertainties, he is unable to determine what witnesses he might require at the hearing should he require some issue to be determined on oral evidence. In some cases, therefore, and in order to meet these difficulties, a practice has developed by which the applicant—as here—includes in his Originating Notice a further notice in the alternative—namely, that if the respondent should appear and oppose the application, the Court would be asked to order that pleadings be delivered, with directions as to the time of delivery thereof and, when desired, that all the issues of fact be determined on oral evidence. In many cases, that procedure has been followed and as far as I am aware the parties thereto have agreed that the method was useful and practical. So far as I know, the objections now taken are raised for the first time.

In other cases where neither party required any issue of fact to be determined on oral evidence, the practice has

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been to treat the motion as one for directions and an order would be secured fixing the delay within which the affidavits should be filed by both parties, the date of the hearing and similar matters. In still other cases where no oral evidence was required, the matter has been disposed of on the basis of the affidavits filed, without any adjournment.

It seems to me that in opposed applications where the applicant desires to have some issue of fact determined on oral evidence—as in this case—it would be practically impossible for the motion for expungement to be heard on the date given in the notice, and that further directions by the Court would be required. Such issues of fact as are to be determined on oral evidence should, in my opinion, be specific issues settled by the Court after hearing both parties. For that reason, I can see no objection to including in an Originating Notice of Motion a further motion in the alternative. How otherwise could notice be served on the respondent that the applicant would ask that oral evidence be allowed on certain issues, when the solicitor for the applicant may have no knowledge as to whether the respondent is to oppose the motion and would have no knowledge as to the name of the respondent's solicitor, until the very date of the hearing?

Counsel for the respondent also took objection to the affidavit filed in support of the motion. It is by a patent agent in the office of the solicitor for the applicant. The objection is taken on the ground that the deponent could have no personal knowledge of the matters sworn to, such as the adoption and use of the trade mark by the applicant, the registration thereof in the United States, particulars of the sales of the applicant's garments, the advertisements used in connection therewith and the costs of such advertisements and the date of first user of the mark. Many of the statements made are made as though they were within the personal knowledge of the deponent, when it is clear that he would have no such knowledge. Still other statements are made as being on information and belief, without stating the grounds thereof, or the source of the information. That is contrary to the provisions of Rule 168 which is in part as follows:

> 168. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions on which statements as to his belief with the grounds thereof may be admitted.

Reference may also be made to *Battle Pharmaceuticals* v. *Lever Brothers Ltd.* (1), in which the President of this Court drew attention to the necessity of strict compliance with the provisions of Rule 168 and stated that proceedings under section 52 of the Act were not in the nature of interlocutory proceedings. (See also *Young* v. *Young Manufacturing Co.* (2)).

Strictly speaking, therefore, the affidavit of Mr. Aubrey should be disregarded except as to paragraphs 1 and 10 and that part of paragraph II which is within his knowledge. In the *Battle Pharmaceuticals* case the President, under the special circumstances there existing, dismissed the application to expunge, but pointed out that the Court might in a proper case grant an adjournment to enable the applicant to perfect his case on appropriate terms.

In this case I shall not dismiss the motion to expunge but will give leave to the applicant to rectify the proceedings on the terms later to be mentioned.

Counsel for the respondent also took the position that the alternative motion should not be granted. As I have intimated above, I am of the opinion that proceedings under section 52 should be of a summary nature and heard on affidavit evidence except on some specific issues required to be determined on oral evidence. The proceedings are initiated by an Originating Notice of Motion which in my opinion should state clearly the issues raised by the applicant and it should include particulars as to why the entry in the Register does not accurately express or define the existing rights of the registrant. In this case that information is to be derived only by inference from the supporting affidavit. Such a procedure as I have suggested would not only define the issue but would sufficiently inform a respondent as to the nature of the case he would have to meet and would be of assistance to him in determining whether he should or should not oppose the application. The affidavits used in support of the application should be those which the applicant intends to use when the matter is heard although no doubt the Court would have power to direct the filing of further affidavits in a proper case. If the procedure outlined were adopted, I can see no reason for

(1) (1946) Ex. C.R. 277 at 282. (2) (1900) 2 Ch. 753.

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directing the filing of a statement of claim or a defence. If an order for general pleadings were made, the summary nature of the hearing required by section 54 would be entirely done away with. For that reason I do not think that an order directing the filing of a statement of claim should be made and I therefore refuse the alternative application on that point.

The material filed by the applicant being defective, I shall dispose of the matter by granting an adjournment on the main motion to enable the applicant to file and serve such further and other material in support thereof as may be advised, such affidavits to be so filed and served within thirty days of this date.

The respondent will have twenty-one days from such service to file and serve any additional affidavits it may require. Either party may on notice move that such specific issue or issues as it desires to have determined on oral evidence, be so heard.

As the adjournment is granted to enable the applicant to perfect its material, the costs of the day on which the motion was heard will be cost to the respondent in any event.

Judgment accordingly.

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Nov. 22
Nov. 29

BETWEEN:

DURAND & CIE. ..... PLAINTIFF;

AND

LA PATRIE PUBLISHING CO. LTD. ..... DEFENDANT.

Practice—Copyright—Demand for Particulars—Rules 42 and 88 of Exchequer Court—Rules of Supreme Court of England, 1883, Order XIX, r. 7, r. 7B, Order XLVIIIA, r. 2—Particulars related to status of plaintiff to be furnished—Plaintiff not required to give particulars related to existence of copyright or title of owner since burden of proof on defendant if he put them in issue—The Copyright Act, R.S.C. 1927, c. 32, s. 20(3)—Manner in which plaintiff's title derives from the author a material fact to be alleged—Facts that would indicate whether or not plaintiff has parted with his title to copyright or those that would assist defendant in establishing plaintiff's title matters to be ascertained upon production or examination for discovery.

Held: That in an action for infringement of copyright the defendant is entitled to have full particulars as to the status of a plaintiff instituting proceedings against him.

2. That particulars related to the existence of copyright in a play or to the title of the owner therein are not needed to enable a defendant to prepare his defence since the burden of proof on these points is on him should he put them in issue.

3. That assuming the plaintiff herein is neither author or composer of the play "Pelleas and Melisande", but that it holds whatever rights it possesses therein under assignments or licenses, particulars as to the manner in which its title is derived from the author and composer are required since it is a material fact on which the plaintiff necessarily relies to make his case. If not so alleged in the action the defendant is totally unaware of the nature of plaintiff's claim to title and unable satisfactorily to prepare a defence.

4. That the plaintiff is not required to set out facts which would indicate whether or not it has parted with its title to copyright, or such facts as would assist the defendant in establishing the latter's title. These are matters which can be properly ascertained upon production of documents or upon examination for discovery.

MOTION for particulars.

The motion was heard before the Honourable Mr. Justice Cameron at Ottawa.

S. Rogers, K.C. and *G. F. Henderson* for the motion.

R. Quain, K.C. contra.

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

CAMERON J. now (November 29, 1951) delivered the following judgment:

This is a motion on behalf of the defendant for an order requiring the plaintiff to give certain particulars of the statement of claim. It is supported by the affidavit of Gordon F. Henderson—a member of the firm of solicitors acting as Ottawa agents for the defendant's solicitors—and concludes as follows:

5. The defendant is unable to plead to the Statement of Claim without such particulars having regard to the sparse nature of the information contained in the said Statement of Claim.

The usual demand for particulars was made but was not complied with and this motion followed.

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The action is one for damages for infringement of copyright in the play "Pelleas and Melisande," it being alleged that the defendant was responsible for the broadcast over Radio Station CHLP of a recorded performance of the said work in its entirety, or substantially so.

It may be noted here that a default judgment was set aside by my order of September 5, 1951, and that by that order leave was given to the defendant to file a defence within twenty-one days after the payment by it of certain costs. That time has expired but the parties have agreed that the time should be extended to the date of hearing of this motion. Upon that hearing I reserved my finding but directed that the time for filing the defence would be further extended until the disposition of the motion, when the matter would be dealt with.

The defendant asks for particulars of eleven different matters. Counsel for the plaintiff opposed the motion as to all the items except No. 11, particulars of which he agreed to furnish. As to the remaining ten items, there can be no doubt that they are referable to matters which would be relevant to the issues to be determined at the trial, should questions be raised (as seems probable) as to the title of the plaintiff to copyright in the play, and as to the existence of copyright in the play itself. The main contention of counsel for the plaintiff was that the statement of claim was sufficient to disclose the issues, that particulars were not needed to enable the defendant to prepare its defence; and that in any event such particulars could properly be secured upon an examination for discovery or upon production of documents.

Rule 88 of the General Rules and Orders of this Court provides that "every pleading shall contain as precisely as may be a statement of the material facts on which the party pleading relies, but not the evidence . . ."

Rule 42 thereof would also appear to be applicable to this case and therefore the practice and procedure to be followed is that in force in similar proceedings in His Majesty's Supreme Court of Judicature in England. 0.19 of those Rules is in part as follows:

> 7. A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleadings, notice, or written proceedings requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise as may be just.

7B. Particulars of a claim shall not be ordered under Rule 7 to be delivered before defence unless the Court or Judge shall be of opinion that they are necessary or desirable to enable the defendant to plead or ought for any other special reason to be so delivered.

The statement of claim herein is unusually short. Exclusive of the claim for damages in the sum of $600, it merely states in brief form that the plaintiff is the owner of copyright in the play, that the defendant on March 10, 1950, performed or caused to be performed a recorded performance over Station CHLP of the play in its entirety or substantially so.

Item 1 of the demand is for particulars as to the status of the plaintiff. The only information furnished in regard to the status of the plaintiff is its name as shown in the style of cause. Nothing is stated as to the jurisdiction in which it is located, where it carries on business, or whether it is an incorporated company or a partnership. I have no doubt whatever that a defendant is entitled to have this information in regard to a plaintiff instituting proceedings against him. If the plaintiff is a corporation, the claim should state that fact, the jurisdiction in which it was incorporated and the location of its head office. If it be a partnership, that fact should be stated, together with the names and addresses of the partners on whose behalf the action is brought.

0.48(*a*), r. 2 of the English Rules, provides that when proceedings are instituted in the firm name of a partnership, the defendant may demand particulars of the names and places of residence of the partners on whose behalf the action is brought, and that if such be not supplied all proceedings in the action must be stayed.

It would appear that the plaintiff has an office in or may carry on business in France. It is of interest, therefore, to note that under the English practice, if such a firm was a partnership and had no place of business in England, it could neither sue nor be sued in the name of the firm. In the 1950 Annual Practice, p. 851, it is stated: "A partnership firm which has no place of business in England within the meaning of words 'carrying on business within the jurisdiction' as defined in the preceding note, can neither sue nor

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be sued in the firm's name. The partners must sue or be sued individually in their own name and be served as ordinary defendants."

The particulars required under Item 1 must be furnished by the plaintiff.

Items 2, 3 and 4 of the demand are for particulars of the names of the author of the words and the composer of the music, of the play, and the name of the country in which they are citizens or subjects. Item 8 is for particulars of all assignments by virtue of which the plaintiff claims to have acquired the copyright in the said work or any interest therein, and the extent of such interest, and setting forth the date of and parties to such assignments. The particulars required in these items all go to the question of the title of the plaintiff to copyright in the play.

Items 5 and 6 are for particulars as to whether the author and composer are alive, and if deceased, the dates of death. Item 7 is for particulars of the name of the country in which the play was first produced, the date thereof and the name of the publisher. These demands in my opinion relate to the question of the existence of copyright in the play.

These particulars are among those which counsel for the plaintiff submits can be ascertained upon discovery. It is not always easy to draw the line between what ought to be furnished by way of particulars and what ought to be obtained by way of discovery. Particulars are ordered primarily with a view to having a pleading made sufficiently distinct to enable the applicant to frame his answer thereto properly, and secondarily to prevent a party from being taken by surprise at the trial. Examination for discovery is made to get at the knowledge of the adverse litigant.

Rule 88 of this Court requires pleadings to contain the precise statement of the material facts on which the party pleading relies. The general rule was thus stated by Cotton, L.J. in *Phillips* v. *P.* (1):

> In my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard, and tell them what they have to meet when the case comes on for trial.

(1) (1878) 4 Q.B.D. 139.

In *Bruce* v. *Odhams Press Ltd.* (1), Scott, L.J. defined "material":

> The word "material" means necessary for the performance of formulating a complete cause of action, and if any one "material" statement is omitted, the statement of claim is bad.

Sections 20 to 24 of the Copyright Act, R.S.C. 1927, c. 32, as amended provide the civil remedies for infringement of copyright. Under section 20(3) thereof, certain statutory presumptions arise in infringement proceedings when the defendant puts in issue either the existence of the copyright or the title of the plaintiff thereto. In such a case the work, unless the contrary is proved, is presumed to be one in which copyright subsists; and the author of the work, unless the contrary is proved, is presumed to be the owner of the copyright.

I think I may safely assume that in this case the defendant will put in issue either the existence of copyright or the title of the plaintiff thereto, or both; and therefore, in considering what are the material facts which the plaintiff must set forth in its claim, it is proper to take into account that the plaintiff may intend to rely on the presumption that copyright subsists in the play rather than setting out matters which would establish that fact. From that point of view, it is not material to its case to allege facts which establish the existence of copyright. While particulars as to Items 5, 6 and 7 would doubtless be of great assistance to the defendant in meeting the presumption as to the existence of copyright in section 20(3) of the Act, it must be remembered that the burden of proof on that point (under the circumstances I have mentioned) lies on the defendant. For that reason I do not think that the plaintiff is required to give particulars as to Items 5, 6 and 7.

But different considerations apply to Items 2, 3, 4 and 8. I think I may assume that the plaintiff is neither author or composer of the play, but that it holds whatever rights it possesses therein under assignments or licenses. By virtue of the presumption that, under the circumstances which I have mentioned, title to copyright is in the author, the plaintiff in order to succeed must establish that the title thereto is in it. The root of the plaintiff's title is in the author and composer, and it is material to the plaintiff's

(1) (1936) 52 T.L.R. 224 at p. 228.

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case that it establish the manner in which its title is derived from the author and composer. These being material facts on which the plaintiff necessarily relies, they must be pleaded, or, strictly speaking, the plaintiff could not give evidence in regard thereto (see *Phillips* v. *P.* (1)). If not so alleged in the claim, the defendant is totally unaware of the nature of the plaintiff's claim to title and unable satisfactorily to prepare a defence. The particulars asked for in Items 2, 3, 4 and 8 must be furnished by the plaintiff.

Item 9 is for particulars of all assignments and/or agreements whereby the plaintiff has parted with the public performing right in the copyright or has granted the right to license performances of the said work in Canada setting forth the dates of and parties to such assignments and/or agreements.

These particulars are no doubt asked for in the hope that they will indicate that the plaintiff has at some time parted with its right to reproduce the play—or some part of that right—in Canada. From material filed on the application to set aside the default judgment, it would appear that Station CHLP is a member of the Canadian Association of Broadcasters and holds certain licences from the Composers, Authors and Publishers Association of Canada (C.A.P.A.C.), a performing rights society; and that C.A.P.A.C. in turn has entered into certain agreements with S.A.C.E.M.—a performing rights society in France—in regard to the use of certain works in Canada. It is the duty of the plaintiff to set out the material facts on which it relies to establish its title to copyright, but it is not required to set out facts which would indicate whether or not it has parted with such title, or such facts as would assist the defendant in establishing the latter's title. These are matters which in my opinion are not necessary to enable the defendant to prepare its defence, but are matters which can be properly ascertained upon production or upon examination for discovery. I therefore refuse the motion as to Item 9.

Item 10 is for particulars of any registration of copyright and assignments thereof at Stationers Hall, London, England, under the provisions of the Imperial Copyright Act of 1842 or other relevant Imperial legislation.

(1) (1878) 4 Q.B.D. 133.

As I understand the argument on this point, it is contended by the defendant that the existence of copyright in Canada may depend upon the question as to whether the work was registered at Stationers Hall under the Imperial Copyright Act, 1842 (see *Smiles* v. *Belford* (1)). Again, this appears to be a matter of the existence of copyright and for the reasons I have stated in regard to Items 5, 6 and 7, I shall not order the plaintiff to give particulars. If the assignments referred to in Item 10 are ones by which the plaintiff acquired copyright in the work, the details of such assignments will be furnished under the disposition I have made of Item 8. If the plaintiff does not rely on any registration at Stationers Hall, it is not required to set out particulars thereof. Such information as the defendant may require in regard thereto is properly to be obtained upon examination for discovery.

In the result, therefore, the motion for particulars will be granted in part. There will be an order requiring the plaintiff to deliver to the defendant particulars of the statement of claim as required in Items 1, 2, 3, 4, 8 and 11 of the notice of motion, within two months of the date of this order; and that all further proceedings be stayed until the delivery thereof.

It is further ordered that the time within which the defendant shall file and serve its statement of defence be extended; and that the defendant shall have leave to file and serve its statement of defence within twenty-one days of the service of the particulars to be delivered under this order by the plaintiff.

The cost of the motion will be to the defendant in the cause.

Judgment accordingly.

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(1) (1877) 1 O.A.R. 436.

1951
Nov. 26
Nov. 29

BETWEEN:

JOHN CRAGG .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

Revenue—Income Tax—Income Tax Act, S.C. 1948, c. 52, Div. J., s. 91(4) —Whether profit from purchase and sale of property is capital gain or taxable business profit a question of fact—Taxpayer not subject to tax on income not received during year.

Between May 1, 1943 and January 31, 1946, the appellant purchased ten properties in Toronto and sold nine of them and the question was whether his profit on these transactions was a capital gain upon the realization or exchange of an investment or a profit or gain from a trade, business or calling.

Held: That whether a profit on the purchase and sale of properties is a capital gain upon the realization or exchange of an investment or a profit or gain from a trade, business or calling is a question of fact to be answered in the light of all the surrounding circumstances and little, if any, help is to be derived from the actual decisions in other cases. *California Copper Syndicate* v. *Harris* (1904) 5 T.C. 159 followed.

2. That the Court must be careful before it decides that a series of profits, each one of which would by itself have been a capital gain, has become profit or gain from a business. Such a decision cannot depend solely on the number of transactions in the series, or the period of time in which they occurred, or the amount of profit made, or the kind of property involved. Nor can it rest on statements of intention on the part of the taxpayer. The question in each case is what is the proper deduction to be drawn from the taxpayer's whole course of conduct viewed in the light of all the circumstances. The conclusion in each case must be one of fact.

3. That, on the facts, the appellant was carrying out a scheme of profit making, that his purchases and sales of property were operations of business and that his profits therefrom were subject to tax.

4. That a taxpayer cannot be taxed in respect of income that he has not received during the taxation year. *Capital Trust Corporation Limited et al* v. *Minister of National Revenue* (1937) S.C.R. 192 applied.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Thorson President of the Court, at Toronto.

J. D. McNish K.C. and *S. G. Tinker* for appellant.

G. B. Bagwell K.C. and *T. Z. Boles* for respondent.

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

THE PRESIDENT now (November 29, 1951) delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board (1) dismissing the appellant's appeal from his income tax assessment for the year 1946 whereby the sum of $7,537.66 was added as taxable income to the amount reported by him.

This amount was said to be the appellant's net profit in 1946 from the purchase and sale by him of three properties in the city of Toronto, namely, 100 Albertus Avenue purchased on July 31 1945, for $11,962.34 and sold on November 26, 1946, for $8,750 a loss of $3,212.34, 2339-41 Yonge Street purchased on January 15, 1946, for $133,000 and sold on May 15, 1946, for $141,000, a profit of $8,000 and 94 Tyndall Avenue purchased on January 31, 1946, for $34,500 and sold on April 30, 1946, for $37,250, a profit of $2,750.

It was contended for the appellant that this amount was a capital gain upon the realization or exchange of an investment and for the Minister that it was the annual net profit or gain from a trade, business or calling carried on by the appellant.

The test to be applied in determining an issue such as this has been considered by the courts in several cases. In *California Copper Syndicate* v. *Harris* (2) the Lord Justice Clerk (Macdonald) put it as follows:

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable, where what is done is not merely a realization or change of investment, but an Act done in what is truly the carrying on, or carrying out, of a business . . .
>
> What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realizing a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

(1) (1950) 3 Tax. A.B.C. 203. (2) (1904) 5 T.C. 159 at 165.

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This statement of principle has been approved by Lord Dunedin, speaking for the Judicial Committee of the Privy Council, in *Commissioner of Taxes* v. *Melbourne Trust, Limited* (1); by Lord Buckmaster in the House of Lords in *Ducker* v. *Rees Roturbo Development Syndicate* and *Inland Revenue Commissioners* v. *Rees Roturbo Development Syndicate* (2); by Duff J., as he then was, speaking for the Supreme Court of Canada, in *Anderson Logging Co.* v. *The King* (3), which judgment was affirmed by the Judicial Committee of the Privy Council (4), and, more recently, by this Court and Kerwin J. in the Supreme Court of Canada in *Atlantic Sugar Refineries Limited* v. *Minister of National Revenue* (5). The question on which side of the line an item of profit or gain falls is thus one of fact to be answered in the light of all the surrounding circumstances. Consequently, little, if any, help is to be derived from the actual decisions in other cases based, as they must be, upon the facts of the case in which they were given.

The facts appear from the evidence of the appellant who was the only witness called. They are not in themselves in dispute, the only question being the deduction that should be drawn from them. The appellant was a full time employee in the accounting department of the North American Life Assurance Company with office hours from 8.30 a.m. to 4.45 p.m. There is no reference in his evidence to any purchase or sale of properties prior to 1943 but from May 1, 1943, to January 31, 1946, he purchased ten properties and sold nine of them, the particulars of his purchases and sales being set out in Exhibit 1. His first purchase was on May 1, 1943, of 504 Sherbourne Street, a large rooming house of 23 rooms, for $11,500. This, he said, was a revenue producing property. He had acquired some money that he desired to invest and gave as his reason for purchasing the property that he realized that his income as a clerk was going to be limited and he wanted to increase it. On November 1, 1943, he purchased two other properties, one, 29-31 Winchester Street, a small apartment house of 10 suites, for $20,000 and the other, 337-41 Sherbourne Street, a small apartment house of 18 suites, for $25,000. These

(1) (1914) A.C. 1001 at 1010.
(2) (1928) A.C. 132 at 140.
(3) (1925) S.C.R. 45 at 48.
(4) (1926) A.C. 140.
(5) (1948) Ex. C.R. 622; (1949) S.C.R. 706.

were both revenue producing and his reason for purchasing them was the same as in the case of the first one, namely, to increase his income. Then on January 2, 1944, he purchased 610-18 Mt. Pleasant Road. This was a different kind of property from the first three. It had three stores and a billiard room on the ground floor and 4 apartments over the stores. It was also revenue producing. In 1944 the appellant sold all these properties at a substantial profit, 504 Sherbourne Street on March 1, 1944, at a profit of $13,500, 29-31 Winchester Street on April 1, 1944, at a profit of $2,000, 610-18 Mt. Pleasant Road on May 1, 1944, at a profit of $6,500 and 337-41 Sherbourne Street on October 31, 1944, at a profit of $4,000, a total profit of $26,-000. The appellant gave a reason for each of these sales. He said that he was anxious to obtain more desirable properties than the rooming house and the two apartment houses. These were older properties in the heart of the downtown district and needed renovation and it was difficult for him to supervise this in view of his full time occupation. There was a similar reason for selling the 610-18 Mt. Pleasant Road property. He did not have time to attend to this investment and, in addition, the fact that there was a billiard room on the premises caused trouble. I now come to three properties of a different nature. On May 1, 1944, the same day as he sold the Mt. Pleasant Road property, he bought Buckingham Manor at Oshawa, a reasonably modern apartment house of 28 to 30 suites, for $48,500. He had a resident caretaker there who collected the rents but he sold this property on April 30, 1945, at a profit of $4,500, giving as his reason for so doing the fact that Oshawa was 35 miles away and gas rationing made supervision difficult. On January 1, 1945, he bought 34-36 Rosecliff for $149,300. This was a fire proof, very modern building with 52 suites and a 28 car garage. The appellant still owns this property, which is fully rented, and has refused an offer of $300,000 for it. Then on July 31, 1945, he purchased Wilton Court, a 100-room hotel. This was revenue producing. It was managed for him by persons on the staff of the hotel. He sold this property on December 5, 1945, at a profit of $23,000, making a total profit in 1945 of $27,500. He gave as his reason for this sale that there was a second mortgage on the Rosecliff property which he

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had to meet and that he used part of the proceeds of the Wilton Court sale to pay it. As part of the sale price for Wilton Court the appellant had to take in 100 Albertus Avenue at $11,962.34. He did not like this investment. Indeed, he never acquired it as such. It was really a trade in which he had to take in order to make his advantageous sale of Wilton Court. He sold this property on November 26, 1946 at $3,212.34 less than the amount at which he had taken it in trade. This was the only sale on which he did not make a profit. Then we come to the other two properties already mentioned, 2339-41 Yonge Street, an apartment house with 40 suites and 2 stores, which the appellant bought on January 15, 1946, and sold on May 15, 1946, at a profit of $8,000 and 94 Tyndall Avenue which he purchased on January 31, 1946, and sold on April 30, 1946, at a profit of $2,750. Altogether his profits on the 9 properties sold between March 1, 1944 and April 30, 1946, was $61,037.66.

The appellant emphasized that he had never advertised any of his properties or listed them for sale and that he had not sought out buyers but that the real estate agents had brought offers to him which he had accepted. He also stated that he often felt an urge to leave his insurance company employment and look after his investments but that he decided in 1946 that he would stay with the company and after that he purchased no other properties, except a small residence which he did not buy for investment. The only property he still retains is 34-36 Rosecliff. He left the employ of the insurance company in 1949 and is now engaged in real estate development and promotion.

While the appellant said that his sole reason for purchasing the properties was to produce revenue and increase his income he admitted on cross-examination that he had stated before the Income Tax Appeal Board that he knew the condition of the real estate market in 1943 and 1944, that it seemed to him that there would be a good market and an increase in value and that this fact influenced him in his decision to purchase. When he was asked why he did not retain the properties if his sole purpose was investment he said that when he was approached to sell he did so, it being his desire sooner or later to own a modern revenue producer which he obtained when he purchased 34-36

Rosecliff. When he was asked why he then purchased Wilton Court he said that at the time he was thinking about resigning his position with his insurance company and that if he had done so he would have retained Wilton Court. This was also given as his reason for purchasing 2339-41 Yonge Street and 94 Tyndall Avenue. This uncertainty followed a period of service in the forces.

There is one other fact to which reference must be made. On May 26, 1947, the appellant made an application under section 5 of the Excess Profits Tax Act, 1940, for a reference to the Board of Referees to have his standard profits determined at $25,000. In this application he described the nature of his business as that of real estate and stated that it had commenced in July 1943. There was a solemn declaration by him that the facts in his application were true. The appellant also filed returns under the Excess Profits Tax Act for the years 1944 and 1945, showing under the head of business income a profit on the sale of properties of $26,000 for 1944 and $27,500 for 1945. His standard profits were fixed by the Board of Referees at $25,000 subject to a deduction for salary allowance. The appellant gave as an explanation for his application that it had been made at the request of the Income Tax Department, but the fact of the application and its contents remains.

Counsel for the appellant stressed the fact that he had not listed or advertised any of his properties or attempted to sell them, that he had testified that his purpose in purchasing the properties was to increase his income and that his evidence was uncontradicted and that he had given a sound reason for the sale of each property. He agreed that the onus was on the appellant to show that he had not been carrying on an operation of business and submitted that the appellant had discharged this onus. His argument then was that in purchasing the three properties the appellant was merely investing his money and that in selling them he was merely realizing his investment and that his profit on each sale was a capital gain and not subject to tax.

There is, I think, no doubt that each of the profits made by the appellant could, by itself, have been properly considered a capital gain and the Court must be careful before it decides that a series of profits, each one of which would by itself have been a capital gain, has become profit or gain

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from a business. Such a decision cannot depend solely on the number of transactions in the series, or the period of time in which they occurred, or the amount of profit made, or the kind of property involved. Nor can it rest on statements of intention on the part of the taxpayer. The question in each case is what is the proper deduction to be drawn from the taxpayer's whole course of conduct viewed in the light of all the circumstances. The conclusion in each case must be one of fact.

I am unable to accept counsel's submission that all that the appellant did was to invest his money and then realize his investment. That does not seem to me to be a realistic view of his course of conduct. I am not impressed with his statement that he did not list or advertise his properties or seek to sell them. He did not have to do so for the offers came to him and he accepted them. The number of transactions and the rapidity of turnover of the properties are also important factors. I am also of the view that it may fairly be inferred from his conduct, rather than from his statements, that in 1943 he embarked upon a program of purchasing properties because he thought that they would increase in value and selling them with the objective of finally acquiring a modern revenue producing property. On the facts, I have no difficulty in finding that the appellant was carrying out a scheme of profit making, that his purchases and sales of property were operations of business and that his profits therefrom were subject to tax. Moreover, I am unable to see how he can now assert that his profits were not business profits in view of his statutory declaration that he was in the real estate business. He cannot escape from this declaration by his attempted explanation.

In view of this finding the appeal herein on the ground put forward by the appellant must fail. But the assessment against which the appeal was taken cannot stand in its present amount. It appeared as the result of questions put by the Court that the alleged profits of $8,000 from the sale of 2339-41 Yonge Street and $2,000 from the sale of 94 Tyndall Avenue were represented by mortgages in favour of the appellant payable by instalments. The mortgage back to him on the sale of 2339-41 Yonge Street was a second mortgage for $10,560, which included his so-called

profit of $8,000. This was payable at the rate of $100 per month inclusive of interest, the first payment falling due in June, 1946. The mortgage on 94 Tyndall Avenue was also a second mortgage for $4,695, of which $2,750 was profit, payable quarterly at the rate of $250 and interest at 5 per cent per annum, the first payment being due on July 31, 1946. It was, therefore, clear that the profit alleged to have been received in 1946 on the sale of these properties was not in fact wholly received in 1946. I think it must follow from the decision of the Supreme Court of Canada in *Capital Trust Corporation Limited et al* v. *Minister of National Revenue* (1) that since a taxpayer is taxable in respect of the income received by him during a taxation year, regardless of the year in which it may have been earned, he cannot be taxed in respect of income that he has not received during such year. Consequently the appellant was taxable in 1946 only for such profits, if any, as he received in 1946, the remaining profit being taxable in subsequent years.

Under the circumstances, I granted leave to the appellant to amend his statement of claim to allege that the profits of $8,000 and $2,750 were not received by the appellant in 1946 and not taxable in that year. In so doing I acted under section 90(2) of the Income Tax Act, Statutes of Canada 1948, chap. 52, as amended, included in Division J of that Act, which governs this appeal.

Section 91(4) of the Income Tax Act provides for the manner in which the Court may dispose of an appeal from the Income Tax Appeal Board as follows:

91. (4) The Court may dispose of the appeal by

(*a*) dismissing it;

(*b*) vacating the assessment;

(*c*) varying the assessment; or

(*d*) referring the assessment back to the Minister for reconsideration and reassessment.

It is interesting to note that there is no specific provision for disposing of the appeal by allowing it. The alternative to dismissing the appeal is to deal with the assessment in

(1) (1937) S.C.R. 192.

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one of the ways specified in paragraphs (*b*), (*c*) and (*d*) of section 91(4). In order to give effect to the findings of the Court that the appellant is subject to tax on the ground that his profits were net profits from a business but not subject to tax on profits not received by him in 1946 the Court must dispose of the appeal by referring the 1946 assessment back to the Minister for reconsideration and reassessment.

On the matter of costs I see no reason why the appellant, having failed on the grounds of appeal put forward by him, should be excused from liability for costs. If he had originally raised the matter which I gave him leave to raise by amendment the Minister might well have given effect to it and amended the assessment accordingly. After careful consideration of the matter I have concluded that the respondent is entitled to costs.

Judgment accordingly.

1951
Sept. 27
1952
Jan. 4

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

THE L. D. CAULK CO. OF CANADA LTD. ..... RESPONDENT.

Revenue—Income Tax—Income War Tax Act R.S.C. 1927, c. 97, s. 6—1—"Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income"—Deductibility of legal expenses incurred in defending a charge prosecuted under the Criminal Code and of making representations to the Commissioner under the Combines Investigation Act—No difference in tests to be applied to determine deductibility of legal expenses and any other expenses or disbursements—Appeal dismissed.

Respondent, a manufacturer of dental supplies, in 1947 at the invitation of the Commissioner under the Combines Investigation Act, who was conducting an investigation into an alleged combine in the manufacture and sale of dental supplies in Canada, made representations before him, employing for that purpose solicitors to whom in 1947 a fee was paid for their services.

Later respondent with others was prosecuted upon a charge laid under the Criminal Code of Canada that they did in fact constitute a combine in the manufacture and sale of dental supplies in Canada. At the trial of such charge respondent was acquitted and an appeal from such acquittal taken by the Crown was dismissed. Respondent in 1948 paid fees to its solicitors and also to counsel who acted for it at the trial and appeal.

In its income tax returns for the taxation years 1947 and 1948 respondent deducted from its income the amounts so paid by it to its solicitors and counsel for their services at the hearing before the Commissioner and at the trial and appeal. These deductions were disallowed by the Minister of National Revenue and an appeal taken by respondent to the Income Tax Appeal Board was allowed. The matter was referred back to the Minister to re-assess the respondent and allow the deductions in full. The Minister appealed to this Court.

Held: That the payments to its solicitors and counsel by respondent were made in the usual course of business and were made with reference to a particular difficulty which arose in the course of the year, namely, the investigation by the Commissioner, the charge laid against the respondent and the unfavourable and damaging publicity which resulted therefrom, and which would have been greatly enhanced had the charge been sustained: the disbursements had nothing to do with the assets or capital of the company but were made in an effort to establish that its trading practices were not illegal, and to enable it to carry on as it had in the past, unimperilled by charges that such practices were illegal.

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2. That the disbursements were wholly, exclusively and necessarily laid out for the purposes of its trade and for the purpose of earning the income.

3. That the tests to be applied to determine the deductibility of legal expenses from income are the same as those applicable to any other disbursements or expenses.

4. That there is no essential difference between expenses incurred in defending a right of a trader to describe his goods in a certain manner (in common with all other members of the public) and expenses incurred in successfully defending a right to the use of certain trade practices which were equally available to all members of the public.

5. That there is no distinction between the legal expenses incurred in the proceedings before the Commissioner and those expenses incurred in defending the criminal charge laid against the respondent, the same matters were in issue throughout and arose out of precisely the same circumstances.

6. That in view of the fact that respondent was acquitted the mere fact that the charge against respondent was made under the Criminal Code has no bearing on the deductibility or otherwise of the expenses incurred in defence of that charge.

APPEAL from a judgment of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Cameron at Toronto.

Jos. Singer, K.C. and *J. S. Forsyth* for appellant.

J. W. Pickup, K.C. and *J. D. Pickup* for respondent.

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

CAMERON J. now (January 4, 1952) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Income Tax Appeal Board, dated December 4, 1950. By consent I heard this appeal and similar appeals in four other cases at the same time. In the other cases the Minister of National Revenue had also appealed from decisions of the Income Tax Appeal Board, the respondents being the *Dominion Dental Co. Ltd.* (No. 43983), *Goldsmith Brothers Smelting and Refining Co. Ltd.* (No. 43981), *The Dental Co. of Canada Ltd.* (No. 46470) and *S.S. White Co. of Canada, Ltd.* (No. 43982).

The principles involved in each case are precisely the same and it was therefore agreed that a formal judgment should be rendered in one case and that that judgment should be applicable to all. I have selected this particular case inasmuch as it applies to two taxation years and involves payments made in respect of two different matters.

The main facts in this case (as well as in the other cases) are not in dispute. The respondent herein carries on the business of manufacturing of dental filling materials and dental specialties at Toronto. In 1947, the Commissioner under the Combines Investigation Act, R.S.C. 1927, c. 26, had been conducting an investigation into an alleged combine in the manufacture and sale of dental supplies in Canada. Prior to making his report thereunder, the Commissioner had invited the respondent along with other companies, to make representations before him. The respondent for that purpose employed solicitors to represent it before the Commissioner and in the year 1947 paid such solicitors the sum of $625 for their legal services.

Later in 1947, the Commissioner made a report to the Minister of Justice and therein he expressed the opinion that a combine existed in the distribution and sale of dental supplies in Canada within the meaning of the Combines Investigation Act, and that the respondent, along with others, was a party and privy to that combine. That report was circulated and widely publicized throughout Canada. Subsequently, a charge was laid against the respondent—and other companies—under section 498 of the Criminal Code, and at the trial of that charge the respondent and the other companies were acquitted. Later, an appeal from such acquittal was taken by the Crown and that appeal was dismissed.

In the taxation year 1948, the respondent paid its solicitors a total of $701.41, representing their charges for preparation for trial of the charge so laid against the respondent. As those solicitors were unable to represent it at the trial, the respondent secured counsel and for his services paid the sum of $12,000 in 1948. The respondent claimed to be entitled to deduct from its taxable income the said sum of $625 for the taxation year 1947, and the said sums totalling $12,701.41 in the taxation year 1948. By Notices of Assessment dated respectively December 3, 1949, and May 18, 1950, the Minister totally disallowed the

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said deductions. An appeal was taken by the respondent to the Income Tax Appeal Board which board by its decision dated December 4, 1950 (3 T.A.B.C. 160) allowed the said appeals and referred the matter back to the Minister with a direction that the said deductions should be allowed in full, and to re-assess the respondent accordingly. From that decision an appeal is now taken to this Court.

In his Notice of Appeal the Minister relied on the provisions of paragraphs (*a*) and (*b*) of section 6(1) of the Income War Tax Act, R.S.C. 1927, c. 97, as amended, as follows:

> Sec. 6.—1. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> (*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;
>
> (*b*) any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence, except as otherwise provided in this Act.

At the hearing, however, counsel for the Minister abandoned all reliance upon paragraph (*b*).

At the hearing, no oral evidence was given and the argument proceeded on the basis of the record before me, namely, the documents forwarded by the Registrar of the Income Tax Appeal Board (pursuant to the provisions of the Act) which, of course, included the judgment of the Board and the exhibits filed at the hearing before it.

In each case it is essential to ascertain the true nature of the expenditure in order to determine whether it has been "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income." Ex. A-9 in this case is the indictment preferred against the respondent and others. It shows that they were charged that "during all the years from 1930 to 1947, both inclusive, they did within the jurisdiction of this Honourable Court unlawfully conspire, combine, agree or arrange together and with one another and with certain others (named persons or corporations) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply in the cities of Toronto and Montreal and other places throughout Canada, of articles or commodities which may be a subject of trade or commerce, namely, new, used, and refinished dental equipment,

artificial teeth, precious metals used in dentistry and dental treatment, dental sundries, and other articles or commodities used in dentistry and dental treatment and did thereby commit an indictable offence contrary to the provisions of the Criminal Code, Section 498, subsection 1(*d*)."

I think I may safely assume that the investigation in 1947 by the Commissioner under the Combines Investigation Act, at which time the respondent incurred expenses in having its solicitors appear before him, was an investigation into precisely these same matters.

No question is raised as to the reasonableness of the amounts so paid so that I am not concerned at all with the amount of the deductions.

It is to be noted particularly that the investigation before the Commissioner and the subsequent criminal proceedings taken against the respondent had to do with the day to day practice of the respondent in conducting the manufacturing and selling of its products; that the legal expenses so incurred were incurred directly by and on behalf of the respondent itself, and not on behalf of its individual directors; that the proceedings instituted against it were of a criminal nature and that the respondent was wholly successful throughout. The deductions claimed, therefore, are not in respect of a penalty or fine imposed as a result of a breach of the law or for legal expenses incurred in a criminal proceeding in which the taxpayer was convicted. They do not, therefore, fall within the principles laid down in such cases as *Commissioners of Inland Revenue* v. *E. C. Warnes & Co. Ltd.* (1) and *Commissioners of Inland Revenue* v. *Alexander Von Glehn & Co. Ltd.* (2).

Throughout the whole of the proceedings which occasioned the expenditures in question, the trade practices of the respondent were challenged and defended. It was alleged that such practices were illegal and that the respondent was guilty of a crime. The adverse publicity incidental to the Commissioner's report and the subsequent criminal charge was of such a nature that the company's future prospects were placed in jeopardy. Quite naturally, therefore, they took steps to see that their interests were protected by employing solicitors to represent them before

(1) (1919) 12 T.C. 227. (2) (1919) 12 T.C. 232.

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the Commissioner and to prepare for the trial and the criminal charge, and later by employing counsel to represent them at the trial and the appeal which followed. In the result, their efforts were successful and the respondent was acquitted, the Crown having failed to prove that the trade practices complained of were in any way illegal. I have said that their business was placed in jeopardy by the charges so laid. In the judgment rendered by the Tax Appeal Board it was stated that "the adverse publicity had already contributed to a substantial decrease in the company's business," and under the circumstances of this appeal I think I am entitled to rely on that finding of fact. The respondent's business reputation—and therefore its capacity to earn profits—was at stake and consequently it secured legal assistance in defending its position and its practices. It was forced to incur these expenses or possibly suffer the consequences of a serious loss in business.

Under the circumstances, then, were the disbursements made "wholly, exclusively and necessarily for the purpose of earning the income?"

As stated by the President of this Court in *Siscoe Gold Mines Ltd.* v. *Minister of National Revenue* (1):

> There is nothing in the Income War Tax Act to warrant the assumption that legal expenses are a special class of disbursements or expenses or that they are generally deductible and that it is only in exceptional cases that their deduction is disallowed. The tests to be applied in determining their deductibility are the same as those applicable to any other disbursements or expenses.

Counsel for the respondent submitted that the disbursements here in question were incurred by the respondent not in its capacity as a trader, but as a citizen amenable to the law like all other citizens. His argument was put in this way.

> That the legal costs of successfully defending the criminal charge and of resisting the investigation by the Commissioner preceding those charges, were not "business expenses" but "personal expenses" and, therefore, should be disallowed as "not expended for the purpose of earning the income." Although the acts which gave rise to the investigation before the Commissioner, and the charge, were done in the course of "business", the criminal charge and the previous investigation by the Commissioner were taken against the company as "citizens amenable like all other citizens, individual and corporate, to the law," and expenses of clearing themselves were expended upon themselves in their character of citizens and not in their character of traders.

(1) (1945) Ex. C.R. 257 at 261.

He relied on the well-known case of *Strong & Co. Ltd.* v. *Woodifield* (1). The headnote in that case is as follows:

A brewery company owned an inn which was carried on by a manager as part of their business. A customer sleeping in the inn was injured by the fall of a chimney, and recovered damages and costs against the company for the injury, which was owing to the negligence of the company's servants:—

Held, that the damages and costs could not be deducted in estimating the balance of profits for the purpose of the income tax, the loss not being connected with or arising out of the trade, and not being money wholly and exclusively laid out or expended for the purposes of the trade.

Lord Loreburn, L.C., said at p. 452:

In my opinion, however, it does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction; for it may be only remotely connected with the trade, or it may be connected with something else quite as much as or even more than with the trade. I think only such losses can be deducted as are connected with in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader. The nature of the trade is to be considered. To give an illustration, losses sustained by a railway company in compensating passengers for accidents in travelling might be deducted. On the other hand, if a man kept a grocer's shop, for keeping which a house is necessary, and one of the window shutters fell upon and injured a man walking in the street, the loss arising thereby to the grocer ought not to be deducted. Many cases might be put near the line, and no degree of ingenuity can frame a formula so precise and comprehensive as to solve at sight all the cases that may arise. In the present case I think that the loss sustained by the appellants was not really incidental to their trade as innkeepers, and fell upon them in their character not of traders, but of householders. Accordingly I think that this appeal must be dismissed.

He also referred to *Fairrie* v. *Hall* (2), in which the taxpayer, a sugar broker, claimed the right to deduct from his assessment £550 damages and £3025 legal expenses which he had been obliged to pay as the result of a malicious libel published by him against the chairman of a rival company. In that case MacNaghten, J., following the *Strong* v. *Woodifield* case, disallowed the deductions, finding that the said sums were not losses connected with or arising out of the taxpayer's trade, but fell upon him in the character of a calumniator of a rival sugar broker.

It seems to me that in the matter now before me these cases can have no application on the point under discussion. The business of the respondent was that of manufacturing, distributing and selling dental supplies and it was in

(1) (1906) A.C. 448. (2) (1947) 2 A.E.R. 141.

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relation to its trading practices in manufacturing, distributing and selling that the Commissioner caused an investigation to be held and that later the Crown laid the criminal charge. If the respondent had not been engaged in the manufacture and sale of dental supplies and if it had not followed certain trade practices in connection with its business, no investigation would have been held, no charge would have been laid and no such expenses would have been incurred. I am quite unable to find that such expenses were incurred as "personal" expenses or that they were incurred in any manner or capacity other than that of trader.

In the Supreme Court of Canada the deductibility of legal expenses has been considered on a number of occasions. In the case of *The Minister of National Revenue* v. *The Dominion Natural Gas Co. Ltd.* (1), the decision was concerned with a deduction claimed by the respondents in respect of the costs of litigation, which, in its results, affirmed the right of the respondent under certain bylaws of the Township of Barton to sell gas in certain localities in the City of Hamilton. In that case the decision in this Court (2) was reversed and the deductions disallowed. In the case of *The Minister of National Revenue* v. *The Kellogg Co. of Canada, Ltd.* (3), Duff, C.J. summarized the Court's finding in the *Dominion Natural Gas* case as follows:

> It was held by this Court that the payment of these costs was not an expenditure "laid out as part of the process of profit earning," but was an expenditure made "with a view of preserving an asset or advantage for the enduring benefit of the trade," and, therefore, capital expenditure.

In the instant case it is not contended that the amounts disbursed were capital expenditures.

In the *Kellogg* case Duff, C.J., speaking for all the members of the Court, after stating that counsel for the appellant rested his case on the decision in the *Dominion Natural Gas Co.* case, and after reviewing that case and the decision thereon, stated:

> The present appeal concerns expenditures made by the respondent company in payment of the costs of litigation between that company and the Canadian Shredded Wheat Company. To quote from the judgment of the Privy Council, delivered by Lord Russell of Killowen in

(1) (1941) S.C.R. 19. (2) (1940) Ex. C.R. 9.
(3) (1943) S.C.R. 58.

Canadian Shredded Wheat Co. Ltd. v. *Kellogg Co. of Canada, Ltd.* (1938) 2 D.L.R. 145, at 149, the Canadian Shredded Wheat Company claimed

"an injunction to restrain (the respondent) from infringing the registered trade marks consisting of the words "Shredded Wheat" by the use of the words "Shredded Wheat", or "Shredded Whole Wheat" or "Shredded Whole Wheat Biscuit", or any words only colourably differing therefrom."

As regards this payment, the question in issue was whether or not the registered trade marks of the plaintiffs in the action were valid trade marks, or, in other words, whether or not the present respondents, The Kellogg Company, and all other members of the public were excluded from the use of the words in respect of which the complaint was made. The right upon which the respondents relied was not a right of property, or an exclusive right of any description, but the right (in common with all other members of the public) to describe their goods in the manner in which they were describing them.

It was pointed out in *The Minister of National Revenue* v. *The Dominion Natural Gas Company, supra,* at p. 25, that in the ordinary course legal expenses are simply current expenditures and deductible as such. The expenditures in question here would appear to fall within this general rule.

It is very clear that the appellant does not succeed in bringing his case within the decision upon which he relies.

The appeal should be dismissed with costs.

The principles applied in that case seem to me to be applicable here. The dispute which arose and which resulted in the payment of legal expenses was occasioned by certain trading practices which in the result were not found to be illegal. The right upon which the respondent relied was the right to conduct its business in a certain manner and was not a right of property or an exclusive right of any description, but the right, in common with all other members of the public, to follow the trade practices which it was following. Insofar as the provisions of section 6(1) (*a*) are concerned, I am unable to perceive any essential difference between expenses incurred in defending a right of a trader to describe his goods in a certain manner (in common with all other members of the public) and expenses incurred in successfully defending a right to the use of certain trade practices which, so far as I am aware, were equally available to all members of the public.

Further, I am unable to find that any distinction can be made between the legal expenses incurred in the proceedings before the Commissioner and those expenses incurred in defending the criminal charge laid against the respondent,

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of which charge it was acquitted. The same matters were in issue throughout and arose out of precisely the same circumstances. In view of the fact that the respondent was acquitted, I do not think that *in this case* the mere fact that the charge against the respondent was made under the Criminal Code has any bearing on the deductibility or otherwise of the expenses incurred in defence of that charge. The result might have been different had the respondent been found guilty of the charge, but as to that I need say nothing.

The decision in *Spofforth & Prince* v. *Golden* (H. M. Inspector of Taxes) (1) is of considerable interest. In that case the appellant was a firm of chartered accountants and Mr. Spofforth, one of the partners, was accused of conspiring with a client to defraud the revenue in setting up a new corporation. No charge was laid against Mr. Prince, the other partner, but in defending the charge before the Magistrate, Mr. Spofforth had his own counsel and Mr. Prince was represented by counsel having a watching brief. The case broke down *in limine* and the Magistrate declined to commit Mr. Spofforth. The costs incurred by both Mr. Spofforth and Mr. Prince were paid by the firm and the firm claimed the right to deduct the legal expenses so incurred from the profits of the partnership for the year.

Wrottesley, J. disallowed these deductions. As I read the judgment, the costs incurred by Spofforth were disallowed on the ground that they were incurred in defending a charge against him personally and not a charge against the partnership; there was also considerable doubt as to whether the costs, while paid by the appellant, were, in fact, incurred by the partnership. The costs of Mr. Prince were also disallowed on the ground that while Mr. Prince was separately advised, both he and Mr. Spofforth were aiming not at the making of profits by the partnership, but at enabling Mr. Prince to protect his own interests.

But in that case Wrottesley, J. did allow deductions in respect of legal costs incurred by the partnership itself. Mr. Spofforth received a letter from the Solicitor of Inland Revenue stating that the latter wished to take statements of evidence from two employees of the Appellants. Mr.

(1) (1945) 26 R.T.C. 310.

Spofforth immediately consulted his partner, Mr. Prince, and sought an interview with their solicitors on the 18th of December, 1940, and on the 31st of December, 1940, the solicitors wrote to the Solicitor of Inland Revenue. The appellant partnership claimed that the legal expense so incurred by it should be allowed as a deduction, and, in allowing them, Wrottesley, J. said at p. 315:

> From the letter written by Messrs. Rowe & Maw on 31st December, 1940, it would appear that at and down to this stage this firm was acting for the appellants in the ordinary course of business, and in circumstances in which the appellants can fairly say that the purpose for which they gave the instructions and incurred the resulting costs were their ordinary professional purposes. There had been a somewhat unusual demand by a government department to interview servants of the firm, and in that case it was an ordinary business precaution that the firm's solicitors should be called in to advise. If, therefore, any appreciable sum of costs was incurred by the firm up to this point, it is, in my view, properly to be deducted.

In that case, therefore, the legal expenses actually incurred by the partnership in preparing to meet a demand by a department of Government were considered to be in the ordinary course of business and deductible as such. It was apparently not necessary in that case to reach any conclusion as to whether the legal expenses at the trial would have been allowed had the partnership been charged with and acquitted of conspiracy, for, while the learned judge posed that as one of the questions which he might have to determine, I am unable to find that he did so.

Reference may also be made to *Mitchell (Inspector of Taxes)* v. *B. W. Noble Ltd.* (1). In that case the directors of the company, being satisfied that in order to save the company from scandal it was necessary to get rid of a certain director, paid him a large sum of money and claimed the right to deduct that sum in computing its profits. The Court of Appeal in affirming the judgment of Rowlatt, J. held that that sum must be regarded as money "wholly and exclusively laid out and expended for the purposes of the trade" of the company, and were deductible as such.

Lord Hanworth, M.R. said in part at p. 737:

> It was a payment made in the course of business, with reference to a particular difficulty which arose in the course of the year, and was made not in order to secure an actual asset to the company but to enable the company to continue to carry on, as it had done in the past, the

(1) (1927) 1 K.B. 719.

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same type and high quality of business, unfettered and unimperilled by the presence of one who, if the public had known about his position, might have caused difficulty in its business and whom it was necessary to deal and settle with at once.

And in the same case Sargent, L.J. said that

> it is quite impossible to put against the capital account of the company . . . a payment of this nature. It seems to me that the payment . . . was not of such a nature; it certainly was not capital withdrawn from the company, or any sum employed or intended to be employed as capital in the business . . . To my mind, it is essentially different from these various payments in the cases which have been referred to, which were of the nature of adding to, or improving the equipment, or otherwise made for the permanent benefit of the company.

It is true that the deduction permitted in that case was not in respect of legal expenses, but as I have said above, the tests to be applied are the same for legal expenses as for other expenses. It seems to me that in many respects the opinions so expressed by the Master of the Rolls and Sargent, L.J. are applicable here. The payments were made in the usual course of business and were made with reference to a particular difficulty which arose in the course of the year, namely, the investigation by the Commissioner, the charge laid against the respondent and the unfavourable and damaging publicity which resulted therefrom, and which would have been greatly enhanced had the charge been sustained. The disbursements had nothing to do with the assets or capital of the company, but were made in an effort—which in the result turned out to be successful—to establish that its trading practices were not illegal, and to enable it to carry on as it had in the past, unimperilled by charges that such practices were illegal. They were wholly, exclusively and necessarily paid out for these purposes and were therefore, in my opinion, laid out for the purposes of its trade and for the purposes of earning the income.

Reference may also be made to the *Governor and Company of Adventurers of England Trading into Hudson's Bay* v. *Minister of National Revenue* (1). In that case the company claimed the right to deduct legal expenses incurred in connection with an action brought by it in the United States to restrain a firm from using a name

(1) (1947) Ex. C.R. 130.

similar to that of the company. In allowing the deduction, Angers J. said:

> The legal expenses and costs laid out by the appellant to protect its trade name, business and reputation were not incurred with the object of creating or acquiring any new asset but were incurred in the ordinary course of protecting and maintaining its already existing assets. On the other hand, I do not believe that these expenses and costs can be considered as being a capital outlay or loss.
>
> . . . There was no new asset brought into existence by these proceedings. The expenses were incurred in the ordinary course of maintaining the already existing assets of the Company.

I am of the opinion, therefore, that the judgment of the Income Tax Appeal Board was right and that the disbursements claimed by the respondent do not fall within the exclusions of the Income War Tax Act.

There will therefore be judgment affirming the decision of the Income Tax Appeal Board and dismissing this appeal. The respondent is entitled to its costs after taxation.

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

ALBERTA WHEAT POOL ELEVATORS LIMITED ..... PLAINTIFF;

AND

THE SHIP *ENSENADA* ..... DEFENDANT.

Shipping—Ship striking dolphin with too much momentum—Damages—Commission evidence forms no part of record if not read by either party.

Held: That either party to an action may read into the record the evidence of witnesses examined on commission and if neither party chooses to do so such evidence does not form part of the record.

2. That defendant is liable to plaintiff for damages suffered by plaintiff through defendant ship striking a dolphin on plaintiff's wharf with too much momentum.

ACTION for damages allegedly caused by defendant ship.

The action was tried before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

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ALBERTA WHEAT POOL ELEVATORS LIMITED v. S.S. *Ensenada*

Cecil Merritt for the plaintiff.

Vernon Hill and *J. Cunningham* for the defendant.

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

SIDNEY SMITH D.J.A. now (January 11, 1952) delivered the following judgment:

In this action the plaintiff claims damages for damage done to its dolphin, situated at the northwest corner of plaintiff's wharf in Vancouver harbour, by the defendant ship while berthing along the west side of the wharf about noon on 2nd May 1951.

At the trial evidence, which I accept, was given by three of plaintiff's "tie-up crew," who were standing-by to take the ship's mooring lines. They testified as to the force with which the ship struck the dolphin; the successive cracking of its several piles and the lateral displacement of the whole. The all-important witness for the defence was the pilot in charge of the vessel (under the Master) at the time. He was not aware of any undue impact when coming alongside but admits having been told by the plaintiff's foreman of the alleged damage when he was leaving the vessel. One witness from an assisting tug and another from a line-boat were also called. They testified they saw nothing unusual, perhaps due to the position of their respective vessels at the time.

The evidence of the Master and Chief Officer of the *Ensenada* had at the instance of the defendant been taken on commission at Montreal, but defendant's counsel declined to read this into the record on the authority of *Gogstad & Co.* v. *S.S. Camosun* (1), followed by me in *Pacific Express* v. *Salvage Princess* (2). Here plaintiff submitted that defendant's counsel had no right of election and that the evidence must be tendered, the witnesses being absent from the jurisdiction. As the point was important and recurring, I reconsidered the matter. With great deference I am satisfied that my predecessor in this Court was right and that defendant's counsel may exercise the privilege he sought. In addition to *Atkinson* v. *Casserley* (3), relied on in the *Camosun* case, reference may be made

(1) (1940) 56 B.C.R. 156. (2) (1949) Ex. C.R. 230.
(3) (1910) 22 O.L.R. 527.

to the form of the long order for commission in our Supreme Court Rules, p. 219, form 35 (*b*); to Admiralty rule 111; and to *Proctor* v. *Lainson* (1). I think it quite clear from these authorities that either party may put in commission evidence, and that if neither does so, it forms no part of the record, and that is the situation here.

On the evidence before me I am of opinion that there was an error of judgment on the part of those in charge of the defendant ship, who were in control of the operation of making fast alongside the wharf in the face of no particular difficulties. I think they lost control of the vessel and allowed her to strike the dolphin with too much momentum, thus doing the damage complained of. The dolphin is for the purpose of protecting the corner of the wharf and cannot be expected to withstand blows of excessive violence. Here the dolphin was composed of 19 piles; 7 outside piles had been broken prior to this accident; 9 inside piles were broken on this occasion; only 3 remained intact.

I must therefore find for the plaintiff with costs. I think the parties will have no difficulty in reaching a settlement on the damages. To assist them I may say that in my view nothing should be allowed for the cost of replacement of the previously broken piles. Failing settlement there will be a reference to the learned Deputy Registrar.

Judgment accordingly.

(1) (1836) 7 C. & P. 629.

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BETWEEN:

FURNESS (PACIFIC), LIMITED.....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Revenue—Income tax—Income—Deductions from income—Income War Tax Act R.S.C. 1927, c. 97, secs. 3, 5(1) (p), 6(1) (j), 8—"Taxation period"—"Taxation year"—Losses sustained in business operations in foreign country—Appeal dismissed.

Appellant, incorporated in the Province of British Columbia, carries on business in Canada and in the United States of America. In the years 1944 to 1946 it sustained losses on its United States operations and in 1947 and 1948 it made a profit on those operations. In its return under the provisions of the Income War Tax Act for the years 1947 and 1948 it claimed a deduction on its United States operations of the losses in the years 1944 to 1946 from its income earned in the United States for 1947 and 1948. These deductions were disallowed and the Income Tax Appeal Board affirmed the income tax assessments for 1947 and 1948. The Company appealed to this Court.

Held: That "taxation period" in s. 6(1) (*j*) of the Income War Tax Act is not synonomous with "taxation year" in s. 5(1) (*p*) of the Act.

2. That the provisions of s. 5(1) (*p*) of the Act are general while those of s. 6(1) (*j*) are specific in that they deal with the computation of tax on foreign income and so override those of s. 5(1) (*p*) and the appeal must be dismissed.

APPEAL from the judgment of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Sidney Smith, Deputy Judge of the Court, at Vancouver.

D. N. Hossie, K.C. for appellant.

R. M. Howard and *F. J. Cross* for respondent.

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

SIDNEY SMITH D.J. now (January 9, 1952) delivered the following judgment:

This appeal is brought from a judgment of the Income Tax Appeal Board sustaining the appellant's income tax assessments for the years 1947 and 1948. Only the former year need be dealt with as the same principles apply to both.

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Sidney Smith D.J.

The appellant was incorporated in the Province of British Columbia and carries on a general shipping business in this Province and also in the United States of America by means of branches in Los Angeles and San Francisco and sub-agents in Seattle and Portland.

In the taxation years prior to 1944 the appellant, generally speaking, made a profit on its United States operations as well as on its Canadian operations. During the relevant years it claimed and received, under sec. 8 of the Income War Tax Act, relief for income taxes paid to the Revenue authorities of the U.S. on income earned in the United States. In the taxation years 1944 to 1946 however appellant suffered losses on its United States operations and did not then claim such losses as a deduction from income in these taxation years. But in the taxation years 1947 and 1948 appellant again made a profit on its U.S. operations, and in its income tax returns for such years it claimed that it was entitled to deduct the losses suffered by it in the taxation years 1944 to 1946 from its income earned in the U.S. in the taxation years 1947 and 1948. Appellant says that it is entitled to deduct these losses under sec. 5(1) (*p*) of the Income War Tax Act; it admits that under sec. 6(1) (*j*) of the Act it is prohibited from deducting such losses in the taxation year in which the losses were incurred; but it contends there is no such prohibition in sec. 6(1) (*j*) with respect to losses suffered in the previous three years. The respondent contends otherwise and that is the issue in this case.

The relevant statutory provisions of secs. 5 and 6, reduced to material skeleton form, are as follows:

Sec. 3—"Income" means the annual net profit . . . directly or indirectly received by a person . . . from any . . . business . . . whether derived from sources within Canada or elsewhere.

Sec. 5(1) "Income" . . . shall . . . be subject to the following deductions:—

(*p*) Amounts in respect of losses sustained in the 3 years immediately preceding . . . the taxation year, but . . .

Sec. 6(1) . . . a deduction shall not be allowed in respect of

(*j*) net losses sustained in . . . any taxation period . . . in any foreign country, after the tax-payer has in respect of any such period . . . received reciprocal tax relief under this Act for taxes paid to any such country in respect of profits earned therein.

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Sidney Smith D.J.

It is common ground that the amount of income subject to Canadian taxation in any particular year must be ascertained under the provisions of the Canadian Income War Tax Act; that appellant elected to claim and received tax relief under sec. 8 of the Act during the relevant period; that accordingly sec. 6(1) (*j*) precludes it from deducting net losses sustained in the taxation year for which the tax is being computed. But on the other hand appellant says it is not precluded by sec. 6(1) (*j*) from deducting losses for the three preceding years (1944, 1945, 1946) from U.S. profits earned in 1947; that it retains this right under sec. 5(1) (*p*); that the quantum of income derived from sources within the U.S. during the years 1947 can only be arrived at after due allowance for business losses incurred in the U.S. during 1944, 1945 and 1946, as provided by sec. 5(1) (*p*) of the Act; that the question in issue is not the deduction of losses as envisaged in sec. 6(1) (*j*) but rather the proper application of the overriding definition of income in sec. 3 and in sec. 5(1) (*p*).

The respondent's answer is short and simple, if anything can be regarded as simple in income tax matters. It says it comes squarely within the provisions of sec. 6(1) (*j*). It submits that this section was enacted in 1935 to remedy an unfavourable situation which was found to exist in the case of a company carrying on business both in Canada and abroad. The respondent brought to my attention and adopted the observations of Mr. H. H. Stikeman K.C. on this point in the Dominion of Canada Taxation Service, vol. 1, sec. 6, para. J., p. 6-501:

> This section was designed to remedy a condition whereby the Canadian Revenue would bear a burden when losses were incurred and receive no tax when profits were earned. As it now stands, a Canadian company which brings into account profits earned in any country which affords reciprocal relief from taxation under section 8 of the Act may claim as a credit against the Canadian Tax on such profits the tax paid to the Country where the profits arose. It follows, therefore, that little or no tax is paid in Canada in respect of such profits. It would therefore be improper to permit profits made in Canada to be reduced by losses incurred in a foreign country and in respect of which no tax is ever paid in Canada.

I accept this statement of the respondent's submission. The question is whether the section, as drafted, is adequate to bring the circumstances of appellant's case within its scope. I think it is. The language of the section is wide.

It speaks of "taxation period"; not "taxation year". I cannot find these terms synonymous. It provides no ground for saying that while the losses of any one taxation year may not be offset against income in that year, yet by virtue of sec. 5(1) (*p*) losses of the three preceding years may be thus set off. As pointed out by the learned Appeal Board this would be a curious anomaly, were it so. It seems to me such a construction would require very express language, which is altogether missing here.

Appellant based an argument on the expression "net losses" found at the commencement of sec. 6(1) (*j*). Whatever these words may mean in their context I do not think they mean that the aforesaid foreign losses are to be deducted from foreign income before the computation of tax. Nor do I think any inference favourable to appellant can be drawn from the circumstance that sec. 5(1) (*p*) was first passed in 1940 and did not assume its present form until 1944. I must take the Act as it stood during the years in question. And doing so, I cannot overlook the force of the respondent's submission that the provisions of sec. 5(1) (*p*) are general, while those of sec. 6(1) (*j*) are specific in that they deal with the computation of tax on foreign income, and thus override those of sec. 5(1) (*p*).

An alternative point raised by appellant was the question of double taxation, and Article XVI of the Canada-United States of America Tax Convention Act, 1943, was referred to. But I can find no case of double taxation here, and even if there were, I do not see what this Court could do about it.

I have not found this an easy case. Appellant's argument was attractive, and reasonable, and it is with some regret that I find I am unable to give way to it. But in the end, it seems to me clear enough that the language of the statute cannot be construed as appellant would have it. And I am bound by the statute.

The result is that the argument put forward on behalf of appellant fails and this appeal must be dismissed with costs.

Judgment accordingly.

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May 28, 29 & 30

Dec. 14

BETWEEN:

THE JAMES MacLAREN CO. LTD. ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Revenue—Excess Profits Tax—Excess Profits Tax Act, 1940—Income War Tax Act R.S.C. 1927, c. 97, s. 3, s. 5(1) (w)—P.C. 331, January 30, 1948 as amended March 6, 1948—Portion of corporation taxes paid Province of Quebec deductible from income—Method of computing amount deductible—Cost of "barking" logs excluded as being considered as part of manufacturing or processing—Appeal allowed.

Held: That in computing the net income of appellant for the year 1947 to ascertain its profits under the Excess Profits Tax Act, 1940, the appellant is entitled to deduct from its taxable income a proportion of taxes paid for that year to the Province of Quebec under the provisions of the Quebec Corporation Tax Act; *Spruce Falls Power & Paper Co. Ltd.* v. *The Minister of National Revenue*, Post p. 75.

2. That in computing the costs of the integrated operations carried on by appellant in order to arrive at the amount properly deductible from income computed on a cost-ratio basis the cost of "barking" the logs should be excluded entirely from the computation, "barking" being considered as part of the manufacturing or processing.

APPEAL under the Excess Profits Tax Act.

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

John Aylen, K.C. and *J. Ross Tolmie* for appellant.

D. W. Mundell, K.C. and *T. Z. Boles* for respondent.

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

CAMERON J. now (December 14, 1951) delivered the following judgment:

In its amended income and excess profits tax return for the year 1947, the appellant claimed a deduction from its taxable income of a proportion of taxes paid for that year on its net income to the Province of Quebec under the provisions of the Corporation Tax Act (Statutes of Quebec, 1947, c. 33, s. 6). By his amended notice of assessment dated May 19, 1949, the respondent totally disallowed that deduction. The appeal now before me is in respect of that disallowance insofar only as it relates to excess profits tax payable by the appellant.

Under the Excess Profits Tax Act, 1940, as amended, the "profits" of the corporation means the amount of its net taxable income as ascertained under the provisions of the Income War Tax Act, R.S.C. 1927, c. 97, as amended, subject to certain exemptions not here of importance. Under the latter Act, "income" is defined by section 3, and by section 5 certain deductions and exemptions are allowed.

For the taxation year 1947, the relevant permissible deduction was as follows:

5(1) (*w*). Such amount as the Governor in Council may, by regulation, allow in respect of taxes on income for the year from mining or logging operations.

The appellant bases its claim on para. (*w*) and on the regulations of the Governor in Council applicable thereto, namely, P.C. 331, dated January 30, 1948, as amended by P.C. 952, dated March 6, 1948. The respondent denies that the appellant is entitled to any deduction under para. (*w*) on the ground that the deductions permitted thereby are limited to taxes levied specifically on logging and mining operations; and that in any event the appellant has not brought itself within the provisions of P.C. 331 as amended. I understand that in the Province of Quebec there has never been a tax levied specifically on logging operations.

The appellant is a corporation having its head office at Buckingham in the Province of Quebec and carries on business exclusively in that province. It is engaged in the manufacture of newsprint paper from pulp wood, its business being wholly integrated. It cuts logs on timber limits held under lease from the Province of Quebec, transports the logs by various methods to its pulp mill at Buckingham and to its sulphite mill at Masson, at which points the logs are converted into wood pulp and sulphite pulp; at a later stage the wood pulp is conveyed to the mill at Masson where it is mixed with sulphite pulp and then manufactured into newsprint paper which is sold to the consumers. In addition thereto, it also sells to others timber of a type not needed by it in the manufacture of newsprint, either on the stump or after it has been cut. It also purchases for its own use a certain percentage of pulp wood which has been cut by settlers in the area.

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It will be seen, therefore, that the appellant carried on two separate operations. The first was a purely logging operation, namely, the cutting and selling of logs as such. Its records are kept in such a way that the net income arising from that operation is clearly ascertained. The appellant's fiscal year ends on November 30 and it is established that its net profit for that purely logging operation for the calendar year 1947 was $88,587.87. By the provisions of section 3(*a*) (i) of P.C. 331, a taxpayer is entitled to deduct the whole of the provincial tax paid in respect of that net profit. The provincial tax being at the rate of 7 per cent, the appellant claims the right to deduct eleven-twelfths of 7 per cent of that sum, namely, $5,674.48.

The other operation of the appellant is a wholly integrated one, namely, the acquisition or purchase of timber, or the right to cut timber, the transportation of the logs to the mills and the manufacturing and processing thereof into newsprint paper. The profit on these operations is derived solely upon the sale of the finished products to the consumers. The appellant alleges that in that integrated operation it also carried on "logging operations" up to the point where the logs are taken into the mills; and that therefore a proper proportion of the tax paid to the Province of Quebec on its net income is attributable to its logging operations, and may therefore be deducted from its net income in computing the taxable income under the Excess Profits Tax Act. Later herein, I will refer to the manner in which the appellant computes the amount so claimed.

By consent, this case and that of Spruce Falls Power & Paper Co. Ltd. (No. 33517) were heard together, the general issues being precisely the same. In the *Spruce Falls* case, the appellant was an Ontario corporation and had paid taxes in the same year to the Province of Ontario under the Ontario Corporations Tax Act, 1939. Its business was wholly integrated, consisting in the manufacture and sale of sulphite pulp and newsprint from pulp wood, which pulp wood it acquired from its own properties or from timber limits leased from the province or by purchase from settlers. It did not, however, sell any logs as such. In that case, I held that the appellant came within the

provisions of para. (*w*) of section 5(1) of the Income War Tax Act, and was entitled under the provisions of P.C. 331 to deduct that proportion of the tax paid to the Province of Ontario on its net income, which on sound accounting principles could be deemed as arising from its logging operations—that is, up to the point where the logs were taken into the mill for processing; and that in the absence of any established market value for such logs "at the time of delivery to the mill," such proportion was properly ascertained on sound accounting principles to be the ratio existing between the cost of the logging operations and the total cost of the integrated operations.

For the reasons stated in the *Spruce Falls* case (which need not be repeated here but may be considered as part of my reasons for judgment in this case), I hold that the appellant is entitled to the benefit of the provisions of para. (*w*) of section 5(1) of the Income War Tax Act, and to the provisions of the regulations applicable thereto, namely, P.C. 331 as amended by P.C. 952, although the tax paid by it to the Province of Quebec was not levied under an Act specifically directed to income derived from logging and mining operations. In essence, the provincial tax so levied was the same as that levied under the Ontario Corporations Tax Act, 1939, in the *Spruce Falls* case.

It follows, therefore, that under the provisions of section 3(*a*) (i) of P.C. 331, the appellant in computing its net taxable income is entitled to deduct that portion of the provincial tax which is referable to its net profit from the purely logging operations (i.e., where it sold the logs as such), and that amount has been established at $5,674.48 (see Ex. 6—p. 2). As in the *Spruce Falls* case, I also find that the portion of the second (or integrated) operation of the appellant which preceded the taking of the logs into the mills constituted a "logging" operation within the meaning and intent of para. (*w*) and of P.C. 331, and that in respect of that portion of the operation, the appellant is entitled to the deduction provided in Part (ii) of section 3(*a*) of P.C. 331.

I turn now to the method adopted by the appellant in computing the deduction which it claims in respect of the logging portion of the integrated operation. The evidence is that in the absence of any available market

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value for logs at the time of delivery to the mills, it is in accordance with sound accounting principles to consider that the income reasonably deemed to have been acquired from such logging operations is that same proportion of the total income from the entire operation which the costs of the logging operation bears to the total cost of the entire operation. That principle is established by the evidence of Mr. R. F. Burns, a chartered accountant and a partner in the accounting firm of McDonald, Currie & Co. (who were accountants for the appellant) and also by the evidence of Mr. F. A. Coffey, a chartered accountant and partner in the firm of P. S. Ross and Sons. For the reasons given by them and for the reasons given by me in the *Spruce Falls* case, I find that principle of apportionment to be within the provisions of P.C. 331 and one which the appellant is entitled to use. In the computation made in this case, all selling and administrative expenses are excluded.

The computation so made is as shown on Ex. 6 and is as follows: The total cost of the logging operations are established at $2,273,392.57, and the total cost of the integrated operations (referred to as the cost of sales) is established at $4,995,310.56, the former therefore being 45·51 per cent of the total. The total taxable profits, excluding income from other departments, such as interest received, profit on electric light department and on telephone lines, and on the purely logging operations, etc., is shown to be $3,108,011.87, of which sum 45·51 per cent is $1,414,456.20. The provincial tax which was levied on the income of the appellant for the integrated operations was levied on an income of $3,108,011.87, and of that amount 45·51 per cent, or $1,414,456.20 may be said to be the income derived from the "logging" portion of the integrated operation.

By the computation shown in Ex. 6, it is shown that the total tax paid to the Province of Quebec for the period January 1, 1947, to November 30, 1947, in respect of the income from the integrated operation, was $198,540.42, and applying to that figure the same ratio as exists between $1,414,456.20 and $3,108,011.87 (or 45·51 per cent), it is shown that the total tax paid to the Province of Quebec on the logging portion of the integrated operation was $90,355.75. That amount added to the sum of $5,674.48

(the Quebec tax relating solely to the purely logging operation above mentioned) makes up the total claim of the appellant, namely, $96,030.23.

On the evidence, I find that the principles followed in that computation are in accordance with the provisions of P.C. 331 and that the net profit or gain so determined may be reasonably deemed to have been derived by the appellant from the operations mentioned in paragraphs A and B of section 3(*a*) (ii) of P.C. 331, and to have been computed in accordance with sound accounting principles with reference to the value of the logs at the time of such delivery to the mills, and excluding any amount added thereto by reason of processing or manufacturing the logs.

Section 3(*a*) (ii) is as follows:

> 3. In these regulations,
>
> (*a*) "Income derived from logging operations" by a person means
>
> (ii) where he does not sell but processes, manufactures or exports from Canada logs owned by him, the net profit or gain reasonably deemed to have been derived by him from
>
> (A) the acquisition of the timber or the right to cut the timber from which the logs were obtained, and the cutting and the transportation of the logs to the sawmill, pulp or paper plant or other place for processing or manufacturing, or to the carrier for export from Canada, as the case may be, or
>
> (B) the acquisition of the logs and the transportation of them to such point of delivery
>
> computed in accordance with sound accounting principles with reference to the value of the logs at the time of such delivery, excluding any amount added thereto by reason of processing or manufacturing the logs;

The evidence shows that in its computation of costs of the integrated operations, the appellant has included in its costs of the "logging" portion, the cost of "barking" the logs. It seems to me, however, that the provisions of the Order in Council which I have cited clearly exclude that as an item of costs of logging operations. The computation provided for in para. (ii) is to ascertain the net profit reasonably deemed to have been derived by the appellant from certain specific operations only, namely, the acquisition of the timber (or logs) or the right to cut timber, the cutting thereof, and the transportation of the logs to the mills or other point of delivery. It may well be as suggested by counsel for the appellant that logs when "barked" are still logs; but in view of the limitations

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mentioned, I think that item of cost should be excluded entirely from the computation, "barking" being considered as part of the manufacturing or processing.

The evidence does not supply the barking costs and I am unable, therefore, to correct the computation or to determine the proper percentage to be applied. I assume, however, that the records of the appellant are of such a nature that the exact costs of barking can be readily ascertained and the proper adjustment made.

The general conclusions arrived at in the *Spruce Falls* case are of equal application here. As in that case, therefore, I reject the application of the respondent to introduce evidence of the agreements entered into between Canada and seven of the provinces (not including Ontario and Quebec) under the Dominion-Provincial Tax Rental Agreements, Statutes of Canada, 1947, c. 58. A further objection was raised by the respondent that the "logging" costs of the integrated operations of the appellant are those of the logs actually consumed in the mills in 1947, whereas some of such logs may have been acquired, purchased and transported just prior to 1947. I considered that submission in the *Spruce Falls* case and for the reasons given in that case I must reject it. In the *Spruce Falls* case the respondent originally contended that the deduction claimed was barred by the provisions of section 6(1) (*o*) of the Income War Tax Act and the regulations thereunder (P.C. 5948). I do not know whether that question was originally raised in this case. In any event, counsel for the respondent, in argument, abandoned that defence entirely and it need not be referred to further.

The appeal will therefore be allowed and there will be a declaration that, (*a*) the appellant in computing its net income for the year 1947 under the Excess Profits Tax Act is entitled to deduct therefrom the sum of $5,674.48, that amount being referable solely to its income on its purely logging operations; (*b*) that the appellant is also entitled to deduct therefrom the same proportion of $198,540.42 which the costs of the "logging" portion of the integrated operation (namely, $2,273,392.57 minus the costs of barking to be ascertained) bears to the total cost of the integrated operation (or adjusted costs of sales), namely, $4,995,310.56.

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The assessment will therefore be set aside and the matter referred back to the respondent: (1) to ascertain the costs of the barking of the logs above referred to, and (2) to compute the deduction to be allowed on the basis above set forth, and (3) to re-assess the appellant accordingly.

The appellant will be entitled to its costs after taxation.

Judgment accordingly.

BETWEEN:

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May 28, 29 & 30

Dec. 14

SPRUCE FALLS POWER AND PAPER CO. LTD..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Revenue—Excess Profits Tax—Excess Profits Tax Act, 1940, Income War Tax Act, R.S.C. 1927, c. 97, s. 3, s. 5(1) (w)—P.C. 331, January 30, 1948, re-enacted on March 6, 1948—Interpretation Act, R.S.C. 1927, c. 1, s. 20(a)—Tax on logging operations—Preamble to be disregarded when language of an enactment is clear—Calculation of amount deductible in case of integrated business—Cost-ratio basis of arriving at amount deductible correct—Method of calculation based on sound accounting principles—Appeal allowed.

Appellant, incorporated under the laws of the Province of Ontario and carrying on business in Ontario, appeals from its assessment for the year 1947 under the Excess Profits Tax Act, 1940, by which its claim to deduct from its taxable income a portion of the total sum paid by it to the Province of Ontario under the provisions of the Ontario Corporations Tax Act for the year 1947 was disallowed.

Appellant's business is the manufacture and sale of unbleached sulphite pulp and newsprint. Its business is wholly integrated in that its total operations comprise the acquisition of timber and logs, the transport of them to its mill and their conversion by a series of separate operations into sulphite or newsprint and the eventual sale thereof to the ultimate consumer. The logging phase of the operation is completed when the logs are delivered to the mill. None of the logs are sold as such and appellant's income is received only upon the sale of the finished or semi-finished products.

The tax paid the Province of Ontario by appellant was a general corporations income tax and not in any sense limited to corporations carrying on a specific type of business such as logging. The tax paid was on the whole of its net income and not merely on that part which might be considered as attributable to its logging operations.

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By s. 5(1) (*w*) of the Income War Tax Act, R.S.C. 1927, c. 97 a deduction from income was permitted corporations in "such amount as the Governor in Council may, by regulation, allow in respect of taxes on income for the year from mining or logging operations." P.C. No. 331 January 30, 1948, re-enacted on March 6, 1948, provided these regulations for determining the allowance under s. 5(1) (*w*) of the Act, "the amount that a person may deduct from income under Paragraph (*w*) . . . is an amount not exceeding the proportion of the total taxes therein mentioned paid by him to

(a) the government of a Province . . . that the part of his income that is equal to the amount of

(*c*) . . .

(*d*) income derived from logging operations as defined herein is of the total income in respect of which the taxes therein mentioned were so paid.

2. . . .

3. In these regulations

(*a*) 'Income derived from logging operations' by a person means

(i) .....

(A) .....

(B) .....

(ii) when he does not sell but processes, manufactures or exports from Canada logs owned by him the net profit or gain reasonably deemed to have been derived by him from

(A) the acquisition of the timber or the right to cut the timber from which the logs were obtained, and the cutting and the transportation of the logs to the sawmill, pulp or paper plant or other place for processing or manufacturing or to the carrier for export from Canada, as the case may be, or

(B) the acquisition of the logs and the transportation of them to such point of delivery

computed in accordance with sound accounting principles with reference to the value of the logs at the time of such delivery, excluding any amount added thereto by reason of processing or manufacturing the logs;

Appellant apportioned its net income as between the logging operations and its total operations in the same proportion as the cost of the logging operations bears to the total cost of all its operations, namely, 46·36 per cent, and claims to be entitled to deduct 46·36 per cent of the tax paid to the Province of Ontario as being a tax paid to a province in respect of income from logging operations.

Held: That when a taxpayer is engaged in an integrated business such as the appellant he has a right to apportion his income as between logging and other operations and to claim a deduction for provincial and municipal taxes in respect thereof.

2. That if the language of an enactment is clear, the preamble must be disregarded and there is no inconsistency between the provisions of P.C. 331 as amended and the final version of Para. (*w*) of s. 5(1) of the Income War Tax Act.

3. That appellant in 1947 did conduct logging operations and that P.C. 331 remained in full effect throughout 1947 and appellant is entitled to have its rights determined thereunder.

4. That the basis of arriving at the amount claimed for deduction on a cost-ratio basis, that is, by apportioning the profit of appellant as between logging operations and other operations in the same proportion as the cost thereof and *not* on a market value basis of the logs delivered to the mill is established by the evidence and is made on sound accounting principles and is within the provisions of P.C. 331.

APPEAL under the Excess Profits Tax Act.

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

Roderick Johnston, K.C. for appellant.

D. W. Mundell, K.C. and *T. Z. Boles* for respondent.

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

CAMERON J. now (December 14, 1951) delivered the following judgment:

This is an appeal from an assessment for the year 1947, and made under the Excess Profits Tax Act, 1940, as amended, whereby the respondent totally disallowed the appellant's claim to be entitled to a deduction from its taxable income of $188,454, being a portion of the total sum of $406,501.29 paid by it to the Province of Ontario for the year 1947 under the provisions of the Ontario Corporations Tax Act, 1939. The dispute centres around the interpretation to be placed on section 5(1) (*w*) of the Income War Tax Act, R.S.C. 1927, c. 97, and on the provisions of P.C. 331.

I think it is advisable at once to set out certain facts in regard to the operations of the appellant in order that the issues may be clarified. The appellant is incorporated under the laws of the Province of Ontario, having its head office at Toronto. Its business is the manufacture and sale of unbleached sulphite pulp and newsprint. Its mill is located at Kapuskasing, Ontario. Its basic raw material is pulp wood. In that district it is the owner of 175,488 acres of timberland and also holds eighty-two townships under Crown lease. Camps are established in these areas, the trees are felled, the branches trimmed and the trees cut into logs. The logs are then transported to the mill at

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Kapuskasing by river, rail or truck. The extent of the woods operations is apparent from the fact that in 1947, 1,650 men were engaged thereon in the winter (a number somewhat in excess of the average number employed in the mill proper), that the man-days thereon totalled 514,938 (also in excess of the man-hours worked at the mill), and that 339,627 cords of wood were actually consumed in the mill operations. To supplement its supply of pulp wood, the appellant also purchased a substantial quantity of logs from settlers and then transported them by rail or truck to the mill.

The "logging" phase of the operation is completed when the logs are delivered to the mill. None of the logs are sold as such. The appellant's business is wholly integrated in that its total operations comprise the acquisition of the timber or logs, the transport thereof to the mill, its conversion by a series of separate operations into sulphite pulp or newsprint, and the eventual sale thereof to the ultimate consumer. Its income therefore is received only upon the sale of the finished or semi-finished products.

For the taxation year 1947, the appellant, pursuant to the provisions of section 14(1) of the Ontario Corporations Tax Act, 1939, as amended, paid to the Province of Ontario the sum of $406,501.29, that section being as follows:

> 14. (1) In addition to the taxes imposed in sections 10 and 12, and save as in this section otherwise provided, every incorporated company which has its head or other office in Ontario, or which holds assets in Ontario, or which transacts business in Ontario, shall for every fiscal year of such company pay a tax of seven per centum calculated upon the net income of the incorporated company.

Certain corporations by section 14(3) were exempted from payment of that tax. It is clear, however, that the tax was a general corporations income tax and was not in any sense limited to corporations carrying on a specific type of business such as logging; and that the tax was payable on the whole of the net income computed in accordance with the provisions of the Act. The appellant, therefore, after estimating its net profit in accordance with that Act, paid the tax on the whole of its net income and not merely on that part thereof which might be considered as attributable to its logging operations.

Under the Excess Profits Tax Act, the "profits" of a corporation means the amount of its net taxable income as determined under the provisions of the Income War Tax Act, R.S.C. 1927, c. 97, as amended, subject to certain exemptions not here of importance. Under the latter Act, "income" is defined by section 3, and by section 5 certain defined deductions and exemptions are allowed. For the taxation year 1947 the relevant permissible deduction was as follows:

5(1) (*w*) Such amount as the Governor in Council may, by regulation, allow in respect of taxes *on income for the year from* mining or *logging operations.*

The appellant bases its claim on para. (*w*) and on the regulations of the Governor in Council thereunder as enacted by P.C. 331. That Order in Council was passed on January 30, 1948, but on March 6, 1948, section 1 thereof was revoked and re-enacted in another form. Thereafter, the operative and relevant portions of P.C. 331 as so amended and as they related to the taxation year 1947, were as follows:

1. Subject to these regulations the amount that a person may deduct from income under paragraph (*w*) of subsection one of section five, is an amount not exceeding the proportion of the total taxes therein mentioned paid by him to

(*a*) the Government of a Province, . . .

that the part of his income that is equal to the amount of

(*c*) income derived by him from mining operations as defined herein, or

(*d*) income derived by him from logging operations as defined herein

is of the total income in respect of which the taxes therein mentioned were so paid.

2. No deduction from income shall be allowed under these regulations unless the taxpayer produces to the Minister a receipt or receipts for payment of the taxes in respect of which the deduction is claimed.

3. In these regulations,

(*a*) 'Income derived from logging operations' by a person means

(i) where logs are sold by him to any person at the time of or prior to delivery to a sawmill, pulp or paper plant or other place for processing or manufacturing logs, or delivery to a carrier for export from Canada, or delivery otherwise, the net profit or gain derived by him from

(A) the acquisition of the timber or the right to cut the timber from which the logs were obtained, and the cutting and sale, or the cutting, transportation and sale of the logs, or

(B) the acquisition, transportation and sale of the logs, or

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(ii) where he does not sell but processes, manufactures or exports from Canada logs owned by him, the net profit or gain reasonably deemed to have been derived by him from

(A) the acquisition of the timber or the right to cut the timber from which the logs were obtained, and the cutting and the transportation of the logs to the sawmill, pulp or paper plant or other place for processing or manufacturing, or to the carrier for export from Canada, as the case may be, or

(B) the acquisition of the logs and the transportation of them to such point of delivery

computed in accordance with sound accounting principles with reference to the value of the logs at the time of such delivery, excluding any amount added thereto by reason of processing or manufacturing the logs;

In brief, the contention of the appellant is that para. (*w*) is not limited in its scope to taxes paid specifically on logging operations as such, but that in an integrated business such as its, where one of its operations is a logging operation, it is entitled to apportion its net income between the various operations; that such an apportionment is a commonly recognized principle, and is specifically recognized in the regulations of P.C. 331. It has, therefore, apportioned its net income as between the logging operations and its total operations in the same proportion as the cost of the logging operations bears to the total cost of all its operations, namely, 46·36 per cent. Applying the same principle to the tax paid to the Province of Ontario, it claims to be entitled to deduct 46·36 per cent of that tax as being a tax paid to a province in respect of income from logging operations.

The defence is a denial that the appellant comes within the provisions of para. (*w*) or the regulations, for the reasons later to be referred to. In his decision and in the pleadings, the respondent had also alleged that the deduction was barred by the provisions of section 6(1) (*o*) of the Income War Tax Act and the regulations thereunder (P.C. 5948), but in argument his counsel abandoned that defence entirely. It is not necessary therefore, to consider the alternative claim of the appellant as set out in para. 18 of the statement of claim. It is admitted that section 2 of P.C. 331 has been complied with.

The first question that arises is in regard to P.C. 331. Mr. Mundell, counsel for respondent, submits that as it was enacted and amended prior to the enactment of para. (*w*)

in the form which I have set out above, it must be read with reference to the form in which para. (*w*) existed at the time such regulations were passed and amended. Para. (*w*) was first added to section 5(1) in 1946 and made applicable to the year 1947. The form in which it then appeared is of no importance as it was repealed in 1947, and as then re-enacted was made applicable to the taxation year 1947 and subsequent years, and was as follows:

(*w*) Such amount as the Governor in Council may, by regulation, allow for amounts paid in respect of taxes imposed on the income, or any part thereof, by the Government of a Province by way of tax on income derived from mining operations or income derived from logging operations.

While it was in that form P.C. 331 was passed and amended. Later, in 1948, the 1947 version of para. (*w*) was repealed and re-enacted in the form I have above set out and made applicable to the year 1947. As I have already stated, P.C. 331 was not further amended or annulled and remained in effect for the year 1947. Mr. Mundell submits, therefore, that notwithstanding that the 1947 para. (*w*) was repealed, the regulations passed while it was unrepealed must be construed with reference to it in that form.

In my opinion that is the wrong approach to the question. The 1947 version of para. (*w*) never came into operation so far as the 1947 taxation year was concerned and I do not think it need be considered. It is to be noted, also, that P.C. 331 was enacted shortly prior to and in anticipation of the proposed revision of para. (*w*). The matter is governed, I think, by the provisions of the Interpretation Act, R.S.C. 1927, c. 1, s. 20 (*a*), which was as follows:

20. Whenever any Act or enactment is repealed, and other provisions are substituted by way of amendment, revision or consolidation,

(*a*) all regulations, orders, ordinances, rules and by-laws made under the repealed Act or enactment shall continue good and valid, in so far as they are not inconsistent with the substituted Act or enactment, until they are annulled and others made in their stead.

P.C. 331 as amended continued, therefore, to be good and valid following the 1948 enactment of para. (*w*) insofar as it was not inconsistent therewith. To ascertain whether there is any inconsistency, it becomes necessary to ascertain the meaning of para. (*w*).

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Mr. Mundell's submission is that "taxes on income from logging operations" means taxes levied specifically on logging operations as such and does not include taxes levied under a general corporations income tax on corporations whose business is wholly or in part "logging operations." He says that the deductibility is not to be determined by the nature of the business operations but by a tax which is levied only on a logging operation. He admits that if such a tax were levied, a taxpayer whose business was solely that of logging operations would be entitled to the full deduction of the provincial or municipal tax under section 1 of P.C. 331; but says that a taxpayer such as a pulp and paper manufacturer could deduct nothing for the tax so paid unless that tax was levied solely on its income from logging operations. It is shown that no specific tax on logging operations as such was enacted in Ontario until some years after 1947.

In support of his contention, Mr. Mundell refers to three clauses of the preamble to P.C. 331 as follows:

> AND WHEREAS, at the present session of Parliament, an amendment will be proposed to Paragraph (*w*) of Subsection (1) of Section 5 of the Income War Tax Act to provide therein for the deduction from income of amounts paid in respect of taxes imposed on the income, or any part thereof, by any municipality authorized by a province by way of tax on income derived from mining or logging operations;
>
> AND WHEREAS Paragraph (*w*) of Subsection (1) of Section 5, as proposed to be amended, will implement the undertaking of the Dominion of Canada contained in Clause 8 of the Dominion-Provincial Agreements relative to taxes on income derived from mining or logging operations;
>
> AND WHEREAS it is desirable that the applicable provisions and definitions of the Dominion-Provincial Agreements shall be included in any regulation governing the deduction from income of amounts paid in respect of such taxes;

Further, he submitted that in order to ascertain the full import of P.C. 331, the Court should examine the Dominion-Provincial Agreements themselves and he tendered them in evidence. It is said that an examination of these Agreements will support the contention of the respondent that para. (*w*) was amended in 1948 in pursuance of the Dominion-Provincial Agreements, and that by those Agreements, the contracting provinces and their municipalities could levy only a tax specifically directed to mining and logging operations. It may be noted that the provinces of

Ontario and Quebec were not parties to these Agreements. Objection being raised as to their admissibility, I heard argument thereon and reserved my finding.

The principle of the right of a taxpayer who is engaged in logging operations to claim a deduction for provincial and municipal taxes in respect thereof, and where he is engaged in an integrated business such as the appellant, to apportion his income as between logging and other operations, is so clearly set forth in the enacting portions of P.C. 331 that I find no necessity whatever to refer to the preamble or the Agreements therein referred to in explanation thereof. If the language of an enactment is clear, the preamble must be disregarded. In *Powell* v. *Kempton Park Race Course Co.* (1) the rule was thus stated by the Earl of Halsbury:

> Two propositions are quite clear, one that a preamble may afford useful light as to what a statute intends to reach, and the other that if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment.

On that ground, therefore, I must find that the Dominion-Provincial Agreements are inadmissable as evidence. I might add also that I do not think that the provisions of an agreement between Canada and some of the provinces could be used to limit or vary the provisions of a general enactment, applicable to the whole of Canada.

Disregarding for the moment the definition contained in P.C. 331, section 3, what meaning is to be attributed to "taxes on income from logging operations?" I put that question because of Mr. Mundell's contention that to the extent that the definition in P.C. 331 allowed a deduction of the tax not specifically imposed on income from logging operations, the Governor in Council in enacting P.C. 331 exceeded the powers conferred by para. (*w*).

Let me assume a case in which a corporation in Ontario engaged only in logging operations paid a tax under the Ontario Corporations Tax Act, 1939, on its income therefrom in 1947. Would that not have been "taxes on income from logging operations?" For the reasons I have stated above, the respondent says it would not, but I cannot agree. In my opinion, the tax so paid would fall squarely within the section. If Parliament had intended to limit the

(1) (1899) A.C. 143 at 157.

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deduction in the way suggested by the respondent, it would have used clear words to express that intention, such as "taxes levied specifically on income from logging operations." It is not improbable that as the amended para. (*w*) was to have application throughout Canada, the intention was to confer the same right on taxpayers who resided in the non-agreeing provinces as were conferred on the others by the Dominion-Provincial Agreements, and thereby avoid discrimination.

It is not contended by the respondent that a taxpayer whose integrated business included "logging operations" is in any different position under para. (*w*) than one whose business is solely that of logging. In view, therefore, of the finding I have just made, I do not need to pursue further the right of the appellant under para. (*w*) to apportion its tax as between logging and other operations. I find that there is no inconsistency between the provisions of P.C. 331 as amended and the final version of para. (*w*). I find also that the appellant in 1947 did conduct logging operations. P.C. 331 therefore remained in full effect throughout 1947 and the appellant is entitled to have his rights determined thereunder.

If there were any doubt as to the appellant's right to apportionment of its tax paid to the province, as between logging and other operations, it is completely removed by the provisions of P.C. 331 which was clearly designed to include such a case as the present one. If the Governor-in-Council had intended to limit the right in a manner proposed by the respondent, it would have been necessary only to say that the taxes so paid would be allowed in full. But provision is made in section 1 for an apportionment on the basis of the proportion existing between income from logging operations (as defined by s. 3) and the total income in respect of which the taxes were paid. Then section 3 defines "income derived from logging operations," and by section 3(*a*) (ii) provides a method for the ascertainment of "logging income" in the case of an integrated operation, not only where the taxpayer processes its own logs but also where it buys other logs and processes them. It therefore is unnecessary to refer at any length to the cases cited which indicate that the principle of apportionment of income over the various operations of an integrated business is well established. Reference, how-

ever, may be made to *Commissioners of Taxation* v. *Kirk* (1); *International Harvester Co. of Canada Ltd.* v. *Provincial Tax Commissioners* (2); and to *Provincial Treasurer of Manitoba* v. *Wm. Wrigley Jr. Co. Ltd.* (3).

The respondent submits that even if the appellant be entitled to a deduction of a portion of the tax, it has not brought itself within the provisions of P.C. 331. By section 1 thereof, the appellant is entitled to deduct an amount not exceeding the proportion of the total taxes paid to the Province of Ontario which the part of its income that is equal to the amount of its income derived by it from logging operations (as defined in section 3) is of the total income in respect of which the taxes therein mentioned were so paid. It is established that the tax paid to the province (although the assessment at the time of the trial was not finalized) was $406,501.29, and that the total income in respect of which that tax was so paid was $5,806,653.01. The appellant's income from its logging operations is to be determined under section 3(*a*) (ii) (*supra*). It is therefore the net profit or gain reasonably deemed to have been derived by it from the operations set out in para. A and B, and computed in accordance with sound accounting principles with reference to the value of the logs at the time of such delivery, excluding any amount added thereto by reason of processing or manufacturing the logs.

As the appellant sold no logs as such, it made no profit from the sale of logs. It is submitted that it is necessary to establish a notional profit which on sound accounting principles might be reasonably deemed to have been derived therefrom. The basis proposed by the appellant is that of cost-ratio, namely, by apportioning its profit as between logging operations and other operations (manufacturing and selling) in the same proportion as the cost thereof, which were said to be respectively $7,216,162 and $15,566,208, the logging cost, therefore, being 46·36 per cent of the total. Its claim, therefore, is to deduct 46·36 per cent of the total tax paid to the Province of Ontario of $406,501.29—or $188,454.

This method of apportionment—and for the moment I am not referring to the figures included in the method—is said to be in accordance with sound accounting principles

(1) (1900) A.C. 588. (2) (1949) A.C. 36.
(3) (1950) A.C. 1.

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and to be a method properly used to ascertain the profit or gain reasonably deemed to have been derived from logging operations. Evidence to that effect was given by Mr. A. J. Little, a partner in the accounting firm of Clarkson, Gordon & Co., and who personally had charge of the audit of the appellant's books. That evidence was not challenged in any way. It is also supported by the evidence of Mr. R. F. Burns, a chartered accountant and a partner in the firm of McDonald, Currie & Co., and who gave evidence in another case which by consent was heard at the same time as this appeal.

The respondent contends, however, that such a computation is not in accordance with the Order in Council. He points out that the computation must not only be on sound accounting principles, but must be made "with reference to the value of the logs at the time of such delivery." In his opinion, that "value" means the market value, namely, the amount which the appellant would have received had it sold the logs at the time they were received at the mill, instead of processing them. In that way, he says, the income attributable to the logging operations would have been on precisely the same basis as that of a taxpayer whose operations were limited to logging. By that method, it is said, the profit, if any, on the logging operations could be precisely determined, presumably by deducting costs from the market value; if the market value were less than the costs, there would be no profit on that part of the operations and any profit eventually arising on the total operation would be attributable to manufacturing and sale. I might state here that the evidence is conclusive that the woods and logging operations of the appellant were carried out with maximum efficiency, and that the total costs thereof are shown to be much below the average in the industry.

Now the section does not refer to "market value" but to value of the logs at the time of such delivery . . . to the pulp or paper plant, etc. It seems to me that the regulation was drafted with full knowledge that there is, in fact, no market—and therefore no market value—for pulp wood at the time of its delivery to the mill where it is to be processed. That fact was established to my satisfaction at the trial. Paper mills are of necessity located in or near the area in which their extensive timber limits are located

and when the pulp wood is brought long distances by river, train or truck to the mill, it is brought there not for the purpose of re-sale but to manufacture it into sulphite pulp or paper. It is true in some cases—as in the other case now before me—that a company in the course of cutting its own pulp wood may also cut and sell other types of wood which it does not require for its mill. But those logs are not brought to the mill for manufacturing or processing. Moreover, I do not think that the purchases of logs made by the appellant from settlers throughout the district is of any help in establishing market value at the time of its delivery to the mill. The evidence is all one way and establishes that there was no market for logs at the time of their delivery to the mill.

It is my opinion that too much emphasis should not be placed on the single word "value" in the final part of section 3(*a*) (ii), which I shall repeat.

computed in accordance with sound accounting principles with reference to the value of the logs at the time of such delivery, excluding any amount added thereto by reason of processing or manufacturing the logs;

The main purpose of that phrase is that the portion of the income which in an integrated operation is to be considered as "income from logging operations," is to be ascertained at a given point in the integrated operation, namely, when logs are delivered at the mill, and to exclude any value which might have been added by the processing or manufacturing of the logs thereafter. The "value" of the logs at that point is a clearly notional one and not capable of being precisely ascertained. I think the Order in Council was drawn with full knowledge of that fact and that therefore provision is made that the proportion of the net income which is to be apportioned to logging is that which on sound accounting principles may reasonably be deemed to have arisen at that point.

It is for that reason that the accountants, lacking any market value for logs delivered at the mill, have found it necessary to depart from the practice which they would have followed had such a yardstick been available. In doing so, they have adopted allocation of profit on a cost-ratio basis and they are in agreement that that is in accordance with sound accounting principles, under the circumstances, and that it accurately represents the proper ratio existing between the value at the time of delivery to the

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mill and the total value at the time of the sale of the finished product. No alternative scheme was suggested by the respondent and I am satisfied on the evidence of the accountants that it is the only one which under the circumstances would be fair and reasonable and of assistance in arriving at the allowance which P.C. 331 so clearly contemplates.

Mr. Little considered various methods of computing the apportionment of income on a cost-ratio basis and also on a capital-employed return basis and filed Ex. 5 to indicate the results of these various methods. The latter method he rejected after pointing out that by one computation the logging costs could be considered as representing 35·21 per cent of the total, and by another equally valid on accounting principles they would represent 67·08 per cent of the total.

He pointed out that there were four possible methods of making the computations on a cost-ratio basis, the results depending on whether the indirect costs of general administration, selling and miscellaneous items (totalling $590,108.39) and certain other items of overhead were excluded or included entirely, or whether they were apportioned in part between logging and other operations and the manner of such apportionment.

Basis 2 of Ex. 5 is that claimed by the appellant, and Mr. Little stated that it was computed on sound accounting principles. In that basis the actual direct logging costs are $7,216,162 and in that figure no amount is included for general administrative, selling or miscellaneous items totalling $590,108.39, all of which are added to the total direct costs which thereby aggregate $15,566,208. On that basis the direct logging costs are 46·36 per cent of the total cost so computed, and that is the basis on which the claim of the appellant is put forward. In that computation the company has not included on either side such costs as interest payments, payment to the retirement trust funds, loss on townsite operations, and the like.

Mr. Little personally preferred the computation as shown in Basis 4 of Ex. 5. By that method he would have apportioned certain general expenses between the direct logging costs and the direct total costs, in which case the former would have been 47·58 per cent of the latter—a percentage in excess of that claimed by the appellant.

I find, therefore, that the apportionment proposed by the appellant is established by the evidence to have been made on sound accounting principles and otherwise to be within the provisions of P.C. 331. I might add here that in computing direct logging costs, nothing has been included for "barking" the logs.

One further objection of the respondent should be noted. The direct logging costs as computed by the appellant and its accountant are not in one small respect precisely the actual costs incurred in 1947. The figure $7,216,162 given as "logging costs" is—as stated by Mr. Little—a composite figure representing that portion of the current year's expenditures and the previous year's expenditures applicable to the wood delivered into the mill during the twelve months of 1947. By that he means that some of the logs which were cut or purchased in 1946 would not be delivered to the mill until 1947, and some of those cut or purchased in 1947 might not reach the mill until 1948. The respondent contended, therefore, that the costs computed in that manner are incorrect, and do not accurately reflect the 1947 costs. In the industry, logging and milling operations are practically continuous throughout the year. At any given time there are large quantities of logs cut and lying in the bush, others are being moved to the mill and still others are in the stockpile at the mill, and costs are incurred at every stage. From a practical point of view, it would be an impossible task—and I think a useless one—to endeavour to apportion each item of costs, such as cutting and transportation, to the precise year in which the cost was actually incurred. The only method that could reasonably be followed is that adopted by the appellant and is to relate such costs to the cost of the logs actually put through the mill in 1947, and which alone resulted in the income subject to taxation. I accept the evidence of Mr. Little that that method is in accordance with sound accounting principles.

The appellant is entitled to succeed and the appeal will be allowed. The appeal is under the Excess Profits Tax Act only and I must therefore confine my decision to the provisions of that Act.

There is no dispute between the parties as to the net taxable income of the appellant if its claim is allowed. The notice of assessment dated March 10, 1950, and which

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makes certain other adjustments to the amended return of the appellant dated September 10, 1948, is accepted by both parties except on the one point which has now been determined; it fixes the net taxable income at $7,018,113.30. From that amount there should now be deducted $188,454, plus 46·36 per cent of such further amount, if any, as may be paid by the appellant to the Province of Ontario in respect of the taxation year 1947 under the Ontario Corporations Tax Act, 1939, as and when it has paid the final assessment thereunder.

There will therefore be a declaration that under the provisions of section 5(1) (*w*) of the Income War Tax Act, as it was in effect in the taxation year 1947, and under the provisions of the regulations established by P.C. 331 as amended, the appellant in computing its taxable income under the provisions of the Excess Profits Tax Act of the year 1947, is entitled to deduct therefrom 46·36 per cent of taxes paid (and payable) by it to the Province of Ontario under the provisions of the Corporations Tax Act, 1939 as amended, for the taxation year 1947; that in respect of the sum of $406,501.29 already paid by the appellant to the Province of Ontario thereunder, the appellant is entitled to deduct the sum of $188,454. The appellant is also entitled to a deduction of 46·36 per cent of any additional amount paid or to be paid by it to the Province of Ontario thereunder upon producing to the respondent satisfactory receipts evidencing such additional payment. In view of these findings, I do not think it necessary or advisable to state the amount of the appellant's net taxable income or its excess profits which are assessable to tax, as asked for in the Claims (*d*) and (*e*) of the prayer in the statement of claim. Such amounts can be readily ascertained and agreed upon as soon as the total liability of the appellant to the Province of Ontario has been finally ascertained.

The appeal is therefore allowed, the assessment dated March 10, 1950, is set aside to the extent I have indicated, and the matter is referred back to the Minister to re-assess the appellant in accordance with my findings.

The appellant will be entitled to its costs.

Judgment accordingly.

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Jan. 23, 24 & 25

Dec. 18

BETWEEN:

HIS MAJESTY THE KING .....PLAINTIFF;

AND

PLANTERS NUT & CHOCOLATE CO. LTD.....DEFENDANT.

Revenue—Sales tax—Excise Tax Act, R.S.C. 1927, c. 179, s. 86(1), s. 89—Schedule III—"Foodstuffs"—"Shortening"—Words of a statute not applied to any particular art or science are to be construed as they are understood in common language—Peanut oil not "shortening" within the meaning of Schedule III.

Defendant manufactures and sells peanut oil in liquid form advertising it as liquid shortening and as an all-purpose cooking and salad oil. It claims exemption from sales tax under the exemption provided for by s. 89 and Schedule III of the Excise Tax Act which under the heading "Foodstuffs" exempts "peanut butter and shortening and materials for use exclusively in the manufacture thereof".

Held: That the peanut oil sold by the defendant being in liquid form and therefore lacking the quality of plasticity to be found in lard, is not "shortening" within the meaning of that word as found in Schedule III of the Excise Tax Act.

2. That the words of the Excise Tax Act and Schedule III are not applied to any particular science or art and are to be construed as they are understood in common language.

INFORMATION exhibited by the Attorney General of Canada to recover sales tax from the defendant.

The action was tried before the Honourable Mr. Justice Cameron at Toronto.

J. W. Pickup, K.C. for plaintiff.

The Honourable S. A. Hayden, K.C. and *J. W. Blain* for defendant.

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

CAMERON J. now (December 18, 1951) delivered the following judgment:

In this Information the plaintiff, under section 86(1) of the Excise Tax Act, R.S.C. 1927, c. 179, as amended, claims from the defendant the sum of $1,603.14 for consumption or sales tax said to be payable in respect of the admitted manufacture and sale by the defendant of peanut oil in the period August 23, 1949, to September 30, 1949, together

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with certain penalties and interest for non-payment thereof within the time limited by the Act. The proceedings are in the nature of a test case, for I was informed at the trial that the defendant had then paid the full amount of the tax under protest and without admitting any liability therefor. Moreover, there is no dispute between the parties as to the amount of the claim if, in fact, the respondent be liable to tax.

Section 89 of the Act provides that the tax imposed by section 86 shall not apply to the sale or importation of the articles mentioned in Schedule III thereto, and included in that schedule under the heading of "Foodstuffs," the following are exempted:

> Peanut butter and *shortening* and materials for use exclusively in the manufacture thereof.

The sole contest between the parties is whether the peanut oil so sold and manufactured by the defendant is "shortening" within the meaning to be given to that word in the Schedule. If the defendant's product is found to be "shortening," it is exempt from the tax.

The Excise Tax Act contains no definition of "shortening" or of the other articles mentioned in Schedule III. The words of the Act and of the Schedule are not applied to any particular science or art, and in my opinion are therefore to be construed as they are understood in common language. In the case of *The King* v. *Planter's Nut and Chocolate Co. Ltd.* (1), I had to consider the meaning of the words "fruit" and "vegetable," also found in Schedule III, and reached the conclusion that while from a botanist's point of view the peanut and cashew nut might be included in "vegetable" or "fruit," neither was so included in the common understanding of the words "peanut" or "cashew nut." That judgment was recently affirmed in the Supreme Court of Canada.

The cases which I there cited on this point are of equal application here.

In Craies on Statute Law, 4th Ed., p. 151, reference is made to the judgment of Lord Tenterden in *Att.-Gen.* v. *Winstanley* (2), in which at p. 310 he said that "the words of an Act of Parliament which are not applied to any particular science or art" are to be construed "as they are

(1) (1951) Ex. C.R. 122. (2) (1831) 2 D. & Cl. 302.

understood in common language." The author referred also to *Grenfell* v. *I.R.C.* (1), in which Pollock, B. stated that if a statute contains language which is capable of being construed in a popular sense such a "statute is not to be construed according to the strict or technical meaning of the language contained in it, but is to be construed in its popular sense, meaning of course, by the words 'popular sense,' that sense which people conversant with the subject-matter with which the statute is dealing would attribute it."

In *Cargo ex. Schiller* (2), James, L.J. expressed the same ideas in these words: "I base my decision on the words of the statute as they would be understood by plain men who know nothing of the technical rule of the Court of Admiralty, or of flotsam, lagan and jetsam."

Reference may also be made to *Milne-Bingham Printing Co. Ltd.* v. *The King* (3), in which Duff J. (as he then was), when considering the meaning of the word "magazines" as contained in the Special War Revenue Act, 1915, said: "The word 'magazine' in the exception under consideration is used in its ordinary sense, and must be construed and applied in that sense." In *The King* v. *Montreal Stock Exchange* (4), a case involving the interpretation of the word "newspapers" as used in Schedule III of the Special War Revenue Act, Kerwin, J. said: "In the instant case, the word under discussion is not defined in any statute in *pari materia* and it remains only to give to it the ordinary meaning that it usually bears." He then referred to the definition of the word as contained in Webster's New International Dictionary.

Again, in *Att.-Gen.* v. *Bailey* (5), it was held that the word "spirits," being "a word of known import . . . is used in the Excise Acts in the sense in which it is ordinarily understood." In that case the Court said at p. 292: "We do not think that, in common parlance, the word 'spirits' would be considered as comprehending a liquid like 'sweet spirits of nitre' which is itself a known article of commerce not ordinarily passing under the name of 'spirit.' "

It is of some interest, also, to note the rule of interpretation adopted in the United States in construing Excise Acts.

(1) (1876) 1 Ex. D. 242, 248.
(2) (1877) 2 P.D. 145, 161.
(3) (1930) S.C.R. 282, 283.
(4) (1935) S.C.R. 614, 616.
(5) (1847) 1 Ex. 281.

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As stated in Craies on Statute Law, p. 152, the rule is that the particular words used by the Legislature in the denomination of articles are to be understood according to the common commercial understanding of the terms used, and not in their scientific or technical sense, "for the Legislature does not suppose our merchants to be naturalists, or geologists, or botanists." (*200 Chests of Tea* (1), per Story, J.).

The defendant company carries on business at Toronto. The parent company is located at Suffolk, Va., and since 1928 has there manufactured peanut oil. The defendant began the commercial production of peanut oil in Canada on or about August 23, 1949. It is advertised and sold under the name "Planter's Hi-Hat Peanut Oil" and is a liquid sold only in cans. It is described in the advertisement as "the all-purpose cooking and salad oil."

It is not sold or advertised under the name "shortening," but it is described as a new, modern, all-purpose *liquid* shortening. It is advertised as suitable for use in pan frying, deep fat frying, cooking and baking, in which cases it performs the function of shortening. It is also advertised as suitable for use in salads, soups and sauces and in these cases it is used as an oil and not as shortening. It is therefore referred to as an "all-purpose cooking and salad oil."

The evidence establishes that since August, 1949, the peanut oil sold by the defendant has been used effectively in Canada as a shortening agent in deep fat frying and in the making of pies, cakes, doughnuts and the like. It is therefore submitted by the defendant that as it has been and is being used as a shortening it is, in fact, "shortening" within the meaning of that word in Schedule III, and is therefore exempt from tax. For the plaintiff it is contended that "shortening" in its popular sense and as used in the trade and by the public has a well defined meaning, namely, a manufactured *plastic* fat of the consistency of lard and used for "shortening" purposes in cooking, frying and baking. It is submitted, therefore, that the defendant's product, being in liquid form and not in plastic form and not having been manufactured or processed, but rather being a single refined vegetable oil, is not "shortening."

(1) (1824) 9 Wheaton (U.S.) 435.

The defendant's case, apart from the evidence of those witnesses who testified as to the successful use of peanut oil as a shortening agent in cooking, baking and frying, rested mainly on the evidence of Arthur C. Eaton and Dr. F. A. J. Zeidler. The former is senior chemical engineer of the defendant's parent corporation at Suffolk, Va. He said that the function of shortening is to lubricate and weaken the cell structure of the gluten and starch to make the product tender and easily eaten. He defined shortening as "a material which will lubricate," and stated from his experience and as a chemist that peanut oil fell within that definition.

Dr. Zeidler is President of Zeidler-Bennett Limited, a research and testing laboratory in Toronto. He is a scientist of wide experience and for many years has specialized in applied and organic chemistry. His practical definition of shortening was "a substance that produces a certain velvety crumb in baking and acts as a lubricant in cooking, provided it is palatable and non-toxic." In his opinion, peanut oil fell within that definition.

A very helpful—and I think a very important—summary of the history of "shortening" was given by Dr. N. H. Grace, the head of the Oils and Fats Section in the Division of Applied Biology, National Research Council at Ottawa. He is the holder of several degrees in chemistry, a member of the American Chemical Society, the American Oil Chemists Society, and a Fellow of the Royal Society of Canada. From 1931 to 1937 he was in the Chemical Division of the National Research Council and since then has been in the Division of Applied Biology. For the last seven or eight years he has been engaged in research work, particularly in the adaptation of Canadian oils for edible purposes as oils and as shortenings. He is very familiar with peanut oil. He states that in Great Britain and in America the first substances used in cooking to "shorten," were animal fats such as lard and tallow. "Shortening" as such was invented in the United States in the latter half of the last century. During the great expansion of the cotton industry, it was found that the cottonseed oil—a cheap by-product of the cotton industry—could be mixed with high-melting lard and the whole sold as lard. Then cottonseed oil was blended with tallow. Up to 1910, therefore, cottonseed oil was blended with harder animal

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fats and the result was that lard compounds—called "shortenings"—were designed and sold to simulate the properties of lard.

In 1910 there was a new and important development—the discovery of catalytic hydrogenation of unsaturated fats and oils. By that process, vegetable oils could be made plastic or hardened. The next class of shortening, therefore, was an all-vegetable shortening consisting entirely of vegetable oils hardened to a plastic consistency simulating that of lard. In addition, there were numerous other crosses, such as the blending of peanut oil with a heavily hydrogenated peanut oil which also simulated the properties of lard. No doubt basing his opinion on the knowledge of the history of shortening and on his experience in research work in connection therewith, Dr. Grace defined shortening as "a manufactured plastic fat of the consistency of lard". In his opinion, peanut oil did not fall within that definition in that (1) it was an oil lacking the consistency of lard, and (2) it was a single oil which had been merely refined from the crude peanut oil and therefore was not a manufactured plastic fat. As I have said above, peanut oil is a liquid and is so sold, and it is admitted that it had not been subjected to the hydrogenation process in any degree. Now there is a very considerable amount of evidence to support the view of Dr. Grace and of all the other witnesses for the plaintiff, that in Canada "shortening" as understood and used in the trade and by the general public does not include liquids, but must be a substance simulating and having the plasticity of lard. The defence did not produce any samples of any oils which at any time had been sold in Canada under the name "shortening," or establish that any such oils had been sold under that name. On the other hand, there were produced on behalf of the plaintiff Exhibits 1, 2, 4, 5, 6 and 7, all being cardboard containers used in the sale of six different types of shortenings (all of a plastic nature). Each bears the brand name as well as the name "shortening" prominently displayed on the labels.

Dr. Zeidler in cross-examination admitted that he had never known a substance which was sold as shortening which was not, in fact, plastic like lard or butter; nor had he any knowledge of any liquid oil ever being sold as "shortening." Mrs. Elwood, another witness for the

defendant, is Food Editor of the Toronto Star Weekly and was formerly Food Editor of the Daily Star. She is also a graduate in Home Economics of the University of Toronto, has taught Home Economics, has managed lunch rooms, and has demonstrated food products. She has used both liquid and other shortenings and admitted that in purchasing peanut oil or any other oil to be used for shortening purposes, she had never found it labelled as "shortening" on the package or container by the person who sold it. Mrs. Graham, another witness for the defendant, also used both liquid and other shortenings and admitted that when she did not use one in liquid form, she used a solid shortening like butter or lard—"one of the brands that are sold as shortening." Dr. Elworthy, a witness for the plaintiff, is a graduate of the University of London, a Fellow of the Royal Institute of Chemistry of Great Britain, and of the Canadian Institute of Chemistry. At the time of the trial he was the Commodity Officer of the Oils and Fats Administration of the Dept. of Trade and Commerce, and for about two years was with the Oils and Fats Administration of the Wartime Prices and Trade Board. He has had considerable experience with the baking industry. Speaking as one who was very familiar with that industry, he expressed the opinion that " 'shortening' is a mixture of fats and oils in plastic form" and that that definition was one accepted by the baking industry.

Another witness for the plaintiff was Dr. R. A. Chapman, B.S.A., M.Sc., Ph.D., who is in charge of the food section of the Food and Drugs Division, Dept. of National Health and Welfare, Ottawa. He states in the course of his duties he has examined a large number of materials which were labelled "shortening" and added, "I have not encountered any which were liquid in form—and by that I mean that the main name, its principal name, the common name, on the package was shortening." He expressed the opinion that "shortening" as generally understood was a plastic substance.

But even in the advertisements and publications of the defendant there are to be found indications that "shortening" was ordinarily considered to be a solid or plastic. Throughout, they stress the difference between the new liquid shortening and solid shortening, although solid or plastic shortenings were never sold under the designation

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of "solid shortenings," but merely as shortening. The following extract from p. 2 of Ex. A—a pamphlet of the defendant entitled "Key to Good Health," will serve to illustrate the point. The same extract also appears on p. 35 of Ex. H—a pamphlet entitled "Cooking the Modern Way."

FOR RECIPES THAT CALL FOR SOLID SHORTENING . . .
If you have some favorite recipe that calls for a solid shortening, try it with Planters Peanut Oil. See how much better your results can be. But note this important difference: Because Planters Peanut Oil is richer than *ordinary shortening*, be sure to use less of it—usually about one-third less. If a recipe, for example, calls for a full cup of *solid shortening*, two-thirds of a cup of Planters Peanut Oil should be about right. That means economy too, you see, with Planters.

Special Note: If you are more accustomed to working with solid shortening, just put the Planters Peanut Oil in the freezing compartment of your refrigerator over night. Then you can handle it as you would any solid shortening. But remember—*use about one-third less.*

In that extract the defendant company refers to "*ordinary* shortening" and from what immediately follows there can be little doubt but that in the mind of the author, ordinary shortening meant solid shortening. Mr. Eaton stated that the purpose of hydrogenation is to raise the melting point of the product, and that following hydrogenation "the product *is then commonly called "shortening"*; the peanut oil which is not hydrogenated, he called "a liquid shortening."

Many dictionary definitions of shortening were cited, some of which suggested that any material which performed the function of shortening was, in fact, shortening. I prefer, however, the description given in an authoritative text book, "The Chemistry and Technology of Food and Food Products," by Morris B. Jacobs, where in Vol. I, p. 586, he states: "Shortening agents are distinguished by their plasticity, which enables them to form with milk, flour, etc., the peculiar dough structure which is essential for the production of good baked products." The evidence as to the generally accepted meaning in Canada is in accord with that description.

In the light of this evidence, therefore, I have reached the conclusion that the peanut oil sold by the defendant, being in liquid form and therefore lacking the quality of plasticity to be found in lard, was not "shortening" within the meaning of that word as found in Schedule III. In so

finding I am not unmindful of the other arguments advanced by counsel for the defendant to the effect that the plastic or solid shortenings when melted would still be "shortening," although in liquid form; that the shortening process takes place after the plastic shortenings have been subjected to heat, and that by reducing the temperature the liquid peanut oil would become a solid. I accept the evidence of Dr. Grace and the other witnesses to whom I have referred as indicating beyond question that in the trade and among the public generally, shortening meant a manufactured or processed fat (which from the chemical point of view includes oil) having a plasticity similar to that of lard. In view of the evidence of Dr. Grace (and without taking into consideration the definition of "shortening" as found in the Regulations established under the Food and Drugs Act), I would have been inclined to the view that if the peanut oil had been processed by hydrogenation (even without the addition of any other fat or oil) and sold as shortening, it would have been "shortening" within Schedule III. I am of the opinion that shortening which has the consistency of lard would not be used in any practical sense except as "shortening." The defendant, however, desired to produce an oil—an all-purpose oil—which could be used not only as a shortening agent but also for many other purposes and it is no doubt for that reason that it has not subjected its product to hydrogenation. In so doing the defendant, in my opinion, has not produced shortening. All that may "shorten" is not necessarily shortening. Butter no doubt could be an excellent shortening and may frequently be used for that purpose, but it is not manufactured, sold or purchased as "shortening." Any palatable and non-toxic vegetable oil could possibly be used to perform some or all of the functions of "shortening," but that does not necessarily bring them within the general accepted meaning of "shortening." In my view, peanut oil is itself a known article of commerce not ordinarily passing under the name of "shortening," and that view is amply supported by the evidence.

The opinion which I have just expressed is sufficient to dispose of the case. But inasmuch as much of the evidence and argument was directed to the contention of the defendant that its product was within the definition of "shortening" as contained in the regulations under the

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Food and Drugs Act, R.S.C. 1927, c. 76, as amended, I think I should refer to that argument briefly. That definition was as follows:

> Sec. B.09. 010. Shortening, other than butter or lard shall be a combination of fats and oils, processed by hydrogenation or otherwise, with or without Class IV preservative, and shall not contain more than one per cent of substances other than fatty acids and fat.

I may say that I doubt very much whether that Act or the regulations thereunder should be considered. It is not a taxing Act and its purpose is to suitably control the sale and use of food and drugs. It is not, therefore, an Act in *pari materia* with the Excise Tax Act. In argument, counsel for the defendant contended that it should not be considered, but his witness Dr. Zeidler adopted the definition therein as one definition of "shortening" and much of his evidence was based thereon. It was also referred to by witnesses for the plaintiff.

Dr. Zeidler, being familiar with the process used by the defendant in producing peanut oil and with the chemical ingredients of the product, was of the opinion that from a chemical point of view peanut oil was "a combination of fats and oils," and that while it was not processed by hydrogenation, the process used was an "otherwise processing" as required by the definition. *From the chemist's point of view* he considered fats and oils to be the same. While admitting that in the product sold by the defendant the peanut oil was not combined with any other fat or oil, his view was that as the peanut oil itself consisted of a number of fats or oils, there was within "peanut oil" itself, a combination of fats and oils. The peanut oil consists of six different substances, four of which are glycerides or esters of saturated fatty acids, and two of which are glycerides or esters of unsaturated fatty acids.

The process used by the defendant may be described briefly as follows: The peanuts are broken into small pieces and heat and pressure are applied; the crude peanut oil is drained off; then by a refining method the soap is removed; the resulting neutral oil is washed to produce a neutral washed oil which is then bleached and the bleached neutral oil is then deodorized, the resulting product being peanut oil as it is marketed. These operations, Dr. Zeidler said, constituted "processing."

I do not consider it necessary to review all the evidence on this point. I have read it carefully and have reached the conclusion that the defendant's product does not fall within that definition. I accept the evidence that as ordinarily understood, there is a distinction between fats and oils. Dr. Zeidler, after stating that chemically fats and oils were the same, added: "*We call commonly* a fat a substance of this type, glyceride or ester, which is at ordinary temperatures solid or semi-solid; and we call an oil, a glyceride ester which at ordinary temperatures—I mean the geographical part of the world—is liquid." That view of the distinction between fats and oils is supported by other evidence as well and is, I think, in accordance with the common understanding. That being so, the "peanut oil" is not a combination of fats. It contains no fat in that sense.

Nor do I think it is a combination of oils. It is rather a single oil composed of a number of combined glycerides. In using the words "combination of oils," I think the regulation was intended to apply to those things which were ordinarily considered as oils and not to the combination of the component parts of an oil. Dr. Zeidler was of the opinion that the glycerides so combined to form peanut oil were "fats or oils," but as I have said above, from the chemical point of view he made no distinction between the two words. Dr. Chapman, on the other hand, was of the opinion that the glycerides were neither fats nor oils. In the sense in which they are used in the regulations, I am satisfied that "fats and oils" refers to those things which in ordinary language are considered to be fats or oils and not to the constituent parts of such fats or oils, even although in the view of some chemists such constituent parts are themselves fats or oils.

As I have said, the peanut oil was not combined with any other oil. There was therefore no "combination of fats and oils" as required by the regulations. Peanut oil, therefore, does not fall within the definition of "shortening" as contained in the regulations.

The plaintiff is therefore entitled to succeed. There will therefore be judgment that the plaintiff is entitled to be paid by the defendant the sum of $1,603.14, being the sales tax payable on the sale price of peanut oil sold by it

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between August 23, 1949, and September 30, 1949, together with the further sum of $22.03, being penalties payable in respect thereof up to December 31, 1949. The plaintiff is also entitled to be paid such additional penalties as may have accrued thereon from December 31, 1949, to this date and computed in accordance with the provisions of section 106(4) of the Excise Tax Act.

The plaintiff is also entitled to costs after taxation.

Judgment accordingly.

1951

Oct. 23

1952

Jan. 31

BETWEEN:

INDEPENDENCE FOUNDERS LIMITED ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Revenue—Income—Income tax—Capital or income—Appeal allowed.

Appellant operates an investment trust business and uses as agents two trust companies. Its clients are allowed to buy by instalments fractional shares in blocks of securities that are lumped together. Holders of these fractional interests may buy further interests at market price at any time and can also compel appellant to buy them back at any time at the market price. Appellant's source of income is its right to be paid various fees and emoluments deducted on a percentage basis from all moneys that pass through its hands. Appellant was assessed for income tax on the increases in market value of securities that have been lying passive in its hands.

Held: That any profit made by appellant can be made not from sale and re-purchase transactions but only while the appellant has no transactions in those securities and any increases in value are capital increment and not taxable income.

APPEAL under the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Sidney Smith, Deputy Judge of the Court, at Vancouver.

J. L. Lawrence and *B. W. F. McLoughlin* for appellant.

Dugald Donaghy, K.C. and *F. J. Cross* for respondent.

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

SIDNEY SMITH D.J. now (January 31, 1952) delivered the following judgment:

The Company appeals from assessments for income tax covering several years, and also from assessments for excess profits tax which do not cover quite the same period. But since all the assessments seem to be governed by the same principles, I need not go into details.

The Company operates an investment trust business and the main difficulties that arise in the case are due to the complexity of the relations between the Company and its agents and clientele. The Company makes use of two trust companies and there is a multiplicity of agreements between one or more of the Companies and the clientele. I need not conjecture whether these complications serve any useful practical purpose; but it is necessary to find the essential legal relations of these parties, stripped of unessential complexities. It seems to me that the two trust companies are nothing but agents for the appellant Company, and that this case should be dealt with as though the appellant Company itself carried out all transactions into which the clientele enter.

Without elaborating on the tortuous courses pursued, I may say that I view the appellant's business as one for giving investors an opportunity for investing in securities without having to pay for them in full. Clients are allowed to buy by instalments fractional shares in blocks of securities that are lumped together. One peculiarity of the arrangement is that holders of these fractional interests can buy further interests at market price at any time, and can also at any time compel the appellant to buy them back at the market price. Consideration of the scheme shows that, though the client gains or loses by fluctuations of the market, the appellant neither gains nor loses on interests that are outstanding in the hands of clients, though the appellant is affected by market fluctuations in securities that are merely passive in the appellant's hands and are not the subject of any transaction at the time.

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Sidney Smith D.J.

What have been assessed in this case are the increases in market value of securities that have been lying passive in the appellant's hands. Appellant claims that these increases in value are capital increment and not income at all; the Minister claims that they constitute a profit in a commodity that it is the appellant's business to deal in, and so are income within the relevant Acts. The Minister points to the fact that the appellant's memorandum of association lists the buying and selling of securities as one of the appellant's objects. This, however, though a factor to be considered, is far from conclusive. The question is not whether a company can carry on a particular business, but whether that is in fact its business.

As I have said, the appellant has neither profits nor losses on securities while they are the subject of deals with clients. Though it can gain or lose on securities that are lying passive in its hands, it is as liable to lose as to win, according to the general market. The real source of income or profit that is its *raison d'être* is its right to be paid various fees and emoluments which are given various fancy labels and are deducted on a percentage basis from all moneys that pass through its hands.

The effect of all this is that, though buying and selling interests in securities are essential to the appellant's business, these transactions are not its livelihood. In fact, with regard to these transactions, the appellant is in much the position of a broker relying on commissions. It is only on fluctuations in the market for shares not being bought or sold that appellant can make a profit. It does not seek the profit, which is just as likely to be a loss. If profit, it is a fortuitous profit.

It is true, as respondent says, that these securities are held for the very purposes of the appellant's business. But that is not in itself enough to make them taxable. A logging company may hold timber lands essential to its business, but if it is not a trader in timber lands, an increase in their value is capital, not income. The respondent will answer that that is an isolated transaction, and the land is not bought for re-sale; that here there is a course of dealing in securities, and they are bought for re-sale. Again, I do not think that is necessarily enough.

Take the case of a man who runs a picture gallery, and counts on making his profit by charging admissions. To keep clients interested he may have to keep his collection constantly changing, and so constantly to keep buying and selling pictures, even though he has no desire to be a dealer, and even though he is as likely to lose as to gain by his deals. I cannot believe that his gains or losses would have any bearing on his taxable income; he is a showman, not a dealer. Similarly the appellant keeps securities not as a dealer, but as an inducement to persuade clients to buy and to pay it commissions. These securities are like the tools of a trade; the user of tools must keep replacing them, and may be lucky enough to have them rise in value after replacement; but I quite fail to see how the increase could be treated as income. Or there might be a music-teacher who stocked flutes and supplied them at cost to pupils, so that he could make money giving them lessons. I cannot believe that any rise in the value of his stock could be taxed as income.

The respondent would have more to go on if the appellant actually made profit from sales and re-purchases, even if this was fortuitous and unsought, though I very much doubt whether even then the profit would be income. Here, however, the profit, far from being made from sale and re-purchase transactions, can only be made while the appellant has no transactions in those securities. That seems to me decisive; so I hold that the increases in value are capital increment and not taxable income.

This conclusion makes it unnecessary for me to consider the appellant's other argument that even if a profit made by market gains was taxable, this could not be taxed until it was realized by re-sale; though I appreciate the strength of that submission too.

I would allow the appeal.

Judgment accordingly.

1951
Nov. 27, 29
1952
Feb. 14

BETWEEN:

JASON MINES LIMITED (now NEW JASON MINES LIMITED) — APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... — RESPONDENT.

Revenue—Excess profits tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 48(1), 66, 89. The Excess Profits Tax Act, 1940, S.C. 1940, c. 32, ss. 2(f), 3—Income Tax Act, S.C. 1948, c. 32, s. 92—Meaning of "taxable income"—Quaere whether order for repayment of tax can be made.

The appellant appealed from its assessments for excess profits tax for the years 1940, 1941 and 1942. In each of these years its income was derived from the operation of a metalliferous mine and was exempt from corporation tax under s. 89 of the Income War Tax Act and it contended that it was not subject to tax under The Excess Profits Tax Act, 1940. Appeals allowed.

Held: That the term "taxable income" as used in section 2(*f*) of The Excess Profits Tax Act, 1940, means income that is liable to income tax and that since the appellant's income for the years under review was exempt from income tax it had no taxable income as determined under the Income War Tax Act and, therefore, no profits within the meaning of section 2(*f*) of The Excess Profits Tax Act, 1940, that could be brought into charge for excess profits tax under section 3 of that Act.

2. That it is questionable whether an order can be made in these proceedings for repayment to the appellant of the amount of tax paid by it.

APPEAL under The Excess Profits Tax Act, 1940.

The appeal was heard before the Honourable Mr. Justice Thorson, President of the Court, at Toronto.

T. Sheard K.C. and *A. B. Whitelaw* for appellant.

G. B. Bagwell K.C. and *J. S. Forsyth* for respondent.

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

THE PRESIDENT now (February 14, 1952) delivered the following judgment:

The appellant herein, which was incorporated on November 9, 1938, as Jason Mines Limited by Letters Patent under the Ontario Companies Act and had its name changed on July 8, 1948, to New Jason Mines Limited by Supplementary Letters Patent, appeals from the assessments levied against it for excess profits tax for the years 1940, 1941 and 1942.

The appellant's main ground of appeal is that in each of the said years its income was exempt from income tax under section 89 of the Income War Tax Act, R.S.C. 1927, chap. 97, and that, consequently, it was not subject to any tax under The Excess Profits Tax Act, 1940, Statutes of Canada, 1940, chap. 32. An alternative ground of appeal is that the Minister acted on a wrong principle in disallowing its claims for depreciation allowance. Almost all the evidence at the hearing was directed to this issue but if the appellant succeeds in its main contention its alternative one need not be considered.

The main contention turns on the construction of section 89 of the Income War Tax Act, section 3 of The Excess Profits Tax Act, 1940, and the definition of "profits" in section 2(*f*) of the latter Act. Section 89 of the Income War Tax Act, as enacted in 1936 and amended in 1939, provided as follows:

89. (1) Subject to the provisions of this section, the income of a company derived from the operation of any metalliferous mine which comes into production after the first day of May, 1936, and prior to the first day of January, 1943, shall be exempt from the corporation tax hereunder for its first three fiscal periods established by the Minister hereunder following the commencement of such production.

(2) The Minister, having regard to the production of ore in reasonable commercial quantities, shall determine which mines, whether new or old, qualify under subsection one hereof.

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(3) The Minister shall issue a certificate stating the date upon which any mine is deemed to have come into production and establish such fiscal periods of twelve months each, during which the income derived from any such mine shall be exempt hereunder.

(4) The Minister may make any regulations deemed necessary for carrying this section into effect.

It is admitted that the appellant's income in each of the years under review was derived from the operation of a metalliferous mine, namely, its gold mine, that such mine came into production during the specified period, that the Minister issued the necessary certificate and that the appellant's income was exempt from the corporation tax under the Income War Tax Act. The fact that the appellant had no income in any of the said years that was liable to income tax is not disputed. Indeed, that fact appears on the very face of the notices of assessment issued by the Minister. I now come to the relevant sections of The Excess Profits Tax Act, 1940. Section 3, the charging section of the Act, read as follows:

3. In addition to any other tax or duty payable under any other Act, there shall be assessed, levied and paid upon the annual profits or upon the annual excess profits, as the case may be, of every person residing or ordinarily resident in Canada, or who is carrying on business in Canada, a tax as provided for in the First Part of the Second Schedule to this Act, or a tax as provided for in the Second Part of the said Schedule, whichever tax is the greater.

The amendment of this section in 1942 does not affect the question under discussion. It is plain that what was brought into charge for tax under the Act was "annual profits" or "annual excess profits" and the term "profits" in the case of a corporation was defined by section 2(*f*) the relevant portion of which read as follows:

2. (1) In this Act and in any regulations made under this Act, unless the context otherwise requires, the expression—

(*f*) "profits" in the case of a corporation or joint stock company for any taxation period means the amount of net taxable income of the said corporation or joint stock company as determined under the provisions of the *Income War Tax Act* in respect of the same taxation period;

On these enactments counsel for the appellant contended simply that since the appellant's income was exempt from corporation tax under section 89 of the Income War Tax Act it had no taxable income as determined under the provisions of the Income War Tax Act and, consequently, no "profits" within the meaning of section 2(*f*) of The Excess Profits Tax Act, 1940, that could be brought into charge for excess profits tax under section 3 of the latter Act.

In my judgment, there is no sound answer to this contention. Counsel for the respondent submitted that sections 40 to 87 inclusive of the Income War Tax Act excepting section 76A thereof were, *mutatis mutandis,* made applicable to matters arising under The Excess Profits Tax Act, 1940, by section 14 of the latter Act but that section 89 of the Income War Tax Act was not, and argued that although the appellant's income was exempt from corporation tax under section 89 of the Income War Tax Act there was nothing in that section to warrant any exemption from excess profits tax. That is not the point. It is not a question whether an exemption from excess profits tax can be read into section 89. What is to be determined is the meaning of the words "net taxable income" as used in section 2(*f*) of The Excess Profits Tax Act, 1940. Counsel for the respondent urged that the fact that Section 89 of the Income War Tax Act exempted the appellant's income from corporation tax did not mean that it did not have any "net taxable income", that notwithstanding the exemption it did have a "net taxable income" that was available for any tax other than the corporation tax and, that being the only tax from which it was exempt, it followed that it was not exempt from excess profits tax. I cannot agree with this contention. There would be substance in it if the "net income" of the appellant was made the measure of the profits to be brought into charge for excess profits tax but that is not the case. The measure is the "net taxable

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income" as determined under the Income War Tax Act. I do not see how it could be said that the appellant had any taxable income as determined under the Income War Tax Act when all its income was exempt from tax under it. How could it have any taxable income under the Act if it had no income that was liable to tax under it? The question answers itself. Support for the view that the term "taxable income" means income that is liable to income tax can be found in a statement of Lord Macnaghten, delivering the judgment of the Judicial Committee of the Privy Council in *N.S.W. Taxation Commissioners* v. *Adams* (1) that the words "taxable income", as they were used in the Income Tax Act that was being construed, meant "income liable to income tax". And in *Black* v. *The Minister of National Revenue* (2) Maclean J. held that income that was exempt from taxation under the Income War Tax Act was not taxable income. The same is true here. Since the appellant's income in the years under review was exempt from corporation tax under Section 89 of the Income War Tax Act and there was no other income tax under the Act to which it was liable it had no net taxable income as determined under the said Act. Consequently, it had no profits within the meaning of section 2(*f*) of The Excess Profits Tax Act, 1940, and there could not be any annual profits or excess annual profits that could be brought into charge for excess profits tax under section 3 of that Act. I find, therefore, that the appellant was not subject to any excess profits tax for any of the years 1940, 1941 or 1942 and that the assessments from which it appeals are invalid.

In view of this decision it is not necessary to consider the questions relating to depreciation raised by the appellant in its alternative ground of appeal and I express no opinion on them.

(1) (1912) A.C. 384 at 391.

(2) (1932) Ex. C.R. 8 at 13.

There is one other matter to be mentioned. In its statement of claim the appellant alleged that in accordance with section 48 subsection 1 of the Income War Tax Act the Minister required payment of the amount of tax liability which was disputed by it, namely, the sum of $14,975, that arrangements were made by it with the Minister to retire this amount in instalment payments and that the whole amount was fully paid by March 31, 1951, and it claimed that the said sum of $14,975 should be repaid to it with interest. The appellant's allegations were admitted by the Minister in his statement of defence. While it seems proper that this sum should be repaid to the appellant, since the assessments have been held invalid, it is questionable whether an order for such repayment can be made in these proceedings. The jurisdiction of this Court in appeals from assessments is set out in section 66 of the Income War Tax Act as follows:

> 66. Subject to the provisions of this Act, the Exchequer Court shall have exclusive jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act and in delivering judgment may make any order as to payment of any tax, interest or penalty or as to costs as to the said Court may seem right and proper.

While this section empowers the Court to make an order as to payment of any tax I doubt whether it authorizes an order for repayment of a tax. That there was ground for such doubt and need for removal of it appears from section 92 of The Income Tax Act, Statutes of Canada, 1948, chap. 52, which provided as follows:

> 92. The court may, in delivering judgment disposing of an appeal, order payment or repayment of tax, interest, penalties or costs by the taxpayer or the Minister.

Under this section there would, I think, be power to order the repayment by the Minister of a tax paid by a taxpayer but it does not apply in the present case which must be determined within the limits of the jurisdiction fixed by

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section 66 of the Income War Tax Act. Under the circumstances, even although I think that the sum ought to be repaid, I do not see how the Court can make any order in these proceedings for its repayment.

There will, therefore, simply be judgment that the appeals from the assessments for the years 1940, 1941 and 1942 are allowed with costs.

Judgment accordingly.

BETWEEN:

HER MAJESTY THE QUEEN, on the information of the Attorney General of Canada ..... PLAINTIFF;

AND

THE COMMUNITY OF THE SISTERS OF CHARITY OF PROVIDENCE, ... DEFENDANT.

1951
Jan. 8-12, 15-18
1952
Apr. 3

Expropriation—Expropriation Act, R.S.C. 1927, c. 64, ss. 9, 23—Hospital operated as charitable institution not an object of commercial dealing —Principle of re-instatement applicable to property of exceptional character—Depreciation inevitable notwithstanding maintenance— Depreciation to be ascertained from tables and actual condition of property—Ten per cent allowance for compulsory taking only in exceptional cases—Additional allowance applicable to whole amount of value to owner.

The plaintiff expropriated property in the City of Hull on which there was a hospital operated by a religious community of nuns on a non-profit basis as a charitable institution. The action was taken to have the amount of compensation payable to the owner determined by the Court.

Held: That the nature of the expropriated property takes it out of the class of properties whose value to their owners is measured by the ordinary economic and commercial tests of value. It is not of the kind that lends itself to commercial dealing but is of an exceptional character and its value to the owner must be measured by a standard that is appropriate to it.

2. That this is a case in which the principle of re-instatement should be applied and the defendant should receive such a sum of money as will enable it to replace the expropriated property by property which will be of equal value to it.

3. That it is fallacious to assume that an asset can be so well maintained that it will remain in as good as new condition indefinitely. Depreciation begins from the moment of its first use and continues notwithstanding maintenance. *City of Knoxville* v. *Knoxville Water Co.* (1909) 212 U.S. 1. followed.

4. That although well recognized depreciation tables are of great assistance in ascertaining the amount of depreciation of an asset they ought not to be used by themselves. It is always necessary to make a careful examination of the asset and consider its structural and functional condition so that consideration may be given not only to the elapsed time of its expectancy of life according to the tables but also to the remaining life that may be expected in the light of its actual condition.

5. That it is only in cases where it is difficult by reason of certain uncertainties to estimate the amount of the compensation that there is ground for adding the ten per cent allowance for compulsory taking to the owner's indemnity. *The King* v. *Lavoie* December 18, 1950, unreported, followed.

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6. That the estimation of the compensation in the present case involves sufficient difficulty and uncertainty to bring it within the ambit of the rule in the *Lavoie* case.

7. That the amount found as the value of the expropriated property to its owner is an indivisible sum and the additional allowance for compulsory taking should be based on the whole of it rather than on only part of it.

INFORMATION by the Crown to have the amount of compensation money payable to the owner of expropriated property determined by the Court.

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

F. B. Major Q.C. and *J. Bertrand* for plaintiff.

P. Ste Marie Q.C. and *A. Taché Q.C.* for defendant.

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

THE PRESIDENT now (April 3, 1952) delivered the following judgment:

The information exhibited herein shows that the lands of the defendant described in paragraph 2 thereof were taken by His late Majesty the King for the purpose of a public work of Canada under the Expropriation Act, R.S.C. 1927, chap. 64, and that the expropriation was completed by the deposit of a plan and description of the lands in the office of the registrar of deeds for the registration division of Hull in the Province of Quebec, in which the lands are situate, on May 6, 1946. Thereupon, under section 9 of the Act, the said lands became vested in His Majesty and all the right, title and interest of the defendant thereto or therein ceased to exist and, under section 23, became converted into a claim to the compensation money which was made to stand in the stead of the property.

The parties have not been able to agree upon the amount of compensation money to which the defendant is entitled and these proceedings are brought for an adjudication thereon. By the information the plaintiff offered the sum of $735,676 but the defendant by its statement of defence

claimed $998,000. At the opening of the trial counsel for the defendant applied for and obtained leave to amend its statement of defence by claiming $1,450,614.

The expropriated property is well situated. It is on the east side of Laurier Street in the City of Hull and extends eastward to the Ottawa river. On the north it is bounded by Jacques Cartier Park and on the south by the convent owned by La Congrégation des Servantes de Jésus-Marie. There are two lots in the property the northerly one being Lot No. 219C with a frontage of 209 feet on Laurier Street and an area of 2·3 acres and the southerly one Lot No. 219D with a frontage of 251·5 feet and an area of 2·5 acres.

The defendant, a religious community of nuns devoted to charity, operates a general hospital, commonly called the Sacred Heart Hospital, on Lot No. 219D. It acquired this lot on August 7, 1911, as a gift from the City of Hull subject to certain conditions, one of which was that it should convert the house that was on the property into a hospital and enlarge it to meet the needs of the public. The present hospital is the result of additions and replacements. It may be considered in three sections. The most southerly one consists of the original house called the Champagne house which was built in 1901 or 1902 as a private residence and is now used as a residence for the nurses and the nuns. It is of ordinary brick construction. The main building, which is the hospital proper, was built at different times. The original building was erected in 1912. The north wing was built in 1924 with re-inforced concrete beams and slabs. The centre part, which was re-built in 1928 after a fire in 1926, has a steel frame and is fireproofed with tile and concrete. The south east wing, which was built in 1929, is of similar construction. The main building may properly be described as fire resistive. The third section, called the annex, is the service wing of the hospital. Part of it dates back to 1912 and the rest was built in 1926. It may also be described as of ordinary construction. A plan prepared by Mr. L. Sarra-Bournet sets out the details of the lay-out

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of the hospital on its several floors and the plot plan shows the out-buildings and other out-door improvements on the premises as well as the hospital itself.

After the completion of the hospital in 1929 the defendant acquired Lot 219C on September 23, 1931, from H. Dupuis for $12,000. This lot is still vacant land being used by the defendant for a garden. It is surrounded by a metal fence.

The defendant's hospital has been recognized under the Public Charities Act of Quebec, R.S.Q. 1941, chap. 187, as a public charitable institution and it is admitted that it has always been operated without profit. It is the only general hospital in the City of Hull and serves not only the city but also the surrounding district. It is agreed that it is not large enough to meet the demands of the area it serves and is overcrowded.

After the expropriation the City of Hull, on September 30, 1946, sold to the defendant a property on the Mountain Road in Hull, containing 44·54 acres, for the sum of $1.00, it being understood that the defendant bound itself to build a new hospital and would start before January 1, 1949, and that if it did not do so the sale would be null and void. On November 24, 1948, the City of Hull extended the time for the commencement of the construction to January 1, 1951, and on January 16, 1951, the City granted a further extension to January 1, 1952. The property in question is admirably suited as a site for a hospital.

It was assumed during the case that the defendant will build a new hospital as soon as possible and a considerable portion of the defendant's claim was based on that assumption.

So far as I am aware this is the first time that a hospital voluntarily operated by a religious organization on a non-profit making basis as a charitable institution has been taken under the Expropriation Act. In my opinion, the nature of the expropriated property takes it out of the class of properties whose value to their owners is measured by the ordinary economic and commercial tests of value

laid down by the Judicial Committee of the Privy Council in the three decisions which settle the law on the matter, to which I referred in *The King* v. *Woods Manufacturing Co. Ltd.* (1), namely, *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (2), *Pastoral Finance Association, Limited* v. *The Minister* (3), and *Vyricherla Narayana Gajapateraju* v. *The Revenue Divisional Officer, Vizagapatam* (4). The defendant's property is not of the kind that lends itself to commercial dealing but is of an exceptional character and its value to the owner must be measured by a standard that is appropriate to it. As I see it, this is a case in which the principle of re-instatement should be applied. This means that the defendant should receive such a sum of money as will enable it to replace the expropriated property by property which will be of equal value to it. *Vide*—Cripps on Compensation, 8th edition, page 180; *London School Board* v. *South Eastern Railway Co.* (5); *Metropolitan Railway Company and Metropolitan District Railway Company* v. *Burrow* (6), the text of which judgment appears in the Appendix to Cripps (*supra*) at pages 906-916. The sum to be paid should, therefore, be sufficient to cover the realizable money value of the land, the replacement value of the hospital, being its reconstruction cost less its depreciation, the value of the other outbuildings and out-door improvements, all of these values being computed as of the date of the expropriation, the cost of moving to a new hospital and a sum equal to the increased cost of constructing a new hospital after the date of expropriation, the last item being included in the defendant's entitlement on the assumption that it will build a new hospital. The defendant should, therefore, receive the fair market value of the land, namely, its realizable money value as at the date of the expropriation, regardless of the fact that it may not have to buy a new site, together with such sum as would enable it to build just as valuable a hospital on a new site and move into it.

(1) (1949) Ex. C.R. 9 at 44.
(2) (1914) A.C. 569 at 576.
(3) (1914) A.C. 1083 at 1088.
(4) (1939) A.C. 302 at 312.
(5) (1887) 3 T.L.R. 710.
(6) (1884) The Times, Nov. 22.

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On this basis, counsel for the defendant gave particulars of the amounts of the various items in its claim, amounting in the total to $1,434,649.76 as follows:

INDEMNITÉ PÉCUNIAIRE RÉCLAMÉE PAR LA DÉFENDERESSE COMME COMPENSATION:

Pour la perte de:		
Bâtisses,		$1,177,426.00
Terrain,		72,400.00
Dépendances,		2,260.00
Tennis,		500.00
Clôture métallique,		2,100.00
Chemins—stationnement,		5,000.00
Trottoirs,		700 00
Monument,		600.00
Egout privé		1,000.00
Clôture de bois,		320 00
Arbres, arbustes, gazon, fleurs vivaces, nivellement, etc.		7,500.00
		$1,269,806.00
POUR		
Déménagement:		
Général:	$20,327.00	
Appareils spécialisés:	7,994.00	
Appareils de cuisine et de buanderie:	6,100.00	
	$34,421.00	34,421.00
		$1,304,227.00
POUR:		
Dépossession forcée, 10 pour cent		130,422.70
		$1,434,649.70

The Court took a view of the expropriated property in the presence of counsel for the parties.

I shall deal first with the value of the land. Opinion evidence on this was given by Mr. A. Guertin and Mr. B. Grandguillot for the defendant and Mr. Theo Lanctot and Mr. C. Lalande for the plaintiff. All were agreed that the value to be ascertained was the fair market value of the land as at the date of the expropriation and that the most advantageous use to which it could have been put was for residential purposes and all put forward its possible development for subdivision into lots for private dwellings.

Mr. Guertin proposed a plan of subdivision, Exhibit T, with a 50 foot street running east from Laurier Street immediately north of the convent to a projected 66 foot street parallel with Laurier Street and coming to a dead end at the north end of the property. There were to be 24 lots in this subdivision which he valued at 60 cents to 70 cents a square foot. These lots ran from a low of $3,000 for a 50 foot lot facing on Laurier Street to a high of $6,500 for a lot on the east side of the projected street with a frontage of only 40 feet. Mr. Guertin estimated that these lots could have been sold for a total of $86,000 from which he deducted expenses of $240 for surveys and $8,576 for selling commissions. This left a net valuation of $77,184. This is excessive. Mr. Guertin did not consider the prices paid by the defendant for lot 219C or by the Shell Oil Company or the Supertest Petroleum Company for similar parcels of land with frontages on Laurier Street and extending east to the river, and there were no sales of lots on which he could possibly come even near to a justification of his estimated values. It is doubtful, to say the least, whether such a subdivision with the backs of the houses on the lots on the east side of the projected street facing the river would ever have been permitted. And it is obvious that Mr. Guertin has had no experience in promoting subdivisions, for even if he could have sold the lots at his prices, he could not have made anything like a net $77,184 out of his gross sales of $86,000. Mr. Guertin's valuation would mean more than $16,000 per acre for the property, which is more than three times what the defendant paid for it in 1931. There is no evidence to warrant the assumption of any such increase in value. In my view, it would be unreasonable and unfair to accept Mr. Guertin's valuation and I have no hesitation in rejecting it.

For similar reasons I reject Mr. Grandguillot's valuation of $72,400. It struck me that he was mainly seeking to justify his figures in the municipal valuation which he had made for the City of Hull between 1943 and 1947. He adopted the amounts of 45 cents per square foot for the frontage on Laurier Street and 35 cents for the remainder of the acreage which he had used in his municipal valuation and applied them to a corrected area of 193,376 square feet which gave him a total valuation of $72,400, particulars of which are given by Exhibit U, as against the municipal

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valuation of $70,540. He then sought to test his valuation by an estimate of what the sales of lots in a projected subdivision of the property would have realized. His proposed plan of subdivision, Exhibit X, was similar to Mr. Guertin's except that there were two streets running east from Laurier Street to the projected street parallel with it. This was superior to Mr. Guertin's plan in that there was no dead end street but it left less room for the lots. There were 24 lots on his plan, 7 with a frontage of 48 feet on Laurier Street to be sold at $3,000 each, 7 with a frontage of 48 feet on the west side of the projected street parallel with Laurier Street to be sold at $3,500 each and 10 with a frontage of 46 feet on the east side of this street and extending back to the river to be sold at $4,000 each. The total amount of these sales would come to $84,500 from which Mr. Grandguillot deducted $12,100 for expenses connected with promoting the subdivision such as costs of surveys, selling commissions, interest on capital and taxes during the selling period leaving $72,400 as the market value of the property. No provision was made in the estimate for the cost of roads, sidewalks or water and sewer services. Apart from the fact that it is doubtful that the proposed plan would have been feasible or permitted, Mr. Grandguillot had no support for his figures. He could not point to any sales of comparable property that came anywhere near them. He also disregarded the prices paid by the oil companies, to which reference will be made later, although he admitted that the land owned by them had greater value than the defendant's. It seems plain to me that Mr. Grandguillot's valuation of the land was excessive.

The valuations made by Mr. Lalande and Mr. Lanctot were not much better. Mr. Lalande put forward a plan of subdivision with his report, Exhibit 6, showing two streets running east from Laurier Street to a street along the river bank. The 24 lots on this plan faced either on Laurier Street or on the streets running east from it. Mr. Lalande priced these at 50 cents per square foot for all the lots except the corner ones which he put at 62½ cents per square foot. These prices came to a total of $66,275 from which he deducted $7,000 for charges leaving his valuation at $59,275. Mr. Lalande's plan is open to even more serious objection than the other two plans in that he has put one

of his lots right next to the water's edge and the road along the river could not be built except with a great amount of fill. Otherwise, his plan is subject to the same kind of criticism as the other two. Mr. Lalande did not consider the sales of parcels of land similar to the defendant's but admitted that its land was not as valuable as that of the Shell Oil Company or the Supertest Petroleum Company near the Interprovincial Bridge. He purported to rely on two sales of property on the west side of Laurier, which Mr. Guertin had also mentioned, one of Lot 68 on Laurier Street near Reboul Street to L. Bourguignon on February 16, 1940, at $1,400 which worked out at 22 cents per square foot and the other of Lot 140 on Laurier Street north of the hospital to R. Baillot on October 10, 1942, at $2,200 which worked out at 33·6 cents per square foot. These two sales do not provide any base for Mr. Lalande's estimate. Nor could he find any support in the sales of properties in other parts of the City of Hull, particulars of which were given on pages 2 and 3 of his report. He admitted frankly that these properties were not comparable to the defendant's land. Mr. Lalande's valuation cannot be adopted.

This leaves Mr. Lanctot's opinion. He valued the land fronting on Laurier Street at 50 cents per foot for a depth of 100 feet which came to $23,025 and the balance amounting to 3·46 acres at $9,000 per acre which came to $31,140, making a total valuation of $54,165. An alternative valuation was based on the same amount for the frontage on Laurier Street, for a depth of 100 feet together with ·216 cents per foot for the remainder for a further depth of 300 feet which came to $29,840.40 and 15 cents for a strip along the shore which was submerged at times which came to $1,913.88 making a total of $54,778.95. While I cannot accept Mr. Lanctot's valuation his report, Exhibit 4, does contain reliable information from which a fair estimate can be made. Mr. Lanctot, whose knowledge of real estate values in Hull is very considerable, stated that during the period from 1929-30 to 1940 the real estate market was on the decline but in 1940 there came a rise which up to 1944 he considered as being 15 per cent and then from 1944 to 1946 there was a further increase of 20 per cent. In my view, this estimate in the rise of real estate market

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values is preferable to Mr. Lalande's estimate of an increase of 50 per cent. In valuing the frontage on Laurier Street Mr. Lanctot relied on the sale to Mr. Baillot, already referred to, which worked out at 33·6 cents per square foot in 1942 to which he added a 30 per cent increase up to 1946 which brought it up to 44·75 cents per square foot. On this basis he valued the frontage on Laurier Street at 50 cents. There is less exception to this part of his valuation than to his estimate of $9,000 per acre for the rest of the property. This amount was based on three sales of large parcels of property particulars of which he gave, namely, a sale to the Supertest Petroleum company, registered on April 8, 1929, of 2·5 acres at $13,000 or $5,200 per acre, a sale to the Shell Oil Company, registered on September 3, 1931, of 2·89 acres for $21,000 or $7,266 per acre and a sale to the defendant, registered on September 31, 1931, of 2·4 acres for $12,000 or $5,000 per acre. This works out at an average of somewhat less than $6,000 per acre and Mr. Lanctot applied more than his 35 per cent increase in value to get this up to $9,000 per acre. Mr. Lanctot was quite unjustified in applying the figure of $9,000 per acre, based as it was on the average of the three sales referred to and the increase in market values up to 1946, only to the land 100 feet back from Laurier. He was plainly in error in so doing, for the lands covered by these sales all had extensive frontage on Laurier Street. If he used the figure at all he should have applied it to the whole of the defendant's land.

The evidence of these sales was given before me in the case of *The King* v. *Woods Manufacturing Co. Ltd.* (1) and Mr. Lanctot gave the same estimates of increases in real estate values as he gave in the present case. There was also evidence in that case, which was not before me in this one, that led me to the view that at the time of the sales the fair market value of the land of the defendant in that case was approximately $6,500 per acre. On that assumption and applying Mr. Lanctot's percentage of increase in market values I estimated the value of the 4 acres expropriated on May 19, 1944, at $7,500 per acre and that of the 1·68 acres expropriated on May 7, 1946, at $9,000 per acre. Although my estimate of the value of the expropriated property in that case was increased by the Supreme Court

(1) (1949) Ex. C.R. 21.

of Canada, I think I may fairly say that my estimate of the value of the land was accepted. Although on the evidence before me, taking $6,000 per acre as the average price of the three sales referred to and increasing this by 35 per cent, according to Mr. Lanctot's estimate, I could not reach an average of $9,000 per acre, there are such factors as proximity to the Park and a fine view of the Ottawa River and the cliff on the Ottawa side that would fairly warrant an estimate of $9,000 per acre for the defendant's land. The total area comes to 4·8 acres, almost 5 acres, so that a valuation of the defendant's land at $45,000 in round figures would be ample. I do not see how the evidence before me could possibly justify a higher estimate.

Opinion evidence of the value of the hospital was given by Mr. R. Brunet and Mr. A. Deschamps for the defendant and Mr. E. J. Bartley, Mr. J. Adam and Professor J. A. Coote for the plaintiff. They each made an estimate of reconstruction cost as of the date of the expropriation, then reduced this by the amount of depreciation which they considered appropriate and arrived at an amount which some of them described as depreciated value but which I shall refer to as replacement value. Mr. Brunet, a construction contractor and a former mayor of the City of Hull, said that he obtained the cubic contents of the building from Mr. Bournet and applied what he considered the proper unit price per cubic foot. On this basis he estimated the reconstruction cost of the Champagne house at $97,853.40, the main building at $755,715.28 and the annex at $106,676.64, making a total of $960,245.32. These amounts were reduced by his depreciation allowances, 25 per cent or $24,463.35 for the Champagne house, 15 per cent or $113,357.29 for the main building and 17 per cent or $18,135.03 for the annex, making a total of $155,955.67. This left $804,289.65 as the replacement value.

Mr. Deschamps, an outstanding construction engineer from Montreal with experience in hospital construction, followed the same method. He obtained the cubic contents from Mr. Bournet's plan and applied unit prices thereto which he considered proper, based on hospitals which he said were of similar construction. He estimated the reconstruction cost of the Champagne house at $90,605, the main

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building at $694,591 and the annex at $93,576, making a total of $878,772, to which he added architect and engineer fees at 6 per cent, amounting to $52,706, making a total of $931,498. Mr. Deschamps and Mr. Brunet were in agreement as to their percentages of depreciation, having discussed the matter together. Mr. Deschamps' total allowance for depreciation, based on these percentages and applied only to the total of $878,772.00, came to $142,448. This left a replacement value of $789,050.00.

The witnesses for the plaintiff worked somewhat differently, Mr. Bartley and Mr. Adam dividing the work of estimating the reconstruction cost between them and both working under the supervision of Professor Coote who assumed responsibility for the depreciation estimates and the final valuation. The details of this composite valuation are set out in Professor Coote's report, Exhibit 2. Mr. Bartley surveyed the electrical and mechanical services in the hospital and estimated their reconstruction cost. He explained in detail how he proceeded to ascertain the quantities in the electrical system and that he had obtained the necessary prices from Mofax Electrical Limited one of the largest electrical firms in Montreal. His estimate for the electrical services came to $20,057. He followed a similar procedure with the mechanical services, particulars of which are set out on page 9 of Exhibit 2, and obtained the required prices from John Colford, a large heating and plumbing contractor in Montreal, except in the case of the boilers and the refrigeration where the information was obtained from actual suppliers. His estimate for the mechanical services came to $93,521. With an allowance of $7,000 for architect's fee his estimate of the reconstruction cost of the electrical and mechanical services came to $120,578.

Mr. Adam, an Ottawa architect of great experience, obtained plans of the building from Mr. Sarra-Bournet and other information from various sources. He also made a thorough examination of the building, ascertained the details of construction by inspection and took off the quantities of material in its several parts. To these he applied the current prices for material and labour obtained either from the actual suppliers or from contractors experienced in the various sub-trades. He estimated the reconstruction cost of the Champagne house at $74,699,

the main building at $556,309, the annex at $73,766 and the elevator and dumb waiter at $19,950, making a total of $724,724, which amount included an allowance for architect's fees and contractor's profit, to which he added $50,730 for what he called general conditions, making a total of $775,454. The total of this amount and that of $120,578 for the electrical and mechanical services, coming to $896,032, represents the estimated reconstruction cost of the hospital.

Professor Coote, a consulting engineer with Robert A. Rankin and Company of Montreal and formerly Assistant Professor of the Department of Mechanical Engineering of McGill University for 30 years until his retirement in 1948, was in charge of the valuations made for the plaintiff. He visited the hospital on numerous occasions and supervised and checked the work of estimating. Then in the light of his study and experience he determined the life expectancy of each of the items set out on page 7 of his report, Exhibit 2, and estimated the amount of depreciation of each. He estimated the useful life of the main building at 60 years and, because of its type of construction, applied a 4 per cent sinking fund curved line depreciation and reached his opinion of a 10 per cent depreciation for its 17 years of use. On the assumption that the Champagne house and the annex would be used as long as the main building he put their respective life expectancies at 87 and 63 years. Because both these buildings were of ordinary construction he applied a straight line depreciation to them and estimated a 51 per cent depreciation for the former and a 32 per cent one for the latter. He put the life of the elevator and dumb waiter at 40 years and its depreciation at 43 per cent. The depreciation for the electrical services was put at 43 per cent and for the mechanical services at the various rates shown on page 7 of Exhibit 2. Altogether Professor Coote's depreciation allowances came to $188,850, which left a replacement value for the hospital of $707,182.

This sum of $707,182 covers the same items as the estimates of $804,289.65 by Mr. Brunet and $789,050 by Mr. Deschamps. The difference is mainly due to the larger allowance for depreciation made by Professor Coote. The difference in the estimates of reconstruction cost namely, $960,245.32 by Mr. Brunet, $931,498 by Mr. Deschamps and

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$896,032 by Mr. Bartley and Mr. Adam was not greater than might be expected. I am satisfied that Mr. Bartley and Mr. Adam were very thorough in their inspection and careful in their quantity surveys and, other factors being equal, I would attach greater weight to an estimate of reconstruction cost based on actual quantities and current prices for materials and labour than to one based on cubic contents and an assumed unit price per cubic foot. Against this in the present case there is the fact that Mr. Bartley and Mr. Adam did not have actual working plans and detailed specifications to help them in taking off the quantities. Moreover, I was impressed with Mr. Deschamps' statement that in this case he did not have to take off quantities since he had buildings of a comparable type and known actual costs to go on. This makes Mr. Deschamps' estimate preferable to Mr. Brunet's. While Mr. Deschamps' estimate is subject to some discount by reason of the fact that his cubic contents figure is 500 cubic feet higher than Mr. Sarra-Bournet's and that the hospitals he referred to as being of a comparable type to the building in question were more modern in construction, I have come to the conclusion that his estimate of reconstruction cost, namely, $913,498, is the one that ought to be accepted.

The amount to be allowed for depreciation is not as easy to determine. It is always difficult in the case of a building such as this to estimate its depreciation at any given time. Depreciation means diminution in value and the diminution may be due either to physical deterioration, commonly called depreciation by wear and tear, or simply depreciation, or to functional deterioration or reduced usability by reason of factors other than wear and tear, commonly referred to as obsolescence, or to both. Frequently obsolescence is more important than depreciation by wear and tear but both must be considered together in a proper appraisal of value. In estimating the amount of depreciation of an asset it is important to avoid errors that are surprisingly common. One of these is the assumption that the life of an asset can be prolonged indefinitely through maintenance. This widespread view found favour even with a court of such high standing as the Supreme Court of the United States as late as 1903 in *San Diego Land and Town Co.* v. *Jasper* (1).

(1) (1903) 189 U.S. 439.

Indeed, it was not until 1909 that the inevitability of depreciation was properly understood. In that year the Supreme Court of the United States in the leading case of *City of Knoxville* v. *Knoxville Water Co.* (1) laid down certain principles that have never since been judicially disputed. It is now settled that it is fallacious to assume that an asset can be so well maintained that it will remain in as good as new condition indefinitely. Depreciation begins from the moment of its first use and continues notwithstanding maintenance. The inevitability of depreciation was frankly recognized by Mr. Deschamps, as was to be expected from a person of his eminence. But, on the other hand, it does not follow that the amount of depreciation can be ascertained merely from depreciation tables. While well recognized tables are of great assistance since they are based on recorded experience they ought not to be used by themselves. It is always necessary to make a careful examination of the asset and consider its structural and functional condition so that consideration may be given not only to the elapsed time of its expectancy of life according to the tables but also to the remaining life that may be expected in the light of its actual condition. On the evidence, I have no hesitation in preferring the depreciation estimates of Professor Coote and his associates to those of Mr. Brunet and Mr. Deschamps or of Mr. Guise. In the first place it seemed to me that Professor Coote, by reason of his long study of the theory and principles underlying this difficult subject as well as his actual experience as a consultant had a greater knowledge and better understanding of it than the others. Secondly, and this is a more important reason, his opinion, supported as it was by Mr. Bartley and Mr. Adam, was based on a more careful examination of the facts. I found it more realistic and more convincing. There was not much difference regarding the main building. Mr. Brunet and Mr. Deschamps both put its depreciation at 15 per cent, Mr. Brunet saying this was mostly due to obsolescence and Mr. Deschamps setting it at 9 per cent for obsolescence and 6 per cent for depreciation by wear and tear. Neither could assign any specific reason for the 15 per cent except that Mr. Brunet said that it worked out approximately at 1 per cent per

(1) (1909) 212 U.S. 1.

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year. I may say, in passing, that I do not agree with Mr. Brunet's statement that there was no appreciable depreciation to be seen. Professor Coote found only a 10 per cent depreciation for this part of the hospital due both to wear and tear and to obsolescence and inadequacy. Mr. Adam thought that there was a 17 per cent depreciation mainly because of obsolescence. It was not functioning properly in the light of provincial requirements, not enough cubic space per bed for the number of beds and not enough light. There was a greater discrepancy of opinion in the case of the other buildings. Mr. Brunet and Mr. Deschamps put the depreciation of the Champagne house at only 25 per cent although it was 44 or 45 years old and not up to modern standards. This was admittedly low. The estimates of 51 per cent by Professor Coote and 50 to 55 per cent by Mr. Adam struck me as much nearer reality. In my view, Professor Coote's estimate was reasonable. Nor can the estimate of 17 per cent for the annex be supported. This was only 2 per cent higher than that for the main building notwithstanding that it was only of ordinary construction and part of it was 34 years old. While it is true that the upper floors have had less use than the main building, as Mr. Deschamps pointed out, that is not true of the rest of the annex, particularly of the kitchen. Mr. Adam found signs of wear and tear in the annex. The galleries on the east side were very much depreciated. Moreover, the annex was of a type of construction which in relation to the main building would not have been permitted in 1946. Professor Coote also pointed out that as a service wing it was not up to date. The corridors and stairs were narrow, the kitchen was old and there were several signs of overcrowding. The wing would not have been adequate for any extension of the hospital. Indeed, it was obsolete for a modern hospital. Professor Coote's estimate of a 32 per cent depreciation was a fair one. Neither Mr. Brunet nor Mr. Deschamps made any check of the electrical and mechanical services. There, in effect, I find that the evidence of the plaintiff's witnesses was not seriously challenged notwithstanding the opinion of Mr. Guise, which I am unable to accept. Mr. Bartley said that the electrical services were pretty close to a minimum standard for that type of building and were only in fairly good order, there being evidence of deterioration through lack of maintenance

in the distribution panel and wiring. In his opinion, the heating services were adequate at the time of their installation. The piping and radiators were in good condition but the boiler room was only in fair to poor condition, there being evidence of lack of running maintenance, one of the boilers requiring a complete rebuilding. The steam and condensate system was in good condition. The plumbing services were reasonably good, the system being in good order having regard to its age. Mr. Adam thought that the mechanical services were obsolescent and Professor Coote considered that the electrical and mechanical services were not up to the mark of a modern hospital. I agree. I am satisfied that Professor Coote sought to be fair in his estimate of depreciation and I accept his total allowance of $188,850 for depreciation as reasonable. The deduction of this figure from Mr. Deschamps' estimate of $931,498 for the reconstruction cost of the hospital leaves $742,648 as its replacement value as at the date of expropriation. To use round figures, I put this value at $750,000.

There was very little difference of opinion over the value of the out-buildings and other out-door improvements. Most of the witnesses confined themselves to estimates of the values of these items after due allowances for depreciation and their evidence may be summarized briefly. The out-buildings at the back (dependances) were valued at $2,260 by Mr. Brunet, $1,450 by Mr. Grandguillot and $2,113 by Mr. Adam. Both Mr. Brunet and Mr. Grandguillot valued the tennis court at $500. The metal fence surrounding Lot 219C was valued by Mr. Brunet at $2,320 and by Mr. Grandguillot at $2,100. Mr. Grandguillot valued the driveways at $5,000, the walks at $700, the monument at $600 and the wooden fence at $320. His first estimate of the value of the private drainage at the back (égoût privé) was $4,500 but he later corrected this to $1,000. Mr. Adam did not value several of these items separately, but included the fences, driveway, tennis court, etc., and drainage together with their reconstruction cost and then he and Professor Coote put their depreciated value at $10,000. This total, which did not include anything for the monument, is almost identical with the total for the corresponding items put forward by Mr. Grandguillot. Finally, Mr. Grandguillot valued the trees, lawns, shrubs,

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flower beds, etc., at $7,500, which is too high, whereas Mr. Lalande and Mr. Lanctot put this item at $3,621, which is too low. Mr. Grandguillot's original figures for all these items came to $22,570 but he corrected this by eliminating his first item of $900 and reducing his figure for the private drainage by $3,500, leaving a corrected estimate of $18,170. In my view, it would be fair to fix the value of these items in round figures at $17,500.

I next come to the cost of moving to a new hospital. Mr. J. R. Fournier, an experienced mover, estimated the cost of moving from the present site to the proposed site on the Mountain Road at $20,327.50, the details of which are given in Exhibit V. Against this there was Mr. L. Grondin's estimate of $17,058. I see no reason why I should not accept Mr. Fournier's estimate. To this amount must be added the cost of dismantling, transporting and re-installing certain special hospital equipment, such as tables, X-ray apparatus, sterilizers, operating room lights, centrifuge and hydrotherapeutic apparatus. Mr. L. Lamalice valued this equipment at its 1946 value and took 30 per cent of it as the cost of the moving (déménagement), which came to $11,992.10. But since the cost of actual transport was included in Mr. Fournier's estimate, Mr. Lamalice's estimate must be reduced by one-third which left his figure at $7,994, to cover dismantling, re-installing and risk of breakage. There was also the cost of dismantling and re-assembling the kitchen and laundry equipment, which was not included in Mr. Fournier's estimate. Mr. Grandguillot estimated the depreciation value of this equipment at $24,500, particulars of which appear in Exhibit Z1, and then expressed the opinion that the cost of dismantling and re-assembling with an allowance for breakage would come to $6,100. While Mr. Grandguillot was not an expert in this field and his estimate is open to some doubt on this account, there was no contrary estimate. The three items mentioned come to a total of $34,421.

There remains the claim for the amount required to meet the increased costs of construction after the date of the expropriation. Mr. Sarra-Bournet said that it would take a year for the preparation of plans for a hospital like the present one and Mr. Deschamps agreed. I accept this statement. Mr. Brunet said that it would take 24 to 30

months to build a new hospital. Mr. Deschamps put the required time at 2 years. During all this time the costs of construction were steadily rising, and the defendant is entitled to an allowance for such rise on the application of the principle of re-instatement. The defendant confined its claim for this item to the difference between the cost of construction in May, 1946, and the cost of construction in December, 1948. This, in my opinion, was a reasonable view of the time it would take to draw the necessary plans and specifications and construct a new hospital. The evidence of Mr. Deschamps and Mr. Adam establishes that in Quebec the construction cost index rose from 151·5 in May, 1946, to 191·5 in December, 1948, an increase of 40 points and a percentage increase of 26·4 per cent. If this percentage is applied to the reconstruction cost of $931,498 which I have found, as I think it should be, the result amounts to $245,915.47. If the same percentage is applied to the sum of $17,500, being the value of the out-buildings and other out-door improvements, as I think would be fair, there is a further item of $4,620. These two items make a total of $250,535.47.

The total of these items, $45,000 for the land, $750,000 for the hospital building, $17,500 for the out-buildings and other out-door improvements, $34,421 for the cost of moving and $250,535.47 for the additional cost of construction comes to $1,097,456.47, which I put in round figures at $1,100,000. On the application of the principle of re-instatement I estimate the value of the expropriated property to the defendant at this amount. In my judgment, this is amply sufficient to cover all the factors of value to the owner that ought to be taken into account and, but for recent decisions of the Supreme Court of Canada dealing with an allowance for compulsory taking, it would be the amount of compensation money to which I would find the defendant entitled.

This leads me to consideration of the defendant's claim for a 10 per cent allowance for compulsory taking and the jurisprudence on it. There is no Act of Parliament either in England or in Canada authorizing such an allowance and there is no rule of law requiring it. Its grant is entirely a matter of practice adopted in Canada from a practice in England that has been abolished there in the great majority

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of cases for over 30 years. While the English practice was general and uniform the same cannot be said of the Canadian one. The decisions of this Court on when there should be such an allowance have been conflicting and there has been lack of consistency in those of the Supreme Court of Canada. It would, I think, be an understatement to say that the state of the Canadian law on the subject is unsatisfactory. In view of the importance of the matter and the need for reform it is, I think, desirable to outline the English practice with its present limited extent and then review the decisions on its Canadian derivative.

It is not clear when the English practice first arose except that it was prior to The Lands Clauses Consolidation Act, 1845. In that year a Select Committee of the House of Lords considered the principles adopted by surveyors in assessing compensation for the compulsory taking of lands under various Acts authorizing their acquisition for undertakings of a public nature and reported in part as follows:

> Upon the question of severance and damage, the committee are of the opinion that it is impossible to establish any fixed rate upon which the damage arising from severance, and other injuries to property, can be assessed and compensated.
>
> With respect to the land, etc. actually taken, the witnesses who were examined state, that, to the marketable value of the property taken, they add, in their valuations, a percentage, on the ground of the sale being compulsory. The amount of this percentage varies with the views of the different witnesses, whose evidence will be found in the Appendix; but the committee are of opinion that a very high percentage, amounting to not less than 50*l* per cent upon the original value ought to be given in compensation for the compulsion only to which the seller is bound to submit, the severance and the damage being distinct considerations. In some of the evidence it appears to the committee that a very unfair view is taken of the injury done to proprietors, and of the compensation due to them.
>
> The committee are of opinion that many cases occur in which it is necessary to consider the land, etc., not merely as a source of income, but as the subject of expensive embellishment, and subservient to the enjoyment and recreation of the proprietor.
>
> Public advantage may require all these private considerations to be sacrificed; but as it is the only ground on which a man can be justly deprived of his property and enjoyments, so, in the case of railways, though the public may be considered ultimately the gainers, the immediate motive to their construction is the interest of the speculators, who have no right to complain of being obliged to purchase, at a somewhat high rate, the means of carrying on their speculation.
>
> It is to be observed, that the price of the land purchased, and the compensation for that which is injured, form together but a small proportion of the sum required for the construction of a railway, so that no

apprehension need be entertained of discouraging their formation, by calling upon the speculators to pay largely for the rights which they acquire over the property of others.

This extract from the Committee's report is set out in Hodges on Railways, 6th Edition (1876), at page 202. Greater detail of the report, Sessional Paper, 1845, No. 184, will be found in Shefford's Law of Railways, 4th Edition (1865), Vol. II, at page 228. It is manifest from the report that the Committee did not attempt to justify the allowance on any ground other than that of being compensation "for the compulsion only" and made no pretence that any principle of valuation was being established. It is plain that they thought that speculators who were promoting undertakings of a public nature should pay the owners of the lands required for them more than they were actually worth. It seems to have been considered that the taking savoured of tort. In any event, the compensation was set at the value of the lands plus the additional allowance because they were taken against the owner's will. There was no other reason for the allowance.

The next text-book reference is in Lloyd on Compensation, 6th Edition (1895), at page 71, where the author, after referring to the above Committee's recommendation that not less than 50 per cent upon the original value ought to be given as compensation for the compulsion, said:

> Recent experience has shown that such estimate is an exaggerated one; and 10 per cent is considered a sufficient compensation for the compulsory sale in addition to the assessed value in the case of house property; but in respect of agricultural lands as much as 25 per cent is sometimes given.

Here again the allowance was considered as additional to the value of the land.

Then there is the following statement in Hudson's Law of Compensation (1905), Vol. I, at page CLVII:

> As a matter of custom, an addition of a certain percentage should be made to the value of the property taken (but *not* to any sum claimed for injurious affection), where the promoters are purchasing under compulsory powers. This percentage varies from 10 per cent upwards, according to the nature of the property taken. Where the land has reached its true value and been applied to its most profitable user (such as building), 10 per cent is generally accepted as being proper and sufficient, but where, for instance, land is clearly applied to some purpose giving it a present value below that which will arise in the future when it is put to some more profitable use although no actual calculation of this enhanced value is possible at the moment, it is customary to add more than ten per cent as a solatium to the owner for the loss of the additional, but distant, value which attaches to the land of which he is being deprived.

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This statement is further confirmation of the fact that the allowance was additional to the value of the land. It is also interesting to note that the addition was a matter of custom. There was no attempt to lay down any principles for determining when it should be given. It was always given.

I now come to statements in the English text-books of a later date. In Cripps on Compensation, 8th Edition (1938), the author says, at page 213:

> The fact that lands have been taken under compulsory process does not alter the principle of valuation, and the customary addition of 10 per cent can only be justified as a part of the valuation and not as an addition thereto. In practice the 10 per cent is applied to the value of the lands only, and not to incidental damage, this percentage may be taken to cover various incidental costs and charges to which an owner is subject whose land has been taken, and if no percentage were added such incidental costs and charges would have to be considered in assessing the amount of compensation.

And there is a similar statement in Arnold on Damages and Compensation, 2nd Edition (1919), at page 248. These two statements differ from the previous ones. It seems to me that in the statement that the customary addition of 10 per cent can only be justified as a part of the valuation and not as an addition thereto there was a recognition that a valuation of lands based on their value plus a fixed percentage of their value simply because they were taken against the owner's will was contrary to principle and an attempt was made to rationalize the allowance as a principle of valuation and make it cover various incidental costs and charges.

There is a dearth of English judicial decisions on the subject. This is, no doubt, largely due to the fact that the amount of compensation to be awarded in cases under The Lands Clauses Consolidation Act, 1845, was not a matter for the judges but was to be assessed by justices of the peace, arbitrators or surveyors under section 63 or by arbitrators or juries under section 68. In *Lock* v. *Furze* (1) there was a recognition of the practice of making the allowance, although it was held not to be applicable to the facts of that case, and in *In Re Wilkes Estate* (2) Hall V.C. referred to it as "the additional 10 per cent for compulsory purchase" and dealt with it in the same way as the rest of the purchase-money. Later, there was an attempt in

(1) (1865) 19 C.B.N.S. 94.

(2) (1880) 16 Ch. D. 597.

Jervis v. *The Newcastle and Gateshead Water Company* (1) to obtain a judicial decision on the legality of the additional allowance but it failed because it was held that the transaction under review was not a compulsory purchase and it was, therefore, unnecessary to consider the legality of the additional allowance. I have not been able to find any other English decision bearing on the matter, but there is an Irish decision in which there are some *obiter dicta* on it. In *In re Athlone Rifle Range* (2) the Master of the Rolls held that an addition of 20 per cent to the purchase price of rents reserved under a lease was made without authority and then, at page 437, said:

> As regards compensation for land (as distinct from rent) taken compulsorily, arbitrators in the same way as juries do frequently add something for the annoyance of being disturbed in the possession, and the difficulty and delay in procuring other suitable premises, and they are not legally bound to treat the case as exactly the same as an ordinary case of vendor and purchaser where both parties are willing to contract; but I cannot say that even in respect of actual occupation of lands in point of law an allowance of 20 per cent additional is a reasonable allowance. I am sure it is unreasonable in respect of a rent charge.

Vide also *Lord Mayor of Dublin* v. *Dowling et al* (3) where the allowance was recognized.

The practice which gave the owners of lands that were compulsorily taken at first 150 per cent and later 110 per cent of what they were worth merely because they were taken against the owner's will is now in effect in England in only comparatively few cases. From time to time Parliament recognized that there was no justification for the allowance and prohibited it by statutory enactment as, for example, by section 21 of the Housing of the Working Classes Act, 1890, and by section 9 (10) of the Local Government Act, 1894. The greatest limitation of the practice came in 1919 when the allowance was abolished in all cases where land was acquired by any government department or any local or public authority. This was done by rule 1 of section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, which read as follows:

> 2. In assessing compensation, an official arbitrator shall act in accordance with the following rules:
>
> (1) No allowance shall be made on account of the acquisition being compulsory;

(1) (1896-97) 13 T.L.R. 14 and 312.

(2) (1902) 1 Ir. 433.

(3) (1880) L.R. Ir. 6 Q.B. 502.

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I think it may fairly be said that Parliament took this step because it recognized that the practice of automatically giving the owner of lands required for public purposes 10 per cent more than their realizable money value inevitably led to excessive awards and could not be justified. Thus the English practice came to an end and in all the cases to which the Act of 1919 applied and since most cases of compulsory taking are under this Act it may be said that the practice has largely ceased in England. It continues, however, as Cripps points out, at page 265, in cases that still come under the Lands Clauses Consolidation Act, 1845, and in such cases the 10 per cent allowance is always added to the value of the land taken compulsorily.

But although the additional allowance has been abolished in England in all cases of expropriation by the government or any local or public authority the practice of granting it still persists in Canada in certain cases under the Expropriation Act notwithstanding that all expropriations under it are made by the Crown in right of Canada. During recent years this Court substantially discontinued granting any additional allowance for compulsory taking, but this trend has been partly reversed by the recent decisions of the Supreme Court of Canada in *Irving Oil Company Limited* v. *The King* (1), *Diggon-Hibben Ltd.* v. *The King* (2) and *The King* v. *Lavoie* (3).

The importance of the subject merits a review of the Canadian jurisprudence on it. I have already pointed out that there is no statutory support for the practice, the only reason for it being the English practice to which I have referred. It is also a fact that it has not been as generally applied as it was in England. There are many cases both in this Court and in the Supreme Court of Canada in which an additional allowance of ten per cent for compulsory taking has been granted without any comment at all or with merely a reference to it as the "usual" allowance for compulsory taking as, for example, in *The King* v. *Torrens et al* (4). These present no difficulty, apart from the question of the propriety of the allowance, for they are strictly in accord with the English practice. But at an early date attempts were made in this Court—and later in

(1) (1946) S.C.R. 551.
(2) (1949) S.C.R. 712.
(3) Dec. 18, 1950, unreported.
(4) (1917) 17 Ex. C.R. 19 at 31.

the Supreme Court of Canada—to justify the additional allowance on some ground of principle other than merely that of compensation for compulsory taking and to determine when it should and when it should not be granted. There was nothing in the English practice to support any such distinction. In England, as we have seen, the additional allowance was always granted—until it was abolished except in the few cases referred to. It seems to me that in these attempts there was an implicit recognition that the general practice of giving every owner of expropriated property ten per cent more than its value merely because it had been expropriated could not be justified in principle. But when the attempts were made differences of opinion and confusion arose. The extent of the differences can best be illustrated by contrasting almost the first decision on the subject with almost the last. In *Symonds* v. *The King* (1) Burbidge J. held that the additional allowance for compulsory taking should be added only "in cases where the actual value of lands can be closely and accurately determined", but that where that cannot be done, and the price allowed is liberal and generous there is no occasion to add anything for the compulsory taking. On the other hand, in *Diggon-Hibben Ltd.* v. *The King* (2) Rand J. held that the practice of making the allowance applied in certain circumstances presenting difficulty or uncertainty in appraising values. There could not be a greater difference of view.

In between these opposites the decisions both of this Court and of the Supreme Court of Canada show a great variety of reasons for granting or withholding the allowance, some of which are irreconcilable with one another. I shall deal first with the cases prior to *The King* v. *Hunting et al* (3). In several cases the "usual" ten per cent for compulsory taking was allowed merely because the land had been taken against the will of the owner: *Belanger* v. *The King* (4); *The King* v. *Carrieres de Beauport Cie* (5); *The King* v. *The Hudson's Bay Co.* (6); *The King* v. *Patrick King* (7); *The King* v. *Bowles* (8); *The King* v. *Grass* (9). These cases were all strictly in accord with the English

(1) (1903) 8 Ex. C.R. 319 at 322.
(2) (1949) S.C.R. 712 at 713.
(3) (1916) 18 Ex. C.R. 442; (1917) 32 D.L.R. 331.
(4) (1917) 17 Ex. C.R. 333 at 350.
(5) (1915) 17 Ex. C.R. 414 at 425.
(6) (1916) 17 Ex. C.R. 441 at 445.
(7) (1916) 17 Ex. C.R. 471 at 481.
(8) (1916) 17 Ex. C.R. 482 at 486.
(9) (1916) 18 Ex. C.R. 177 at 197.

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practice. But several other reasons for granting the additional allowance appear in the cases. For example, it has been given for contingencies, moving, good-will, etc, *The King* v. *Condon* (1); for contingent items, *The King* v. *Macpherson* (2); for the good-will of a hotel because its value could not be moneyed out with precision and any loss and all other expenses incidental to the closing down of a going concern, *The King* v. *The Carslake Hotel Co.* (3), affirmed by the Supreme Court of Canada (4); for the compulsion and to cover all other unforseen incidentals including moving, *The King* v. *Blais and Vadeboncoeur* (5). These cases are related to one another in that in them the allowance was granted as compensation for disturbance of various kinds. But the presence or absence of disturbance was not a determining factor for it was granted in several cases where there was no disturbance, as for example, in the case of vacant land that was part of a timber limit, *The King* v. *The New Brunswick Railway Co.* (6); in the case of properties from which there had been revenue, *The King* v. *Hearn* (7); in the case of vacant lands that were particularly suitable for warehouse site purposes, *The King* v. *Vassie & Co. et al* (8). And there were cases where the allowance was granted not as compensation for disturbance but in addition to an award for it, *The King* v. *Courtney* (9); *The King* v. *Jalbert et al* (10). Then there were cases in which it was held that no allowance should be given, as, for example, when the owner has made no use of the property and derived no revenue from it but bought it for speculative purposes, *Raymond* v. *The King* (11); in the case of properties that yielded practically no revenue and were not occupied, *The King* v. *Hearn* (12); because the property had been bought for speculative purposes in the expectation of its expropriation, *The King* v. *Picard* (13); in the case of property which the owners had been trying to sell for a number of years, *The King* v. *McCarthy* (14), affirmed by the Supreme Court of Canada (15), without

(1) (1909) 12 Ex. C.R. 275 at 282.
(2) (1914) 15 Ex. C.R. 215 at 232.
(3) (1915) 16 Ex. C.R. 24 at 33.
(4) June 13, 1916, unreported.
(5) (1915) 18 Ex. C.R. 63 at 66.
(6) (1913) 14 Ex. C.R. 491 at 497.
(7) (1916) 16 Ex. C.R. 146 at 175.
(8) (1917) 17 Ex. C.R. 75 at 83.
(9) (1916) 16 Ex. C.R. 461 at 464.
(10) (1916) 18 Ex. C.R. 78 at 80.
(11) (1916) 16 Ex. C.R. 1 at 22; (1918) 59 Can. S.C.R. 62.
(12) (1916) Ex. C.R. 146 at 176.
(13) (1916) 17 Ex. C.R. 452 at 460.
(14) (1919) 18 Ex. C.R. 410 at 436.
(15) Oct. 11, 1921, unreported.

any reference to this point. Yet the allowance was granted in *The King* v. *Blais et al* (1) "to cover all incidental expenses occasioned by the expropriation and for the compulsory taking against the will of the owners, who were desirous to hold the property for speculative purposes." The refusal to grant the additional allowance was a departure from the English practice.

It is plain that up to this date there had been no success in this Court in establishing any general ground of principle for the application of the additional allowance apart from that of compensation for the compulsion only.

In the Supreme Court of Canada there were no pronouncements by way of attempted justification of the additional allowance prior to the decision in *Dodge* v. *The King* (2) where Idington J. said:

> There may be added, as usually is added, a percentage to cover contingencies of many kinds.

There were other cases in which the additional allowance was granted without comment as in *The King* v. *Trudel* (3) and in *The King* v. *Hearn* (4) where the Court reduced the amount awarded by this Court but included ten per cent for the compulsory taking without distinguishing, as this Court had done, between the properties that yielded revenue and those that did not.

I shall now refer to the *King* v. *Hunting et al* (5) which, until recently, was the leading Canadian case on the subject. In this Court Cassels J. allowed full compensation to each of the owners of the expropriated properties and, in addition, allowed each one ten per cent for the compulsory taking. On an appeal to the Supreme Court of Canada the legality of this additional allowance was challenged by counsel for the Crown but it was upheld by a majority of the Court, a variety of reasons being given by the several judges. Fitzpatrick C.J. expressed his opinion as follows, at page 331:

> If there is to be any limit to litigation there must be some finality in the determination of law and in rules of practice. The allowance of 10 per cent for compulsory purchase has become so thoroughly established

(1) (1915) 18 Ex. C.R. 67 at 71.
(2) (1906) 38 Can. S.C.R. 149 at 156.
(3) (1914) 49 Can. S.C.R. 501 at 517.
(4) (1917) 55 Can. S.C.R. 562 at 576.
(5) (1915) 18 Ex. C.R. 442; (1917) 32 D.L.R. 331.

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a rule from the innumerable cases both here and in England in which it has been awarded almost as a matter of course, that I certainly should not be prepared to countenance its being questioned in any ordinary case. At the time of the passing of the Consolidated Lands Clauses Act, 1845, it was suggested that 50 per cent should be the allowance for compulsory purchase; this, however, was too high and long experience has proved that 10 per cent is a reasonable sum to add to cover anything not included in the actual valuation. That owners may have such further claims if they are to be fully compensated for the taking of their property may, I think, be seen in the present cases, where they have been brought before two Courts before they can recover the compensation to which they are entitled. I suppose it is well known that the costs they can recover from the Crown do not represent the expense to which they are put in such litigation. That this charge should be open to dispute and be specially fixed in each case would be, I think, disastrous. The 10 per cent allowance does not, of course, profess to be anything but a covering charge, and perhaps there might be cases in which it ought not to be allowed. In ordinary cases such as the present and where allowed by the Judge, I do not think it should ever be questioned in this Court.

It appears from these reasons that, notwithstanding the statement in Cripps to which I referred earlier, the ten per cent allowance is not part of the valuation of the lands but is a "covering charge" additional to it "to cover anything not included in the actual valuation". There is no indication of what is included in this coverage except the reference to the expenses of litigation beyond the costs recoverable from the Crown. Idington J. thought that the usual ten per cent should be added as "compensation for compulsory taking". He agreed that there is no rule of law rendering it an invariable consequence of compulsory taking but thought that in the majority of cases it "is no more than justice demands". Then there are generalizations in his reasons which suggest that the allowance may be for disturbance. Duff J., as he then was, simply dismissed the appeal. Anglin J., as he then was, put the case differently from the others. After some general observations, in the course of which he stated that the inconvenience and possible loss attendant upon disturbance is not the only element involved in the ten per cent allowance, which has now become customary, that in some instances it has been allowed on the expropriation of vacant land, *vide The King* v. *New Brunswick Railway Co.* (1), and that an element present in every case is the inconvenience and possible loss

(1) (1913) 14 Ex. C.R. 491 at 497.

in finding a satisfactory re-investment, he laid down the following principles, at page 333:

> Compensation should cover not merely the market value of the land, but the entire loss to the owner who is deprived of it. It must, therefore, usually exceed the market value, though it may occasionally be less, as where the land taken is, while in the owner's hands, subject to depreciatory restrictions from which it is relieved when expropriated. The 10 per cent allowance is of course independent of and additional to any sum in excess of market value to which the owner may be entitled because of special adaptability of the expropriated premises to his purpose.

It is clear from these reasons that Anglin J. considered that the 10 per cent allowance is independent of and additional to not merely the market value of the expropriated property but its value to the owner. Then Anglin J. expressed the opinion that when such an important item of convenience and possible loss as disturbance in occupation, involving the finding of other suitable premises, is wholly absent, as it was in the case before the Court, a substantial reduction in the allowance of ten per cent may well be made and proceeded to divide the ten per cent as follows, at page 335:

> After giving careful consideration to the various elements in respect of which the 10 per cent is allowed, I would fix the allowance (in addition to market value and for special adaptability) at 4 per cent for disturbance in actual occupation, including the inconvenience of finding other suitable premises, and 6 per cent to cover all other expenses, damage and inconvenience to the deprived owner entailed by the taking of his property. Like the 10 per cent itself this 4 per cent is of course an arbitrary figure. While no authority can be cited to support it, reason demands that, where there is no actual disturbance of possession, the allowance for compulsory taking should be less than where that serious inconvenience is suffered, and the division of the "additional allowance" of 10 per cent into two parts, ascribing 4 per cent to damage caused by actual eviction, and 6 per cent to other damage occasioned by the taking of the property, will probably at least work approximate justice in the majority of cases.

There is, of course, no judicial authority for this division and there was nothing in the English practice to warrant it. But the division is interesting because of its implicit recognition that the granting of an allowance in terms of percentage over and above the value of the expropriated property to the owner merely because it had been taken from him is not reasonable or consistent with principle. Brodeur J., dissenting from the other judges, was of the opinion that since the owners of the expropriated property had received a liberal compensation for it without having suffered any disturbance they were not entitled to any

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additional allowance. I have set out the reasons of the several judges without attempting to deduce the *ratio decidendi* of the decision other than that the granting of the additional allowance was, for various reasons, approved.

After the decision in the *Hunting* case (*supra*) there were numerous cases in this Court in which the additional allowance for compulsory taking was granted or refused on various grounds as, for example, in *The King* v. *Lynch's Limited et al* (1); *The King* v. *The Royal Scotia Yacht Squadron et al* (2). Indeed, it would be fair to say that prior to my coming to the Court it was granted more often than it was refused. Thereafter, the practice of this Court went the other way. I made it a rule not to grant any additional allowance for compulsory taking in the expropriation cases that came before me and the other judges of this Court followed a similar course with the exception of Angers J. who continued the former practice. As I saw it, the Court was not obliged in law to grant any additional allowance. No Act of Parliament, either English or Canadian, authorized it and no rule of law required it. The only reason for granting it was the English practice to which I have referred. But that practice had been formally abolished in England in 1919, which was subsequent to the decision in the *Hunting* case (*supra*), in the case of all expropriations of the same kind as those made in Canada under the Expropriation Act and I could not see any reason why a practice should continue to be maintained in Canada when the English practice on which it was dependent had itself ceased to exist. Moreover, considerations of principle similar to those that led to the abolition of the practice in England weighed strongly with me, namely, that where property has been lawfully expropriated by the government pursuant to an Act of Parliament and Parliament has determined that the compensation payable to its owner shall be measured by the value of the property to him the Court ought not to give him ten per cent more than its value. Consequently, since the owner had no legal right to an additional allowance for compulsory taking I did not give him any. It was, and still is, my view that where all the proper factors of value have been taken into account and adequate com-

(1) (1920) 20 Ex. C.R. 158 at 163. (2) (1921) 21 Ex. C.R. 160 at 162.

pensation has been awarded there is no justification in principle for any additional allowance for compulsory taking and that such an allowance is an unwarranted bonus. I have, therefore, felt it my duty on several occasions to criticize the additional allowance as contrary to principle and urge its abolition: *vide The King* v. *Thomas Lawson & Sons Limited* (1); *The King* v. *Diggon-Hibben Limited* (2); *The King* v. *Woods Manufacturing Co. Ltd.* (3). I am not alone in my criticism of the allowance. Its propriety has been challenged in a number of cases: *vide re Watson and City of Toronto* (4); *In re Wilson and The State Electricity Commission of Victoria* (5).

I now come to the decisions of the Supreme Court of Canada partially reversing the trend that was being followed in this Court. The first was in *Irving Oil Company Ltd.* v. *The King* (6). There an appeal from O'Connor J. of this Court was allowed and his award increased. In the increase there was a ten per cent additional allowance for compulsory taking but no reason for granting it was given except that of Kerwin J. who said, at page 556:

> Under the circumstances of this case, the appellant is entitled to ten per cent for compulsory taking.

No general rule for granting or refusing the additional allowance was laid down. But a general rule was enunciated in *Diggon-Hibben Ltd.* v. *The King* (7). There an appeal from my judgment, in which I had declined to grant any additional allowance for compulsory taking on the ground that it would really be a bonus, was allowed and an additional allowance of ten per cent on a portion of the amount which I had found as the value of the property to the owner was added to my award. Rand J., speaking also for Taschereau J., put the reason for granting the allowance as follows, at page 713;

> In the case of *Irving Oil Company* v. *The King* (6), it was held that while an allowance of 10 per cent for compulsory taking is not a matter of right, in circumstances presenting difficulty or uncertainty in appraising values, such as were found there, the practice of making that allowance applied. Similar circumstances are present here; in fact in the general character of the two situations there is no difference whatever. For that reason, I think the allowance should be made.

(1) (1948) Ex. C.R. 44 at 106.
(2) April 15, 1948, unreported.
(3) (1949) Ex. C.R. 9 at 59.
(4) (1916) 38 O.L.R. 103 at 111.
(5) (1921) V.L.R. 459.
(6) (1946) S.C.R. 551.
(7) (1949) S.C.R. 712.

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Estey J. agreed with Rand and Taschereau JJ. in adding the allowance to the amount of my award but not for the same reasons. He put his decision on the basis of the general practice. At page 719, he said:

> The allowance for compulsory taking is founded upon a long established practice in the Courts and is granted as part of the compensation. It is a factor separate and apart from what would be included as disturbance allowance.

Later, at page 720, he said:

> The amount allowed may be varied and there are cases where, having regard to the circumstances, no allowance should be made, but, with great respect, the circumstances in this case do not distinguish it from these cases in which an amount for compulsory taking was allowed.

The question came before the Supreme Court of Canada again in *The King* v. *Lavoie* (1). There the Crown appealed from the judgment of Angers J. of this Court and the owner of the expropriated property cross-appealed. The appeal and the cross-appeal were both dismissed. One of the grounds of the cross-appeal was that the owner was entitled to an additional allowance of ten per cent for forcible taking and that this had been denied by Angers J. On this point, Taschereau J., who delivered the unanimous judgment of the Court, laid down an important general rule in the following terms:

> Le contre-appellant soumet en second lieu, qu'il a droit à un montant supplémentaire de 10 pour cent de la compensation accordée, pour dépossession forcée. Ce montant additionnel de 10 pour cent n'est pas accordé dans tous les cas d'expropriation, et ce n'est que dans les causes où il est difficile par suite de certaines incertitudes dans l'appréciation du montant de la compensation, qu'il y a lieu de l'ajouter a l'indemnité (*Irving Oil Co.* v. *The King* (2); *Diggon-Hibben Ltd.* v. *The King* (3)). Ici, on ne rencontre pas les circonstances qui existaient dans les deux causes que je viens de citer, et qui alors ont justifié l'application de la règle. Il n'a pas été démontré qu'il existait des éventualités inappréciables et incertaines, impossibles à évaluer au moment du procès.

Thus in this case the Supreme Court of Canada adopted, with variations, the rule enunciated by Rand J. in the *Diggon-Hibben Ltd.* case (*supra*) rather than the reasons given by Estey J.

I shall deal briefly with the variations referred to. The rule laid down by Rand J. in the *Diggon-Hibben Ltd.* case (*supra*) did not mean that the ten per cent additional allowance for compulsory taking was to be applied in all

(1) Dec. 18, 1950, unreported. (2) (1946) S.C.R. 551.
(3) (1949) S.C.R. 712.

cases of difficulty or uncertainty in appraising values for, as I read his reasons, he limited its application to circumstances of difficulty or uncertainty such as were found in the *Irving Oil Company* case (*supra*). If his language were construed strictly there would be very few cases in which the practice would apply. But in the *Lavoie* case (*supra*) the application of the practice was not confined to the circumstances such as were found in the *Irving Oil Company* case (*supra*) and, to that extent, it was put on a somewhat wider basis. But the *Lavoie* case (*supra*) also held that not all cases of difficulty or uncertainty in estimating the amount of the compensation warrant the granting of the additional allowance for it emphasized that it is only in cases where it is difficult by reason of certain uncertainties to estimate the amount of the compensation that there is ground for adding the additional allowance to the owner's indemnity. Thus, while the limits for the application of the additional allowance were not fixed with precision it is made clear that the range of cases in which it should be granted is a narrow one.

The decisions lend themselves to several comments. The first is that the Supreme Court of Canada has broken new ground. I have made a careful search of the authorities on the subject of the additional allowance for compulsory taking in England, Canada, Australia and New Zealand and have found no case prior to the *Diggon-Hibben Ltd.* case (*supra*) in which the application of the additional allowance has been restricted to cases of difficulty or uncertainty or difficulty by reason of uncertainty in estimating the amount of the compensation. There was nothing in the English practice to warrant such a restriction and there is no Canadian statutory enactment or prior rule of law that supports it. The test laid down by the Court for determining in what circumstances the additional allowance should be granted is thus of its own creation.

The second comment is that, although the Supreme Court of Canada asserted in *Stuart* v. *Bank of Montreal* (1) that it was bound by its previous decisions save, as Duff and Anglin JJ., stated, in very exceptional circumstances, the Court did not in the *Lavoie* case (*supra*) consider that it was bound by its previous decision in the *Hunting* case

(1) (1909) 41 Can. S.C.R. 516.

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(*supra*) but felt free to overrule it without doing so expressly. Certainly, the decisions in the two cases cannot both stand. It cannot be the rule, as Fitzpatrick C.J. put it in the *Hunting* case (*supra*), that the additional allowance for compulsory taking is so thoroughly established and of such general application that it should not be questioned in any ordinary case and at the same time also be the rule, as Taschereau J. put it in the *Lavoie* case (*supra*), speaking for the whole Court, including the Chief Justice and Rand J., who had also been in the *Diggon-Hibben Ltd.* case (*supra*), that the additional allowance is permissible only in cases where it is difficult by reason of uncertainty to estimate the amount of the compensation. It is not possible to reconcile these two decisions. To the extent that they are inconsistent with one another the *Hunting* case (*supra*) must be regarded as having been overruled by the *Lavoie* case (*supra*). The latter now takes the place of the former as the leading Canadian case on the subject. That being so, it is a matter for regret that it has not been reported.

The decisions have served a useful purpose in brushing aside several confusing statements both in this Court and also in the Supreme Court of Canada. Now certain propositions are established beyond dispute. One of these is that the additional allowance for compulsory taking is not in lieu of an allowance for disturbance, as some of the cases suggest, but is separate and apart from it. It is also settled that the additional allowance for compulsory taking has no place in ordinary expropriation cases. It is no longer the general rule to grant it. Indeed, it is to be granted only in the exceptional circumstances mentioned in the *Lavoie* case (*supra*). This radical change is not only a great departure from the original English practice and a sharp reversal of the opinions expressed in the *Hunting* case (*supra*), but is also, in my opinion, a marked advance towards recognition that the former practice of giving every owner of expropriated property ten per cent more than its value to him simply because it was expropriated cannot be defended. The recognition will not be complete until the additional allowance is abolished altogether.

It is apparent from this review that the Canadian law relating to the additional allowance for compulsory taking has had a chequered career. I must now decide whether such allowance should be granted in the present case. I have come to the conclusion that it should be. Notwithstanding my own opinion that the sum of $1,100,000, which I have found as the value of the expropriated property to the defendant, is ample compensation to it and that any additional allowance would really be a bonus, I find that the estimation of the amount of the compensation involves sufficient difficulty and uncertainty to bring the case within the ambit of the rule in the *Lavoie* case (*supra*). Consequently, an additional allowance should be added to my award.

I must next decide its amount. This has given me concern. In the *Diggon-Hibben Ltd.* case (*supra*) the Supreme Court of Canada, in allowing the appeal from my judgment, added only $10,000 to the amount of my award, although I had found $120,000 as the amount of compensation money to which the defendant was entitled. With great respect, I question the correctness of the basis of the computation. It would seem more appropriate, once it was decided to grant the ten per cent additional allowance, to attach it to the whole amount of my valuation instead of to only part of it and make it $12,000 instead of $10,000. In fixing the latter amount Rand J. suggested that I had found the value of the land at $100,000. I cannot agree. I did not separate my award into one amount for the value of the land and another as an allowance for disturbance. I made only one award for the value of the expropriated property. In the course of my judgment I stated my opinion that it is the duty of the Court to estimate the value of the property as a whole rather than to attempt to assess the amounts of the several factors that ought to be taken into account in arriving at the estimate of value which section 47 of the Exchequer Court Act directs the Court to make and that the amount of such estimate is a global sum. My award of $120,000 was my estimate of the value of the property to the defendant after taking into account the various factors and elements of value that were brought to the attention of the Court, including the defendant's claim for disturbance. To take

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only $100,000 of my estimate as the value of the property suggests that the remaining $20,000 was for something other than its value. My award did not lend itself to any such partition. It was an indivisible amount and all of it, in my opinion, represented the value of the property. It is the established rule in England in cases under the Lands Clauses Consolidation Act, and, in my judgment, the rule is the same in Canada in cases under the Expropriation Act, that a claim for disturbance is not a separate head of compensation, such as a claim for damages for injurious affection, but is merely one of the factors of value of the property to the owner that is to be taken into account in determining the amount of the compensation. This was the view taken by the Court of Appeal in *Horn* v. *Sunderland Corporation* (1). And it is consistent with the statement of Lord Halsbury L.C. in *Inland Revenue Commissioners* v. *Glasgow and South Western Ry. Co.* (2). I am, therefore, of the opinion that since an additional allowance for compulsory taking is to be granted it should be based on the whole of the amount which I have found to be the value of the expropriated property to its owner rather than on only part of it. By the application of the principle of re-instatement I have found this value at $1,100,000. Consequently, I award ten per cent of such value, or $110,000, as the additional allowance for compulsory taking, making a total award of $1,210,000.

While I regard this additional allowance of $110,000 as a bonus and grant it only because of the rule laid down by the Supreme Court of Canada in the *Lavoie* case (*supra*), my objection to it in the present case is eased by the fact that it will be used by the defendant in furtherance of the charitable purposes for which it was formed.

The defendant has been left in undisturbed occupation and possession of the expropriated property ever since the date of its expropriation, without payment of any rent. Therefore, under the long established practice of this Court, it is not entitled to any interest.

(1) (1941) 2 K.B. 26.

(2) (1887) 12 A.C. 315 at 320.

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There will, therefore, be judgment declaring that the property described in paragraph 2 of the Information is vested in Her Majesty as from May 6, 1946; that the amount of compensation money to which the defendant is entitled, subject to the usual conditions as to all necessary releases and discharges of claims, is the sum of $1,210,000 without interest; and that the defendant is entitled to costs to be taxed in the usual way.

Judgment accordingly.

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Feb. 21, 23 24, 25

BETWEEN:

RALPH DI FIORE, trading under the firm name and style of THE STEADFAST SHOE REG'D., ... PLAINTIFF;

AND

GABRIEL TARDI, trading under the firm name and style of ATOMIC SLIPPER REG'D., ... DEFENDANT.

Patents—Infringement—The Patent Act, 1935, S. of C. 1935, c. 32, ss. 26, 35(1), 35(2)—Shoe-making process—Moulding slippers by the use of moulds—Misleading and ambiguous statements in specification—Failure to disclose important information—Anticipation—Failure to confine claims to invention.

The plaintiff brought action for infringement of his patent for a shoe-making process. The defendant attacked the validity of the patent on the grounds of insufficiency in the specification, lack of novelty and subject matter, and claiming more than was invented and denied infringement.

Held: That if a specification by itself will not enable a person skilled in the art to which it relates to put the invention to the same successful use as the inventor himself could do, without leaving the result to the chance of successful experiment, the specification is insufficient to comply with the requirements of section 35(1) of The Patent Act, 1935, and the patent falls.

2. That the statement in the specification that other materials than leather could be used is misleading.

3. That the term "suitable machinery" in the specification is ambiguous.

4. That the plaintiff failed to disclose how to make and operate the moulds for the preforming of the sole shells and uppers and how to design suitable lasts that can be used with the moulds and taken out of them.

5. That the plaintiff's invention was not anticipated.

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6. That if the plaintiff's method of moulding a slipper was an invention he failed to disclose wherein and in what respects it is different from other methods of moulding known in the art and his patent falls for failure to distinguish his invention from other inventions.

7. That the plaintiff has not confined his claims to his particular method of moulding but has made them cover moulding generally and thus include what is old as well as what might be new and the patent falls for claiming more than was invented.

ACTION for infringement of patent.

The action was tried before the Honourable Mr. Justice Thorson, President of the Court, at Montreal.

E. D. Angers for plaintiff.

C. Scott Q.C. for defendant.

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

THE PRESIDENT orally delivered the following judgment:

This is an action for infringement of the plaintiff's Canadian Letters Patent No. 459,582 applied for on February 18, 1947, and issued on September 13, 1949, for a shoe-making process. The defence to the action is that the patent is invalid for insufficiency in the specification, lack of novelty and subject matter, and claiming more than was invented. The defendant also denies infringement.

The specification recites that the invention relates to a manufacturing method for shoes and, more particularly, such flexible types as so-called "lounge" shoes, slippers and the like and sets out its objects as follows:

The main object of the invention resides in the provision of a simplified method for producing an inexpensive slipper or the like.

Another object is the provision of a method for making an inexpensive yet comfortable shoe.

A further object contemplates a slipper-making method which can be performed by unskilled labour.

A still further object concerns a shoe-making method which is applicable to a variety of styles and forms of slippers or lounge shoes.

Other objects and advantages of the invention will become apparent, or be pointed out further, during the description to follow.

Then there is a description of the four figures of the drawing annexed to the specification and a reference to the parts as follows:

Referring to the drawing, wherein similar reference characters represent corresponding parts throughout, the slipper shown in Figure 1, consists essentially of the following parts: the vamp "V", the rear quarter section "R", the sole shell "S", the heel "H" and the cushion pad "C".

And I set out also the following paragraphs:

In accordance with the method of the invention, the elements above-mentioned are preformed by means of suitable machinery either by heating the leather or other materials chosen for the said elements, moistening the same or a combination of the two. In any case, this preforming operation requires the use of moulds for shaping the elements of the slipper to standardized dimensions.

Describing, now, the individual elements, it will be seen from Figure 3, that the sole shell "S" consists of a sole proper 5 a marginal upstanding wall 6 and a right angular outwardly extending flange 7 integral with the top of said wall 6 and in a plane parallel to that of the sole 5. The vamp "V" and the rear quarter "R"" are similarly provided with flanges 8 and 9 respectively adapted to lie against flange 7 when the elements are assembled in their proper relative positions. Of course, during the forming operation of the vamp and rear quarter a bias or out-turned bead 10 may be formed or provided on the outer edges thereof for decorative purposes.

For assembling together the component parts of the slipper, a suitable last is disposed inside the sole shell, the contacting faces of the flanges 7, 8 and 9 coated with a suitable cement after which the vamp and rear quarter are put in place. Pressure exerted all around on the said flanges will secure the same together and permit the stitching down of the vamp and rear quarter to the sole shell proper by means of a marginal stitching line 15. Thereafter, the projecting portion of the flanges 7, 8 and 9 are trimmed close to the stitching and the ends of the flanges rounded and polished to form a decorative bead as shown to advantage in Figures 1 and 2. The next operation consists in attaching in position the heel "H" and filling the bottom of the sole shell with the cushion pad "C", said cushion being in the form of a suitable textile or a lamb skin (shearing).

The specification ends with two claims reading as follows:

The embodiments of the invention in which an exclusive property or privilege is claimed are defined as follows:

1. In a method of the character described, the steps of forming a sole shell having a depressed sole and marginal flange, similarly forming rear quarter and vamp sections with sole shell-registering flanges, cementing said flanges in contacting relation under pressure, and stitching together the cemented flanges.

2. A shoe-making method, comprising prefabricating by moulding a sole shell having a depressed centre sole and marginal flange, a flanged rear quarter section and a flanged vamp section, cementing said vamp and rear quarter sections flanges to the sole shell flange, stitching the flanges together, and trimming the flanges close to the stitching to form a bead.

The plaintiff, who has been a shoe manufacturer since 1920, gave a detailed and clear demonstration of the process by which he made his slipper, Exhibit 1. The two pieces of leather required for the bottom or sole shell and for the top or upper were cut on a clicking machine. The bottom piece was then moistened and heated and set in an aluminum mould with a last inserted inside the leather.

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This was then pressed down by hand or with a hammer or a hydraulic press. Then the last was removed and the leather piece taken out. This had now become a moulded sole shell with an upright wall and a flat flange at the top. The top piece of leather, intended for the upper, was dealt with in a similar manner and became a moulded upper with a flat flange at the bottom. The moulded sole shells and uppers kept their shapes and could be packed away until required. The next step in the process was to put a fine layer of cement on the top of the flange of the moulded sole shell and the bottom of the flange of the moulded upper. These two parts were then put back in the moulds with the last inserted inside and the two moulds were pressed together so that the cement would hold. The top and bottom moulds were then taken off leaving the moulded sole shell and moulded upper glued together with the last inside. The outstanding flanges of the bottom and top were then stitched together with a Goodyear lock-stitch machine and the last taken out. The excess leather on the united flange was then cut off and the edge trimmed. The slipper was then ready for coloring of the leather, polishing, trimming and other finishing. The plaintiff explained that he had been trying to find a method of putting a sole shell and an upper together that would replace the old method which consisted of mounting the parts on a last by hand by means of mounting pliers or pincers and tacks and then sewing the parts together. When he started to make slippers in a mould he found difficulties such as not being able to take the last out of the mould. It took him 18 months of experimentation before he could make his first slippers.

The plaintiff then explained how he made his moulds. He first drew a design of his proposed slipper on a last, made a pattern of the design out of cardboard, cut the necessary pieces of leather according to this pattern, pasted them on the last, put the last with the leather on it into a form, poured plaster around it up to the top of the bottom piece of leather on the last and thus obtained a plaster cast of the lower mould. A plaster cast of the upper mould was obtained in a similar manner. The two plaster casts were then taken to a foundry where aluminum moulds were made. The plaintiff selected aluminum because it would not spot the leather. Then the moulds required machining

inside, which the plaintiff did himself, and they were then taken to a machine shop and the tops and bottoms made level so that the pressure on the top and bottom when the two moulds were put together should be equal. This was essential. The adaption of the lasts to the moulds presented a hard problem because of the offsets in a standard last. They could not be taken out and the plaintiff had, therefore, to design his own lasts and eliminate the offsets to the extent of making it possible to take them and the slippers out of the moulds.

The slipper now made by the plaintiff, Exhibit 1, is not the one shown on the drawing annexed to the specification but the process of making it is essentially the same.

It was admitted by the plaintiff on his cross-examination, and there is plenty of evidence from other sources, that most of the steps in his process were old, such as, cutting the leather, moistening and heating it, using cement, making soles and uppers with flanges, applying pressure, sewing with a lock-stitch, trimming and polishing. But what was claimed as new was the preforming of the sole shells and uppers by the use of moulds. In effect, the essence of the plaintiff's invention, as counsel for the plaintiff put it, was said to be the making of moulded sole shells and uppers by the use of moulds and suitable lasts and bringing them together by the steps described in the specification.

I have no doubt that the plaintiff's method of making slippers was useful in that it accomplished the purposes which he sought to achieve. The evidence also supports the conclusion that he was the first person in Canada to make slippers by the use of moulds. But this is not enough for section 26 of The Patent Act, 1935, Statutes of Canada, 1935, chap. 32, requires as a condition of the validity of a patent that the invention for which it is granted should be "not known or used by any other person" before the inventor invented it, so that first invention in Canada will not suffice. Moreover, while I believe the plaintiff's statement that he had never previously heard of moulded soles or uppers, meaning thereby soles or uppers preformed by the use of moulds, and think that in making his application for a patent he acted in good faith, this will not help him if any of the attacks on the validity of his patent are well based.

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I shall deal first with the contention that the patent is invalid for insufficiency in the specification for failure to comply with the requirements of subsections (1) and (2) of Section 35 of The Patent Act, 1935, as amended, which provide as follows:

35. (1) The applicant shall in the specification correctly and fully describe the invention and its operation or use as contemplated by the inventor, and set forth clearly the various steps in a process, or the method of constructing, making, compounding or using a machine, manufacture or composition of matter, in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most closely connected, to make, construct, compound or use it. In the case of a machine he shall explain the principle thereof and the best mode in which he has contemplated the application of that principle. In the case of a process he shall explain the necessary sequence, if any, of the various steps, so as to distinguish the invention from other inventions. He shall particularly indicate and distinctly claim the part, improvement or combination which he claims as his invention.

(2) The specification shall end with a claim or claims stating distinctly and in explicit terms the things or combinations which the applicant regards as new and in which he claims an exclusive property or privilege.

I had occasion in *Minerals Separation North American Corporation* v. *Noranda Mines, Limited* (1) to deal with the requirements of a similar section. While my judgment in that case was reversed there was no dissent from my comments on these requirements. There I said, at page 316:

Two things must be described in the disclosures of a specification, one being the invention, and the other the operation or use of the invention as contemplated by the inventor, and with respect to each the description must be correct and full. The purpose underlying this requirement is that when the period of monopoly has expired the public will be able, having only the specification, to make the same successful use of the invention as the inventor could at the time of his application. The description must be correct; this means that it must be both clear and accurate. It must be free from avoidable obscurity or ambiguity and be as simple and distinct as the difficulty of description permits. It must not contain erroneous or misleading statements calculated to deceive or mislead the persons to whom the specification is addressed and render it difficult for them without trial and experiment to comprehend in what manner the invention is to be performed. It must not, for example, direct the use of alternative methods of putting it into effect if only one is practicable, even if persons skilled in the art would be likely to choose the practicable method. The description of the invention must also be full; this means that its ambit must be defined, for nothing that has not been described may be validly claimed. The description must also give all information that is necessary for successful operation or use of the

(1) (1947) Ex. C.R. 306.

invention, without leaving such result to the chance of successful experiment, and if warnings are required in order to avert failure such warnings must be given. Moreover, the inventor must act *uberrima fide* and give all information known to him that will enable the invention to be carried out to its best effect as contemplated by him.

This statement of the extent to which the disclosures must go in describing the invention and its operation or use as contemplated by the inventor, if the patent is not to fail for either the ambiguity or the insufficiency of such description, was abstracted from a number of cases which I cited.

When it is said that a specification should be so written that after the period of monopoly has expired the public will be able, with only the specification, to put the invention to the same successful use as the inventor himself could do it must be remembered that the public means persons skilled in the art to which the invention relates for a patent specification is addressed to such persons. It should, therefore, be looked at through their eyes and read in the light of the common knowledge of the art which they should possess. But it is important to note that such common knowledge must be limited to that which existed at the date of the specification.

I have come to the conclusion on the evidence that the specification does not comply with the requirements of section 35(1) of The Patent Act, 1935. I shall deal first with the less important reasons for this conclusion. On his cross-examination the plaintiff had his attention drawn to the words "or other materials" and was asked what materials other than leather could be used. He suggested that plastics might be used but admitted that shoemakers had given up the idea of using them. The fact is that leather is the only material that is practical, so that the words "or other materials" are, strictly speaking, misleading. Similarly, the term "suitable machinery" is not free from ambiguity. Does it mean merely the machinery by which the moulds are pressed, which seems likely, or does it include the moulds and last as well? Both Mr. C. Jucker and Mr. F. Schonenbach, who gave expert evidence for the defendant, found the words difficult to understand. Mr. Schonenbach thought that he might have to invent his own machinery. I find the term "suitable machinery" an ambiguous one. Moreover, the plaintiff did not give all the

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information known to him that would make his invention work to the best advantage. He said, for example, that it was essential to his process to use leather that had been tanned by a vegetable tanning process and that oil tanned leather such as chrome leather, which is ordinarily used for shoes, would not do. The reason for this was that the vegetable tanned leather admits water whereas the oil tanned leather rejects it and it was essential to the moulding of leather that it should be of such a nature as to let in water. Nor is there any reference to the desirability of using aluminum moulds instead of steel or cast iron ones, although the plaintiff selected aluminum because it would not spot the leather. There is also no information as to how much water or heat should be applied to the leather or how long it should be kept pressed into the moulds to preform the sole shells and uppers. While these omissions of information might not invalidate the patent on the ground that the information is of such a nature that persons skilled in the art might reasonably be expected to possess it there is a striking insufficiency in the specification. Mr. Schonenbach, who is an experienced shoemaker, expressed the opinion that all the operations in the plaintiff's process were fully described, except the moulding, and he could not tell from the specification how the mould, which he considered the crux of the process, should be made. And Mr. Jucker, with whose evidence I was, on the whole, favourably impressed, said that he thought that with the specification he could gradually, through trial and error, make just as good a slipper as Exhibit 1, if he had the moulds, but he would have to have the moulds in order to be able to do so. Then he would also have to design a suitable last. As a matter of fact, the designing of a last that would be suitable for use in a mould would have a determining effect on what kind of a mould should be made.

If a specification by itself will not enable a person skilled in the art to which it relates to put the invention to the same successful use as the inventor himself could do, without leaving the result to the chance of successful experiment, the specification is insufficient to comply with the requirements of section 35(1) of the Act and the patent falls.

In my opinion, the plaintiff has failed to disclose two important things, which are, of course, closely related to one another, namely, the making and operation of the moulds for the preforming of the sole shells and uppers and the designing of suitable lasts that can be used with the moulds and taken out of them. It may be that the designing of suitable lasts is the more important. In any event, I do not believe that a workman skilled in the art and having only the specification before him could put the plaintiff's process into the same successful use and operation as the plaintiff himself can do, without very considerable experimentation. Indeed, I am satisfied that he could not do so. Under the circumstances, I find that the specification fails to meet the requirements of section 35(1) of The Patent Act, 1935, and that the patent is invalid accordingly.

There is another important reason for holding the patent invalid. Counsel for the defendant adduced evidence to show the state of the prior art, in the course of which various types of slippers were produced. These, except for the defendant's slipper, Exhibit 16, were different from the plaintiff's slipper, Exhibit 1, or the slipper which he first made according to the drawing, Exhibit A, and have no direct bearing on the issue except as illustrating part of the prior art. Counsel also filed a great many patents both to show the state of the prior art and also to support the defences of anticipation and lack of subject matter. I list these patents as follows, giving in each case the name of the inventor and the number and date of the patent: Exhibit R, K. Grosz, Canadian patent No. 333,628, dated June 27, 1933; Exhibit S, Q. E. Packard and A. Lennon, Canadian patent No. 83,164, dated September 29, 1903; Exhibit T, J. A. Romain, Canadian patent No. 145,936, dated February 11, 1913; Exhibit U, S. Strauss, Canadian patent No. 180,229, dated November 6, 1917; Exhibit V, J. J. Heys, Canadian patent No. 228,713, dated February 13, 1923; Exhibit W, W. S. Bass, United States patent No. 1,139,153, dated May 11, 1915; Exhibit X, S. Strauss, United States patent No. 1,209,225, dated December 19, 1916; Exhibit Y, S. Strauss, United States patent No. 1,331,220, dated February 17, 1920; Exhibit Z, J. H. Pope, United States patent No. 1,386,654, dated August 9, 1921;

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Exhibit Z1, J. H. Pope, United States patent No. 1,388,120, dated August 16, 1921; Exhibit Z2, K. Grosz, United States patent No. 1,972,339, dated September 4, 1934; Exhibit Z3, O. F. Hoppe, United States patent No. 2,001,308, dated May 14, 1935; Exhibit Z4, A. Bates, United States patent No. 2,054,188, dated September 15, 1936; Exhibit Z5, D. W. Wiggin, United States patent No. 1,871,764, dated August 16, 1932; Exhibit Z6, F. Ashworth, United States patent No. 2,086,526, dated July 13, 1937; Exhibit Z7, L. Mondschein and P. Speier and K. Grosz, British patent No. 383,935, dated November 24, 1932; Exhibit Z8, L. Mondschein and P. Speier and K. Grosz, British patent No. 387,602, dated February 9, 1933; Exhibit Z9, L. Mondschein and P. Speier and K. Grosz, British patent No. 388,349, dated February 23, 1933; Exhibit Z10, K. Grosz et al, German patent No. 573,969, dated April 7, 1933; Exhibit Z11, F. Bengtsson, German patent No. 581,202, dated July 22, 1933. The evidence discloses that the moulding of leather was not new. Nor was the idea of moulding parts of shoes or slippers a novel one. While Mr. Schonenbach admitted that he had not seen a moulded slipper like that of the plaintiff, Exhibit 1, or that of the defendant, Exhibit 16, in Canada and admitted the plaintiff's ingenuity, he had seen moulded bottom shells in Europe made by the Batta Shoe Company in Czechoslovakia. Moreover, the idea of making a moulded slipper had occurred to himself about 10 years ago, and he had prepared a crude mould but had given up the idea of working on it for lack of the necessary time and money and also because he considered that a hand made slipper was superior to a moulded one. Mr. Jucker also said that the moulding of uppers was general in Europe and that the moulding of lowers had been done in Czechoslovakia. Moreover, several of the patents put in by counsel for the defendant indicate the use of moulds in the making of leather footwear, for example, Exhibit V, The Heys Canadian patent No. 228,713, showing the use of moulds for making mocassins and how the moulds should be made and used, Exhibit X, the Strauss United States patent No. 1,209,225, showing a machine for moulding a shoe, Exhibit Z, the Pope United States patent No. 1,386,654, describing the use of moulds in the making of mocassins, Exhibit Z2, the Grosz United States patent

No. 1,972,339, showing a moulded sole, Exhibit Z3, the Hoppe United States patent No. 2,001,308, showing a machine for making a sandal with a moulded sole and Exhibit Z4, the Bates United States patent No. 2,054,188, also showing a moulded sole.

Counsel relied upon Exhibit Z2, the Grosz United States patent, as anticipation of the plaintiff's invention. The requirements that must be met before an invention should be held to have been anticipated by a prior publication have been discussed in many cases. I had occasion to deal with the matter in *The King* v. *Uhlemann Optical Company* (1) which judgment was recently affirmed by the Supreme Court of Canada. There, at page 157, I put the requirements as follows:

> The information as to the alleged invention given by the prior publication must, for the purposes of practical utility, be equal to that given by the subsequent patent. Whatever is essential to the invention or necessary or material for its practical working and real utility must be found substantially in the prior publication. It is not enough to prove that an apparatus described in it could have been used to produce a particular result. There must be clear directions so to use it. Nor is it sufficient to show that it contained suggestions which, taken with other suggestions, might be shown to foreshadow the invention or important steps in it. There must be more than the nucleus of an idea which, in the light of subsequent experience, could be looked on as being the beginning of a new development. The whole invention must be shown to have been published with all the directions necessary to instruct the public how to put it into practice. It must be so presented to the public that no subsequent person could claim it as his own.

This statement was merely a summary of the views expressed in the cases there cited, including *Pope Appliance Corporation* v. *Spanish River Pulp and Paper Mills Ld.* (2), where Viscount Dunedin, in delivering the judgment of the Judicial Committee of the Privy Council, put the test in these words:

> Would a man who was grappling with the problem solved by the Patent attacked, and having no knowledge of that patent, if he had had the alleged anticipation in his hand have said, "That gives me what I wish."

and later, at page 56:

> Does the man attacking the problem find what he wants as a solution in the prior so-called anticipations.

And it should be borne in mind here also that, in considering whether an invention was anticipated by a prior patent, the prior patent must be read in the light of the

(1) (1950) Ex. C.R. 142. (2) (1929) 46 R.P.C. 23 at 52.

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common knowledge which a person skilled in the art should have had immediately prior to the alleged invention. If the prior publication would give such a person the same information, for practical purposes, as the patent under attack then it is an anticipation of the invention covered by it, but otherwise not.

The test of whether a prior publication, such as a patent, is an anticipation of the invention covered by a patent in suit in a particular case is thus seen to be a very exacting one. The Grosz patent, Exhibit Z2, must meet this test before it can properly be held to have been anticipatory of the plaintiff's invention. Can it do so? I think not. When Mr. Schonenbach was asked whether, having the Grosz Canadian patent, Exhibit R, before him, he could make a slipper with a moulded bottom shell like Exhibit 7, the bottom part of the plaintiff's slipper, Exhibit 1, he said that he could. I am unable to accept this statement in view of his evidence about the difficulty involved in the plaintiff's patent of knowing how the moulds should be made. He would be faced with a similar difficulty in trying to make the plaintiff's slipper, Exhibit 1, with only the Grosz Canadian patent, Exhibit R, before him and he later recognized this difficulty himself. When Mr. Jucker was shown Exhibit R, the Grosz Canadian patent, he said that the disclosures in it permitted making a slipper having a sole that was preformed by moulding, thinking that that patent disclosed how the moulds were made, but in this he was completely mistaken for there is no such disclosure there. Then Mr. Jucker was shown Exhibit Z2, the Grosz United States patent, which does indicate that a mould was used, and said that with it before him he could construct a slipper similar to the plaintiff's slipper, Exhibit 1, if he had the necessary last and mould. These were essential and he could not make the slipper without them without experimentation. Then Mr. Schonenbach was re-called and examined with respect to Exhibit Z2, the Grosz United States patent, and substantially qualified his previous statement. He said that, with the Grosz United States patent before him, he could make a slipper similar to the plaintiff's slipper, Exhibit 1, after experimentation. He would have to create his own moulds. On cross-

examination he said that while the Grosz patent gave him the germ of an idea he would have to find something in his own mind that did not exist in the Grosz patent. On this evidence it seems plain to me that the Grosz United States patent, Exhibit Z2, does not meet the tests of anticipation that I described in the *Uhlemann Optical Company* case (*supra*) and I find that the plaintiff's invention was not anticipated by it.

But that does not dispose of the issue of novelty in favour of the plaintiff, for he is on the horns of a dilemma. If his particular method of moulding a slipper was new and inventive, which is not impossible, he has totally failed to disclose wherein and in what respects it is different from other methods of moulding known in the art and his patent falls for failure to distinguish his invention from other inventions. And, furthermore, he is in the position that he has made his claims too broad. Even if his particular method of moulding a slipper was a patentable advance in the art he has not confined his claims to his improvement in the art of moulding slippers or his particular method of moulding. They cover moulding generally and thus include what is old as well as what might be new and the patent falls for claiming more than was invented.

In view of these defects in the patent it is not necessary to enquire further whether the plaintiff's advance in the art, if he made any, over what was common knowledge in it was a workshop improvement or involved the exercise of inventive ingenuity. If it was the former then there was lack of subject matter and if it was the latter it was not disclosed. In either event, the patent falls.

The plaintiff may well be in the position of an inventor who loses the benefit of his invention through defects of draughtsmanship in the specification but every patentee who brings an action for infringement runs the risk of having the validity of his patent challenged.

Since the plaintiff's patent is invalid he has no case for infringement of it. If it were otherwise I would have no difficulty in finding on the evidence that the defendant deliberately took the plaintiff's process without his consent and used it with variations in making his own slippers. It is true that both Mr. Schonenbach and Mr. Jucker pointed out differences between the defendant's slipper, Exhibit 16,

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and the plaintiff's slipper, Exhibit 1. Mr. Schonenbach illustrated two respects in which there were differences. The first was that the defendant's sole shell was moulded all the way around without any seam at the back and was considerably higher from the bottom at the back than the plaintiff's sole shell. The other difference, which followed from the first one, was that the flanges did not go all the way around the slipper but only as far as the front. This made for less sewing. These differences in construction called, of course, for different lasts and moulds but aside from them the method followed by the defendant was essentially similar to that which he had been taught by the plaintiff while he was in his employ. That essential similarity would, in my opinion, be sufficient to constitute infringement, if the patent were valid, but as it is the defendant is free from liability to the plaintiff.

Under the circumstances, the plaintiff's action must be dismissed with costs.

Judgment accordingly.

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Feb. 2

BETWEEN:

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LIMITED . . . . . } PLAINTIFF;

AND

KIWANIS CLUB OF WEST TORONTO . . . . . } DEFENDANT.

Copyright—Infringement action—Copyright Act R.S.C. 1927, c. 32 s. 3(1), 17—"Public performance of any musical work in furtherance of a religious, educational or charitable object"—"In furtherance of" means to promote, to advance or to assist—Defendant a fraternal organization—Receipts from dance at which musical works alleged to have been infringed were performed expended by defendant on charitable, religious or educational objects.

The action is for infringement of copyright in two musical works owned by the plaintiff, a company incorporated under the Dominion Companies Act. Plaintiff alleges that an orchestra under contract with the defendant provided music for public dances held by the defendant at premises in Toronto, Ontario, known as Casa Loma, and at a public dance at such place conducted under the auspices of the defendant the orchestra played these two musical works.

S. 17 of the Copyright Act, R.S.C. 1927, c. 32 provides *inter alia* "that no church, college or school and no religious, charitable or fraternal organization shall be held liable to pay any compensation to the owner of any musical work or to any person claiming through him by reason of the public performance of any musical work in furtherance of a religious, educational or charitable object".

Defendant is a service club incorporated without share capital under the Companies Act of the Province of Ontario. Its Letters Patent set forth its purposes and objects *inter alia* as ". . . (*g*) To carry on charitable and relief work of all kinds and to receive and collect gifts and donations for that purpose; . . .".

By an agreement with the Corporation of the City of Toronto for the use and occupation of Casa Loma as a tourist attraction and entertainment centre defendant was obligated to maintain the premises and expend any surplus funds from receipts derived by defendant from its operation "entirely for the benefit of under-privileged, needy and crippled children, other charities and war service work" and in operating the premises "shall do so always with the object of raising money for such children, charities and/or war service work".

Defendant performed fully its obligations entered into under the contract with the City of Toronto and the net revenue earned from the venture was used for no other purposes than those set forth in the agreement.

Held: That "in furtherance of" in s. 17 of the Copyright Act means to advance or to assist or to promote and to come within the exempting proviso it is not necessary that the function at which the musical work is publicly performed should itself be of a religious, educational or charitable nature.

2. That on the date when the musical works, copyright in which is claimed to have been infringed, were performed, they were performed in the furtherance of a charitable object and the entire proceeds of the Casa Loma project, including the proceeds from the dances in question, were expended almost entirely on charitable objects and those not so specifically expended were directed to religious or educational objects.

3. That defendant is a fraternal organization since it is a body of men associated by some common interest not only fraternizing or uniting as brothers but by those activities which have been undertaken they exemplify towards the needy and underprivileged the care and solicitude which one would expect of a brother.

ACTION for infringement of copyright in musical works.

The action was tried before the Honourable Mr. Justice Cameron at Toronto.

H. E. Manning, K.C. and *Jos. A. Falconer* for plaintiff.

Harold G. Fox, K.C. and *G. M. Ferguson* for defendant.

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

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CAMERON J. now (February 2, 1952) delivered the following judgment:

The plaintiff herein is a company incorporated under the Companies Act of the Dominion of Canada, having its head office at Toronto. The evidence establishes that the plaintiff at all material times was the owner of that part of the copyright in the musical works known as "Sleepy Lagoon" and "Summertime" which consists of the sole right to perform the said musical works or any substantial part thereof in public throughout Canada.

The defendant is a corporation incorporated under the Companies Act of the Province of Ontario, also having its head office at Toronto. It has the use and occupation of the premises in Toronto known as "Casa Loma," and in connection with its activities it holds public dances there. Music for the dances was provided by a professional orchestra under contract with the defendant. It is alleged and proven that on December 15 and December 16, 1950, an orchestra under the leadership of Benny Louis, at public dances at Casa Loma played the musical works "Sleepy Lagoon" and "Summertime," respectively, and that the said dances were conducted under the auspices of the defendant. As a result thereof, the plaintiff alleges that the defendant has infringed its copyright in the said works and, among other things, it now claims damages and an injunction.

The right of the plaintiff in the said works falls within section 3(1) of the Copyright Act, R.S.C. 1927, c. 32, as amended:

> For the purposes of this Act, "copyright" means the sole right . . . to perform . . . the work or any substantial part thereof in public; . . . and to authorize any such acts as aforesaid.

By section 17 of the Act as amended:

> 17. Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright:
>
> Provided that the following acts shall not constitute an infringement of copyright:

Then follow seven specified acts which do not constitute infringement, and the following:

> Further provided that no church, college, or school and no religious, charitable or fraternal organization shall be held liable to pay any

compensation to the owner of any musical work or to any person claiming through him by reason of the public performance of any musical work in furtherance of a religious, educational or charitable object.

It is upon this last mentioned proviso that the defendant relies insofar as the infringement proceedings are concerned. It alleges that it is a fraternal and/or charitable organization and that the public performance of the works in question was in furtherance of a charitable object.

It is of some interest to note the history of the legislation in regard to the exemptions provided for organizations of this sort. Such exemption was first provided by section 6 of c. 8, Statutes of 1931, and thereby the following subsection was added to section 17(1) of the Act.

(vii) The performance of any musical work by any church, college or school, or by any religious, charitable or fraternal organization, provided such performance is given without private profit for religious, educational or charitable purposes.

By c. 28, Statutes of 1936, that subsection was repealed and the following substituted therefor:

(vii) The performance of any musical work by any church, college or school, or by any religious, charitable or fraternal organization, provided such performance is given without private profit for religious, educational or charitable purposes; provided, further, that such performance shall be deemed to be given without private profit if the only fees which are paid are paid to individual performers and that no fees or commissions are paid to any promoter, producer or contractor for services in promoting or producing the performance.

By c. 27, Statutes of 1938, the last mentioned subsection was repealed and the "further proviso" as above was added to section 17(1) in the form which I have set out above.

The facts are not seriously in dispute. The defendant is a service club and a member of the well-known "International Kiwanis" Clubs. It was incorporated without share capital in 1932 and the Letters Patent (Ex. 1) set forth its purposes and objects as follows:

(*a*) To give primacy to the human and spiritual rather than to the material values of life; (*b*) To encourage the daily living of the golden rule in all human relationships; (*c*) To promote the adoption and the application of higher social, business and professional standards; (*d*) To develop, by precept and example, a more intelligent, aggressive and serviceable citizenship; (*e*) To provide through Kiwanis Clubs a practical means to form enduring friendships, to render altruistic service and to build better communities; (*f*) To co-operate in creating and maintaining that sound public opinion and high idealism which make possible the increase of righteousness, justice, patriotism and goodwill; (*g*) To carry on charitable and relief work of all kinds and to receive and collect gifts

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and donations for that purpose; (*h*) To raise money by holding or conducting concerts, entertainments, contests and sales; (*i*) To do all such acts and exercise all such powers as may be considered advisable for promoting and advancing the objects for which such Club has been organized; (*j*) To establish, maintain and operate camps, hostels, relief centres and other like institutions; (*k*) To invest and deal with the moneys of the Corporation not immediately required for the purposes of the Corporation in such manner as, from time to time, may be determined; (l) To do all such other things as are incidental or conducive to the attainment of the above objects; and (*m*) For the purposes aforesaid, to acquire the assets of West Toronto Kiwanis Club, an unincorporated association;

In order to carry out its objects and particularly its charitable and relief work (clause (*g*)), funds had to be provided or raised. Someone conceived the idea that the Club might successfully and profitably operate the very large, palatial residence known as "Casa Loma" by charging a fee to tourists and others who might wish to inspect it, and by conducting dances, concerts and the like. The property at that time was in a somewhat dilapidated condition, had been taken over by the Corporation of the City of Toronto for unpaid taxes and was apparently unsaleable. Accordingly, arrangements were entered into with the owner, by which the defendant became entitled to the use and occupation thereof. In the year 1950, the defendant was in possession under an agreement with the City of Toronto, dated January 2, 1942 (Ex. 10), as amended by subsequent agreements, Exhibits 11, 12 and 13. As so amended, the agreement provided for the use and occupation of Casa Loma and the tunnel, stables and grounds used in connection therewith, for a period of twenty-five years from January 1, 1942. The agreement strictly limited the purposes for which the premises could be used, and shortly were as follows: (*a*) to conduct tours of inspection of the premises under the supervision of the Club; (*b*) to operate tearooms and to carry on dancing under the supervision of the Club; persons using the Club for such purposes to pay the regular admission fee, in addition to any other charges prescribed by the Club for such attendance; (*c*) to sell Casa Loma booklets; (*d*) to grant permission to hold bridge parties, teas and picnics, the stated admission fee to be charged to individuals in addition to any other charge; (*e*) to hold all meetings and functions of the Club in the said building and to use the said building for the general purposes of the Club, all without charge to

the persons attending such meetings and/or functions and/or using the said building for such general purposes of the admission fee per person for entry to the said building; (*f*) to hold under the supervision of the Club bazaars, fairs, amusements and musicales without any charge or for a fixed charge; (*g*) to hold under the supervision of the Club broadcasts, meetings, concerts, weddings, exhibitions or other functions without any charge or for a fixed charge.

The Club was required to charge an admission fee of not less than twenty-five cents and not more than fifty cents for all tourists and visitors entering Casa Loma, with somewhat lower charges for children. Those attending the dances paid the regular admission fee, plus an additional charge.

By clause 3, the Club was required to pay to the city annually 25 per cent of the annual gross receipts from the admission fees with the proviso that if the attendance fell below a certain number, the percentage payable to the city would be reduced to not below 15 per cent. By clause 17, as amended, the city was entitled to be paid 15 per cent of the annual gross receipts from fixed charges made in connection with certain specified functions.

Clause 6 provided that the city should be at no expense for preparation of the building, tunnel or stables, or for renovations or repairs or for any other purpose whatsoever. It may be noted here that by reason of the dilapidated condition of the building and by reason of the use to which the building was to be put, the Club necessarily expended certain sums in repairing windows, installing a new furnace, in laying some new floors and in interior decorations, and in supplying new amenities, as well as certain kitchen equipment and furniture.

By clause 7 the Club was required at its own expense to make all repairs to the building, tunnel and stables and pay for all maintenance thereof, including therein water, sanitary facilities, heat and lighting. By clause 10 the Club was required to keep the lawns and gardens in an attractive condition and to keep the buildings clean and in good order. By the amendment of July 6, 1943 (Ex. 11), the city undertook the costs of repairs to and the renovation of the exterior masonry work of the buildings and stables, the Club undertaking to erect and maintain fences necessary for public safety.

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The most important part of that agreement, so far as this case is concerned, is clause 5, which has remained unchanged since January 2, 1942. It is as follows:

> 5. That the annual gross receipts derived by the Club from the total operation of the Premises less the percentage to be paid to the City as above and hereinafter provided and less the costs to the Club for necessary repairs, improvements, equipment, actual maintenance, supervision and management of the Premises shall be used and expended by the Club entirely for the benefit of under-privileged, needy and crippled children, other charities and war service work and for no other purpose whatsoever and that the Club in using and operating the Premises for the purposes set forth in paragraph number one hereof shall do so always with the object of raising money for such children, charities and/or war service work.

In accordance with the agreements, the defendant operated this project—and it had many others—by a special group of its members called the "Casa Loma Committee." The Committee employed and paid a full-time manager, guides, and other necessary help. Its main revenue therefrom was derived from the admission fees charged to tourists and others. Over a period of years it conducted dances to which the public were invited and at which the music was provided by a paid orchestra. All the income and expenditures in connection with the project were handled by the Committee and after payment of all the expenses and the percentage due the City of Toronto, the amount remaining was paid into a special trust fund. It was out of the latter that the charitable disbursements were made. In any year when the full amount of income in the special trust fund was not used, it was accumulated as a reserve.

Ex. 15 is the audited statement of the defendant's affairs for the year ending December 31, 1950. The Casa Loma income and expenditures are shown at p. 6. The total income was $180,890.72, of which $73,994.15 was from "General gate admission," and $36,253.60 was from "Dance revenue." The residue is made up of smaller amounts from sales of refreshments, tobacco and souvenirs, and of revenue from "checking, guides, luncheon catering and miscellaneous items." The expenditures show that $19,596.33 was paid to the City of Toronto, $25,358.42 was paid out for orchestras and entertainment; and after allowing for the stated amounts for costs of items which were

sold, and for catering, wages, operating expenses, advertising and publicity and administrative expense, the year's operation showed an excess of income over expenditure of $43,887.62.

P. 5 of Ex. 15 provides the details of the income and expenditures of the Casa Loma trust fund. To the $43,887.62 derived from the year's operations there were added "interest earned" of $3,901.37 and sundry income of $97.48 —a total of $47,916.47. The item of "earned income" is derived from investments in bonds of a total face value of $130,000 (p. 4) and called the "trust fund," these investments being made up almost entirely of accumulations of unexpended net revenue from the Casa Loma project over a number of years. The details of the expenditure from the trust fund are shown on p. 5 and will be referred to later. For the year, all the income was expended except $1,719.23. The trust fund account is operated quite separately from the general funds of the defendant and no part of the income from the former is transferred to the latter except one item of $1,500 which will be referred to later.

On this set of facts, two questions must be answered: (1) Were the dances conducted at Casa Loma under the supervision of the Club on December 15 and December 16, 1950, and at which "Summertime" and "Sleepy Lagoon" were performed by the paid orchestra in public, so conducted in furtherance of a charitable object? and (2) Was the defendant at the time a charitable or fraternal organization? It is only if both these questions are answered in the affirmative that the defendant can be relieved of the charge of infringement.

In the sense in which it is here used, I interpret the phrase "in furtherance of" to be equivalent to "to advance," or "to assist," or "to promote." To come within the exempting proviso, it is not necessary that the function at which the musical work is publicly performed should itself be of a religious, educational or charitable nature. It is sufficient if it be held in furtherance of or to promote, advance or assist in any one of these objects. By its agreement with the city, the defendant was required to use its net revenue entirely for the benefit of underprivileged children, needy, and crippled children, other charities and

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war service work. In the year 1950 there was, of course, no "war service work," and the other specified uses were undoubtedly charitable objects. I think it can be inferred that the city was quite satisfied that the defendant had lived up to its agreement in every detail inasmuch as it has not sought to take advantage of clause 18 of the agreement which provides for termination thereof upon breach by the defendant of any of its covenants. The declared aim or object of the Casa Loma project was to secure funds for the charitable purposes mentioned, and it was so limited in the agreement, and one of the Club officers who was a party to the arrangements entered into with the City of Toronto stated that such object constituted the sole motive of the defendant in embarking on the project. An examination of the use to which the net revenue was put satisfies me that that object was fully carried out and the net revenue used for no other purposes.

In 1950, the net income from the Casa Loma operations of that year, available for the use of the Committee, was approximately 25 per cent of the total income (p. 6 of Ex. 15). I do not think it necessary to consider in detail the expenditures listed on that page and which, as to operating expenses and administrative expenses, are detailed on p. 7. It is sufficient to say that after examining them in the light of the evidence adduced, I am satisfied that they were all properly incurred in connection with the project itself and were necessarily disbursed either to meet the requirements of the agreement with the city, or directly in connection with the operation of the project. The payment to the city was, of course, in the nature of a rental. The mere fact that salaries and wages were paid to the employees or to the members of the orchestra is here of no concern. The phrases, "without private profit," or "without motive of gain" do not appear in the "further proviso" now under consideration as they did or do appear in other parts of section 17(1). In the opinion of the accountant of the defendant corporation, they were all properly chargeable to the operation itself.

Moreover, none of the moneys so expended were paid to the defendant (save as to one item which I shall presently mention) or to any of its members. It is contended, however, that the defendant and some of the members did

receive some indirect benefits from the agreements. It is true that for a few years the weekly luncheons of the Club, and the Committee meetings, were held at Casa Loma and that no rental was charged therefor. The members paid for their meals, however, and I gather from the evidence that the luncheons and committee meetings took place there so as to further the interests of the members in the main project carried on by the defendant. It is true, also, that by the agreement members of the defendant club could enter the building without payment of the admission fee, that they and their wives and children, with escorts, could attend the dances free of charge. But these privileges were used very rarely; when members attended the dances —there may have been six or seven on occasions—they ordinarily did so to supervise what was going on as they were required to do by the agreement. These matters are of such minor importance that in my opinion they do not in any way affect the question as to whether or not the public performances were in furtherance of a charitable object.

I turn now to a consideration of the manner in which the net income was disbursed and which, in my opinion, will be helpful in determining not only whether the musical works were performed in furtherance of a religious, educational or charitable object, but also whether the defendant was a fraternal or charitable organization. The details are shown on p. 5 of Ex. 15 and were further elaborated in evidence.

Administrative costs are shown at $1,500. It is explained that this is an annual charge made to the fund and which year in and year out approximates the proportion of the overall administrative costs, which is referable to the Casa Loma project and the trust fund. The assistant secretary's salary of $1,970 is not her full salary but that proportion thereof which fairly represents the proportion of her time which is spent on the project and the trust fund, and it is shown that but a very small part of her time is occupied with the general work of the Club. I see no reason to question these items as properly chargeable to the costs of operation of the project and the trust fund. Contingent liability insurance of $22.08 and unemployment insurance of $22.92, and sundries of $445 are also referable to the project.

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Under the heading of "Underprivileged Children," $3,290.21 was expended for children's aid and Christmas baskets to assist poor children, one of the defendant's committees having ascertained the names of needy children and families from the Neighbourhood Workers' Association, personally investigated each case and supplied free of charge such things as food, clothing, wheel chairs and orthopoedic shoes, the work and distribution thereof being done voluntarily by the committee. For "National Kids' Day," the expenditure was $231.51; it was made for such things as entertainment and refreshments for the sick and crippled children in hospital, and for games for young children of the same sort as are provided by the Y.M.C.A. Under the heading of "Boys' Work," $737.89 was expended on equipment and entertainment for boy scouts in need of assistance; and $50 on youths' probation. The latter amount was given to certain officials of the Juvenile Court to assist in the rehabilitation of poor and needy first offenders.

On "Girls' Work" $4,868.01 was expended. The greatest part was used for underprivileged girls, sixty-two girls having been sent to the summer camp sponsored by the Y.W.C.A., and twenty-three girls to Bolton Camp. Sports equipment was purchased and provided free of charge, and in addition to the sports activities educational classes were held in dramatics, dancing and music.

The defendant operated a summer camp called "Camp Westowanis" to which are sent underprivileged boys and girls. A revenue of $1,716.81 was received from those who could pay part or all of the expenses, but the Club expended a net amount of $3,781.77 in connection with its operation. All the disbursements I have so far referred to would seem to fall within the category of a "charitable object" except the instructions in sports, dramatics, dancing and music, which are of an educational nature.

$1,286.40 was paid out under the heading of "Agriculture." In conjunction with the Ontario Agricultural Representative of the County of Peel, the Club sponsored work of an educational character among junior farmers in the district. To encourage them to be better farmers, they sponsored calf clubs, potato clubs, grain clubs, gardening and cooking activities, and gave prizes therefor and an

annual banquet to the Junior Farmers' Association. A substantial number of trees were planted with the assistance of the Club members to encourage the interest of the young farmers in reforestation, but very little cash was actually laid out on that project.

Under the heading of "Vocational Guidance," $1,251.86 was expended. In this work the Club's committee worked closely with the principals of seven collegiate institutes in West Toronto. Twenty-four special night courses were conducted by it at the Technical School. On the recommendation of the principals, four students received financial assistance to enable them to finish courses which they would otherwise have had to discontinue. The vice-chairman of the committee spent time every evening throughout the winter in conducting these classes. Scholarships of $25 each were given for vocational guidance papers on the recommendation of the principal. Expert advice was received from the Social Service Department of the University of Toronto and books on vocational guidance were purchased and supplied gratis to the libraries of the collegiates. All this work is of an educational character as is the item of $705.55 for "school proficiency awards" expended on the recommendation of the school principals involved.

For the "Key Club" $267.33 was expended. It was to assist in the operations of a group of High School students having similar aims as the Kiwanis Club itself.

Under the heading of "Public Affairs" $608.62 was paid out. In co-operation with other clubs, the defendant participated in a province-wide courtesy and safe driving campaign. Contributions in money or kind were made to aged people's homes and to hospitals, and busses were provided for disabled veterans. Such expenditures, I think, would be of an educational or charitable nature. Then follows an expenditure of $1,293.28 on "Spiritual Aims," and on the evidence of Mr. Oaten it is clear that the amount so disbursed was in furtherance of a religious object. $1,000 of that sum was expended to assist in the furnishing of a church in need of assistance.

One of the main concerns of the defendant was to assist in the operation of the High Park Y.M.C.A. which it constructed at a cost of some $30,000 and turned over to the

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"Y" for one dollar, some years ago. In 1950, it expended $7,789 in support of that work, the largest part of which was in sponsoring the Ki-Y sports supervised by the Y.M.C.A. Practically all the necessary sports equipment was provided, as well as other costs of operation and in these activities 24,000 boys participated. In connection with the Y.M.C.A. itself, $560 was expended for necessary decorations and $402.49 was charged to depreciation for the building itself. In addition, $2,900.50 was expended on the George Syme project which is entirely carried out by the defendant. It is a scheme to organize and supervise the sports activities of a very large number of young people in a depressed area and to keep them off the streets. Of the total amount, $2,400 was used in payment of the salary of a Y.M.C.A. supervisor working exclusively on that scheme, and the balance was for necessary sports equipment. On the evidence, I am satisfied that these outlays related exclusively to charitable objects.

$100 was expended on the Kiwanis Music Festival conducted by all the Kiwanis Clubs in the city. Competitions are held in all fields of music and the amount contributed was used to provide two small scholarships, presumably to assist in the further musical education of the successful competitors. Under the heading of "Music Appreciation," $487.05 was paid out to renovate musical instruments which the members of the defendant club collected, and these were then turned over to be used by musical students who could not afford to purchase them. These two items, I think, are of an educational nature.

"Sundry Projects" accounted for $11,434.98. This included donations to such organizations as the St. John's Ambulance Society, Canadian Red Cross, Canadian National Institute for the Blind, Winnipeg Flood Relief ($2,500), the Queen Elizabeth Hospital and the Humber Memorial Hospital, Toronto Community Chest ($1,500), the Y.M.C.A. World Service ($1,500), the United Nations Children's Relief Fund, the Boy Scouts ($1,000), the Red Shield Appeal of the Salvation Army, the John Howard Society to assist in the rehabilitation of released prisoners, Dr. Barnardo's Home, a grant of $25 to assist a needy girl injured in a fire and to assist her to become self-supporting. All these expenditures are clearly of a charitable nature.

In addition, a small sum ($10) was paid for a membership in the Art Gallery of Toronto, and other small sums were expended for films to show the activities of the Club among underprivileged children and to advertise the Casa Loma project so as to secure more revenue therefrom. The "Sundry Projects" also include an item of $2,250 paid to the Neighbourhood Workers' Association to assist it in the operation of Bolton Camp—a charitable project. This particular disbursement was made to enable the Association to procure additional ground for its camp area. Finally, there is an item of $180 for emergency relief which is made up of small contributions to assist distressed persons whose homes had been destroyed, or the like.

The sole purpose of the defendant Club in carrying on the Casa Loma project was to raise funds for the purpose of carrying on its charitable activities; by its agreement with the city the proceeds could not be used for any other purpose; the dances were held as part of the general project to raise funds for the same purpose, and the musical works referred to were publicly performed at those dances. On the evidence, I have no hesitation in reaching the conclusion that on December 15 and 16, 1950, when the musical works were so performed, they were so performed in the furtherance of a charitable object, and that the proceeds of the whole Casa Loma project in 1950 (including the proceeds from the dances in question) were expended almost entirely on charitable objects. The few that were not specifically directed to charitable objects were directed to religious or educational objects.

If, for example, a local branch of the Red Cross Society—which I think would undoubtedly fall within the category of "charitable organization"—decided to raise funds with which to further its work by conducting a public dance at which the orchestra played copyrighted musical works: and if in connection therewith it paid the orchestra, hall rent and other necessary outgoings, and devoted the net proceeds to its ordinary work—then, I think that the public performance of such musical works would be in furtherance of a charitable object. Essentially, the position here is the same and I can see no difference between the object of the Red Cross Society in so doing and the object of the defendant in conducting its dances for the purposes I have set out.

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I find, therefore, that the first question must be answered in the affirmative.

I have not overlooked the argument of counsel for the respondent regarding the sum of $130,000 shown as investments in the "trust funds," which as I have said is made up very largely of sums accumulated over the years from the Casa Loma project and not used in the year in which they were received. It is suggested that under the contract with the City of Toronto, the full amount of the profits from the project should have been expended annually on charitable objects and that it is possible that the defendant may direct part or all of this accumulated fund to non-charitable objects. As I read the contract, there is no requirement that the annual profits must be spent on charitable objects in the year in which they are earned. Nevertheless, they are bound to be so expended in time and there is little doubt that they will be so used. They are held "in trust" and while there is no specific declaration of trust, the term no doubt refers to the obligation of the defendant to the City of Toronto to use the fund for the specified purposes only. It has not been shown that they have at any time been used for other purposes. I have no doubt whatever that the surplus was built up so that the defendant would have funds on hand to continue its charitable objects in years in which its operating income might be less than it needed to carry on its charitable work.

But, for the relevant year (1950), as I have shown, the defendant expended on such purposes more than its net profits from that year's operations. In *Commissioners of Inland Revenue* v. *Yorkshire Agricultural Society*, (1) Atkin, L.J., in considering whether the Society was established for charitable purposes only, emphasized the necessity of viewing the situation at the relevant time (the taxation year in question) and at p. 632 ff said:

> It was said, this is a voluntary Society, there are no rules and by-laws limiting its activities, and therefore at any moment it may devote its funds to a non-charitable purpose. It might, it is said, distribute its funds amongst its members or in relief of its members and that would not be a charitable purpose, and therefore it is to be deemed to be not a Society formed for a charitable purpose. I think, with respect, that that is a non sequitur. The question you have to consider is whether at the relevant time you are dealing with the income of a society established

(1) (1928) 1 K.B. 611.

for charitable purposes only, and in respect of that income also you have to consider whether the income is applied in fact to charitable purposes only . . . But if it does so (i.e., by adding objects which are non-charitable), then it appears to me that the Society will cease to be a society established for a charitable purpose, and its funds will presumably not be devoted to charitable purposes only. But until it does so it appears to me that the question is the same, whether it was established for a charitable purpose and whether it is still operating in that sphere.

I turn now to the second question as to whether, as alleged, the defendant is a fraternal organization. I note at once that the exemption is applicable to a church, college, school, and to a religious, charitable and fraternal organization. A "fraternal organization" is not defined, but if it is to be judged by its associates, it would seem to be an organization which in some way is devoted to public service and which endeavours in one way or another to bring about better conditions in those fields which are generally recognized as being for the public good. It seems to me that Parliament, while recognizing the rights of owners of musical works, desired to cut down those rights in a limited way by lessening the costs of the public performance of musical works where the performance was in furtherance of a religious, educational or charitable object, thereby possibly increasing the amount of money which would be available to carry out such objects. To limit the obvious difficulties which would be encountered in determining whether the performance was in furtherance of a religious, educational or charitable object, the exemption was made applicable to the named organizations only, which, by their very nature, might be assumed to have such objects, or one or more of them, as their main object. If that were the sole test, then on the evidence I would find that the defendant is a fraternal organization.

In the Shorter Oxford English Dictionary, 3rd Ed., I find the following definitions:

"Fraternal"—Of or pertaining to brothers or a brother; brotherhood.

"Fraternity"—A body of men associated by some common interest; a company—guild.

"Fraternization"—The action of fraternizing or uniting as brothers, *fraternal association.*

As I have said, the defendant is a service club, a member of the well-known "International Kiwanis" Club, and was first organized in 1921. It has a membership of about 110 men, all carefully selected because of their interest in

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the aims and objects of the Club itself. Weekly luncheons are held and there is usually a speaker who may address the members on matters of wide interest or on the work being carried out by the Club itself.

The work of the Club is carried out by its various committees, composed of members of the Club. Under "Club Administration" it has the following committees: Kiwanis Education, Membership, Public Relations, Records, Financial; and under the heading "Club Meetings" the following: Program and Entertainment, Inter-Club Relations and Advisory Board.

There are two main groups of committees carrying out the objects of the Club, namely: "Youth Service" and "Community Service." Under the former there are the following committees dealing with underprivileged children —Children's Aid and Youth Probation, Vocational Guidance and Proficiency Awards, Boys' Work (including Boy Scouts and Cubs), Girls' Work, Camp, Y.M.C.A. (High Park Branch, Perth-Royce Branch, and George Syme Branch).

Under "Community Service" there are the following committees: Agriculture and Horticulture, Business Standards and Public Affairs, Support of Churches in their spiritual aims, Music Appreciation and Kiwanis Music Festival, and Casa Loma.

Under the heading "Special Committees" there are: Club Extension and Emergency Committees.

It seems to me that the general aims and objects of the Club are concisely stated in clauses (*e*) and (*g*) of the "Purposes and Objects" set forth in the Letters Patent, as follows:

> (*e*) To provide through Kiwanis Clubs a practical means to form enduring friendships, to render altruistic service and to build better communities;
>
> (*g*) To carry on charitable and relief work of all kinds and to receive and collect gifts and donations for that purpose.

"Enduring friendships" are created and stimulated by membership in the Club, by regular attendance at the luncheons, by participation in the work of the various committees, and by upholding and practising together the "objects of Kiwanis" (set forth on the opening page of Ex. A). While it may be described as a "luncheon club,"

the luncheon is by no means an end in itself. It is merely a means of bringing the members together so that their interest in the main objects of the Club may be fostered and increased. Each member takes an active interest in the welfare work carried on by the Club, not only by attending the luncheons and committee meetings, but in rendering actual assistance in the projects themselves—the Y.M.C.A., the summer camps for underprivileged children, vocational guidance, and the other activities I have mentioned. The evidence establishes to my complete satisfaction that the defendant is a body of men associated by some common interest and is therefore a fraternal organization. Its members not only fraternize or unite as brothers, but by those activities which I have mentioned they exemplify towards the needy and underprivileged the care and solicitude which one would expect of a brother.

My conclusion, therefore, is that the defendant is a fraternal organization and it therefore becomes unnecessary to consider whether it is also a charitable organization, although there is much to indicate that in the Casa Loma project its aims and objects were entirely charitable, using that word in its broad sense. The defendant has brought itself within the exemption and the plaintiff's claim for infringement and for ancillary relief based on infringement must fail.

One other matter may be referred to. The plaintiff led evidence to indicate that for some two or three years prior to 1950 it had issued an annual license to the defendant for orchestra music at Casa Loma, and that the defendant had paid the annual charges in respect thereof. It was submitted in argument that thereby the defendant had impliedly recognized the rights of the plaintiff and that it was therefore liable to continue the payment of the licence fee for 1950. The evidence did not establish that any contract had been entered into by the defendant by which it was bound to pay any sum to the defendant for the year 1950, and this claim also fails.

The plaintiff's action will therefore be dismissed with costs to be taxed.

Judgment accordingly.

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Sept. 10, 11, 12, 13, 14, 17, 18 & 19.

1952

Jan. 23

BETWEEN:

JAMES RAMSAY and ARTHUR PENNO ..... } SUPPLIANTS;

AND

HIS MAJESTY THE KING .....RESPONDENT.

Crown—Petition of Right—Claim for damage caused by flooding of lands as the result of construction and operation of dams on the Souris River by the Crown—No negligence in construction of dams—Transfer of ownership of dams—No liability on Crown for maintenance and operation of dams after transfer of ownership to Province of Manitoba —Petition dismissed.

Suppliants claim damages from the Crown (1) because their lands were flooded as the result of the construction by the Crown of certain dams on the Souris River in Manitoba, alleging that such dams were improperly, unskilfully, carelessly or negligently constructed and (2) because of the improper, careless and negligent supervision and operation of such dams by the agents and servants of the Crown.

Held: That engineers are expected to be possessed of reasonably competent skill in the exercise of their particular calling and the most that can be expected of them is the exercise of reasonable care and prudence in the light of scientific knowledge at the time, of which they should be aware.

2. That the engineers responsible in any way for the construction of the dam or dams in question were competent in their profession and exercised all reasonable care and prudence after ascertaining and investigating all available material factors appertaining to the river, surrounding country and watershed and the action fails on the allegation of negligence in design and construction of the dams.

3. That the respondent cannot be held liable for damage suffered through supervision and operation of the dams subsequent to April 1, 1945, the date on which ownership of all the dams was transferred to and taken over by the Government of the Province of Manitoba from respondent and were thereafter under the sole control, operation and supervision of officials of that Province. *Lessard* v. *Hull Electric Company* (1947) S.C.R. 22.

PETITION OF RIGHT to recover damages from the Crown for loss sustained by suppliants allegedly due to the negligence of respondent in the construction and operation of dams on the Souris River in Manitoba.

The action was tried before the Honourable Mr. Justice Hyndman, Deputy Judge of the Court, at Winnipeg.

W. P. Fillmore, K.C. and *C. W. Fillmore* for suppliants.

M. J. Finkelstein, K.C. and *K. E. Eaton* for respondent.

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

HYNDMAN D.J. now (January 23, 1952) delivered the following judgment:

By Petition of Right, for which fiat was granted, and filed the 30th August, 1950, suppliants, James Ramsay, claimed to be the owner, and Arthur Penno, the lessee, of all of section 9 in township 5, range 25, west of the principal meridian north of the Souris river, of which 100 acres were under crop cultivation and 54 acres used for hay; and the southwest quarter of section 16 in the said township 5, excepting thereout the right-of-way of the Canadian Pacific Railway, of which 130 acres are under crop cultivation and 24 acres used for hay; which lands are adjacent to the said Souris river.

The Souris river rises in the province of Saskatchewan, follows a course through North Dakota, and thence through the province of Manitoba, and empties into the Assinniboine river.

Suppliants allege that in or about the year 1941, or prior thereto, His Majesty caused to be constructed, without the consent or permission of the suppliants, four dams or dykes at various points on the said river, in the province of Manitoba, one of them situate on section 16 in township 6, range 23, known as the Hartney; another situate on said section 9, known as the Napinka or Stewart dam; one on section 8, township 4, range 26, known as the Ross dam, and one on the northeast of section 33, township 2, range 27, known as the Snider dam; all for the purpose of impeding the waters of said river, or of stopping its natural flow, or raising the level there-in and above such dams, and/or, as it passed through certain of the lands above referred to.

It is claimed that such dams were improperly, unskilfully, carelessly or negligently constructed by His Majesty, as follows:

(*a*) Said dams were of improper design and not fit to perform the function for which they were intended.

(*b*) Were constructed in a manner to narrow natural bed of the river and so as to prevent the free passage along the surface of the said river, of trees and other floating material and so as to cause an obstruction to the ordinary flow in a manner which stopped and gathered debris and prevented it from passing such dam and which caused the said waters to rise above its natural course and flow into the lands of the suppliants.

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(c) Were not of sufficient dimensions to accommodate the natural flow of the waters and forced such water from its natural course on to the lands of the suppliants.

(d) The Hartney dam, which is situate downstream from suppliants' lands, and the Napinka dam, which is adjacent to suppliants' lands, are on a higher level than the lands of the suppliants and were so constructed as to cause water, held back by the dam, to overflow its banks and to flow onto the lands of the suppliants and with no natural flow or outlet to the same, and to remain upon the said lands.

(e) Insufficient or no protection is afforded to prevent the waters of said river, raised by the said dams, from flooding over the banks of said river onto the said lands.

(f) No proper or adequate re-propping with rock was placed on the running water side of said dam.

(g) Sufficient space was not provided between the pillars used in construction of said dam to permit debris to pass over the dams, and,

(h) No proper method was used in the construction of the said dams to properly control the use thereof or the flow of water likely to be impeded thereby.

That as a result of the improper construction of the said dams, water rose above the natural or man-made banks of said river, and flooded valuable portions of agricultural and pasture lands and prevented suppliants from sowing, tilling or harvesting crops or using said lands in each of the years, 1942 to 1949, inclusive.

Furthermore, as a result of the said improper construction, and because of the water of said river overflowing, as aforesaid, the said water was not able to return or enter the river channel, but remained upon suppliants' land, and prevented them from sowing and harvesting crops therefrom, or, if sown, from harvesting the same, or tilling, or otherwise using the lands in proper season, and it is alleged that the suppliants would continue to suffer damage by reason of said flooding, and the lands materially depreciated in value.

It is also claimed that the said dams were improperly, carelessly and negligently supervised and operated by the agents or servants of His Majesty, in that logs placed in the said dams, to hold back the flow of water in the dry months of the year, were permitted to remain in the said dams when the spring floods were rising, and, in consequence, the lands were flooded, and suppliants were prevented from sowing and harvesting any crops therefrom during the years 1942 to 1949 inclusive, and in consequence, the suppliants have suffered damage thereby.

It is also alleged that the said works are of no possible benefit to suppliants but, on the contrary, have materially depreciated said lands, which is rich, river-bottom land, capable of producing heavy crops of wheat.

At the opening of the trial, Counsel for the Crown, moved that clauses 3, 5, 6 and the words "construction or" in the first line of paragraph 7 of the Petition, and the words "construction or" on the seventh line of paragraph 7, be struck out, on the ground that the same do not disclose any cause of action against the respondent within the jurisdiction of the Exchequer Court, which entitles the suppliants to the relief sought, inasmuch as suppliants failed to allege that the damage resulted from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, and cited the case of *Rawn* v. *The King,* (1), and *Ruffy-Arnell and Baumann Aviation Company Limited* v. *The King,* (2).

Mr. Fillmore, counsel for the suppliants, whilst contending that the omitted words were unnecessary, moved to amend the petition by adding such words. This was objected to by Crown counsel, on the ground that a Petition of Right for which a fiat had been granted, could not be amended in the absence of a new fiat. Undoubtedly, where a fresh cause of action would be the result of such an amendment, it should not be allowed without a new fiat. See dicta of the President of this Court in *Rawn* v. *The King*, above, (*supra*) and of McCardie, J. in *Ruffy-Arnell and Baumann Aviation Co. Ltd.* v. *The King* (*supra*). It is argued that by implication, these words should be considered as included in the pleading, but of this I am doubtful. However, with considerable doubt, as no new cause of action is alleged, other than that set out in the petition, I am inclined to allow such amendment. Since the amendment to the Petition of Right Act of 1951, there could be no objection to allowing such amendment. I propose, therefore, to deal with the case on the assumption that the pleadings are in order and valid.

During the course of the trial, counsel for the petitioners abandoned any claim for damages for the years 1942, 1943, 1944, by reason of the Statutes of Limitations, and the years 1946 and 1949, leaving for consideration only

(1) (1948) 4 D.L.R. 412. (2) (1922) 1 K.B. 599.

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the years 1945, 1947 and 1948, the amount of damages claimed for these years being $5,650; $5,650 and $5,650 respectively.

The respondent denied all material allegations of negligence in the petition and, in addition, pleaded that the respondent did not and does not maintain or operate the said dams; and that if said lands were flooded, such flooding was due to the low-lying nature of said lands which are "river bottom lands," and designated as marsh lands in the original survey of 1880; and that the extent and overflow of the waters of the Souris river depend entirely upon the extent, periodicity, and the rate of precipitation in the whole watershed of the river; and such flooding was caused by extraordinary rainfalls and floods in the said watershed.

The dams in question were constructed under the authority of the Prairie Farms Rehabilitation Act, being ch. 23, 25-26 Geo. V. (1935). The Act provided in section 3(1) that the Governor in Council may establish a committee to be known as the Prairie Farm Rehabilitation Advisory Committee, the members of which were to hold office during pleasure and said Committee consisting of representatives of various organizations in Manitoba, Saskatchewan and Alberta. Section 4 of the Act reads:

> 4. The Committee shall consider and advise the Minister as to the best methods to be adopted to secure the rehabilitation of the drought and soil drifting areas in the Provinces of Manitoba, Saskatchewan and Alberta and to develop and promote within those areas systems of farm practice, tree culture and *water supply* that will afford greater economic security and to make such representations thereon to the Minister as the Committee may deem expedient.

The evidence discloses that farmers in the area depend largely on the river for water for their animals. In the so-called "dry years," the river in many places completely dried up, it being possible to walk across it, so that there would be no water available for livestock. Consequently, petitions from farmers and municipalities were forwarded to the Government of Canada, asking for the building of dams to hold and control the water of the river against the dry periods.

In consequence of these petitions, it was decided by the Government of Canada, that the dams hereinbefore mentioned should be constructed under the authority of the said Act.

The only expert witness for suppliants was Mr. Laughlin McLean, a professional engineer, graduate of McGill University in 1909 in civil engineering, with honours in electrical engineering; prior to graduation worked on the Grand Trunk Railway in Quebec and New Brunswick; the Canadian Pacific Railway in Maine and New Brunswick; and on Detroit River, Chaudiere Falls and other places; was Deputy Minister of Public Works in Manitoba from 1922 to 1927, and at present is superintendent and engineer for Greater Winnipeg Sanitary District. He is therefore an engineer of wide experience and to whose evidence I give every consideration.

The gist of Mr. McLean's criticism of the dam is that it is "old fashioned" and he prefers a solid or weir dam. In 1947, he concluded that the dam caused the flooding of suppliants' land.

As opposed to Mr. McLean's opinion is the evidence of Messrs. Russell, Attwood and McKenzie, all engineers, with wide and varied experience.

Benjamin Russell is a civil engineer, graduated in 1909 from McGill University. He worked in Cranbrook in 1909; was City Engineer for Lethbridge for a year then worked with the Canadian Pacific Railway from 1911 to 1933; was in charge at Calgary of the Irrigation Branch for the Dominion Government, and in charge of reservoir services; was then engaged with Calgary Power Company from 1935 to 1944; was Chief Engineer under the P.F.R.A.; then Director of Water Courses for the province of Alberta, and chairman of the Water Power Commission; also secretary of the Irrigation and Drainage Council—which latter position he still occupies.

Mr. Russell testified that in his official capacity, he signed the plan or design of the "Napinka" dam, which was approved by the appropriate authorities; that he had had complete surveys made of the Souris Valley, with a close study of water supply all along the river, and used all available material and official records; also that he visited the places once or twice with McKenzie and consulted all persons with any information with regard to the river and surrounding country.

As the result of these enquiries, consultations and researches, with the concurrence of the other interested

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engineers, the design of the dam, later constructed, was considered the most suitable for the purpose for which it was intended.

Charles Hartley Attwood is a civil engineer, graduate of Queen's University 1911. In 1911 and 1912 was assistant on Bow River Investigation for the Department of Interior, Ottawa; from 1913 to 1919 was district engineer of the Dominion Water and Power Branch in Alberta; in 1919 was district chief engineer, Dominion Water and Power Branch for Manitoba dealing with collection of stream flow data; was supervising engineer for the Dominion Government at Great Falls on the Winnipeg river; in 1925 was engaged in connection with questions pertaining to Lake of the Woods; and in 1929 and 1930 at Seven Sisters' Falls; in 1930 to 1937 was Deputy Minister of Mines and Resources for Manitoba; and from 1937 to 1949, Director for Water Resources for Manitoba. He retired in 1949.

Prior to the construction of the dam and whilst he was Deputy Minister of Mines and Resources for Manitoba, he carefully considered the question of design for the "Napinka" dam, and concluded that the one subsequently built was the most desirable, and all the other engineers concerned with the matter, including Dagg, Russell and McKenzie, shared his opinion. He testified that of the thirteen other dams in the province, ten of them are of the same design and have been entirely satisfactory. He testified that the overflow dam, spoken of by Mr. McLean, was considered and rejected, as in his opinion, it would tend to dam the river worse than anything that could be expected from the one decided upon.

Gordon Leslie McKenzie is a civil engineer, graduate of Queen's University; member of the Engineering Institute of Canada; registered Professional Engineer of Saskatchewan and a Dominion Land Surveyor. In 1934, he worked on the South Saskatchewan and North Saskatchewan rivers for the Department of Public Works, Ottawa. In 1937, he joined the staff of the P.F.R.A. as district engineer and was official engineer in charge of design. In 1945, he succeeded Russell as chief engineer, which position he now holds. He is presently in charge of flood relief on the Red river. In 1949, was a delegate

to the United Nations meeting in connection with conservation of resources. He is also on three international boards under the International Joint Commission.

He testified that the "Napinka" dam was designed by a staff under his direction; that he visted the "locus" several times in 1937; that the river bed was dry in several spots, and he was able to walk across it; examined all available data over many years including that of floods and precipitation. He disagreed with McLean's idea of an overflow or weir dam which he regarded as hazardous in case of floods. In general, his opinion as to the desirability of the dam coincides with that of Russell and Attwood with whom he collaborated. He also testified that several other dams of the same design had been constructed in other localities and have proved entirely satisfactory.

I am satisfied that all reasonable investigations and considerations were given to all material factors with regard to the project prior to the type of dam decided upon.

A good deal was said about the accumulation of brush at the dam as being something that should have been anticipated, but in view of the fact that no trouble in that regard had occurred previously in other dams, I do not consider that any negligence can be imputed on that score. At any rate, on the evidence, I do not believe the presence of brush at the dam had any appreciable effect on the run-off or flow of water.

As above mentioned, the dam was reconstructed in 1948, by removing every second pier, thus widening the spaces between the piers and also raising the "catwalk" some 6 feet. A possible inference from this fact might be that the original dam was defective, and imputed as evidence of negligence on the part of the engineers who originally designed it. However, I am of opinion, that no such inference should be drawn, but that on account of some of the complaints of farmers who believed that accumulation of brush was a cause of flooding, it was more or less a gesture to satisfy their complaints. The fact is that after this change was made, in the year 1949, there was a flood as great as any before, which, in itself, is some, if not strong evidence that the original structure was not the cause of former floods.

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Whether or not there was negligence in regard to design and construction of the dam is a question of fact. Engineers are expected to be possessed of reasonably competent skill in the exercise of their particular calling, but not infallible, nor is perfection expected, and the most that can be required of them is the exercise of reasonable care and prudence in the light of scientific knowledge at the time, of which they should be aware. Every one of the engineers responsible in any way for this project is a man of good education, and I think, can be said to be competent, and even eminent, in his profession, with long experience in cognate matters. I have no hesitation in finding on the evidence that they exercised all reasonable care and prudence after ascertaining and investigating all available material factors appertaining to the river, surrounding country, and watershed. So far therefore as negligence in design and construction is concerned, the action fails.

In addition to the allegation of negligence in design and construction of the "Napinka" dam, as hereinbefore stated, there is the further claim that the dam was improperly, carelessly and negligently supervised and operated by the agents and servants of His Majesty, in that stop-logs were not removed at or before the period of floods, or run-off in the valley, and that debris was allowed to accumulate and was not removed, thus impeding the natural flow of the water.

As any claim for damages for the years preceding 1945 and the years 1946 and 1949 was abandoned, as far as this branch of the claim is concerned, it is necessary to consider only the years 1945, 1947 and 1948.

Evidence adduced by suppliants with regard to removal or non-removal of logs, and the effect of debris was to say the least, vague and uncertain. On the other hand, the witness, Mrs. James Stewart, gave convincing evidence that prior to the first of April, 1945, all stop-logs were removed; and in February and March 1947, at least 30. Mrs. Stewart's particular duty was to visit the dam every day, read the gauge, and at the end of every week, report the gauge readings to the Water Resources Branch, Department of Mines and Resources of Manitoba at Winnipeg, and including any remarks with reference to stop-logs,

condition of the river, and rainfall, et cetera. These weekly cards, for the years 1945 and 1947, were produced and filed as exhibits T and U.

From a study of the cards, together with Mrs. Stewart's evidence, and data in the official government reports, I am clearly of the opinion that there was in fact no flood in the year 1945 and that witnesses for the suppliants in that regard were mistaken.

It is also in evidence that in June 1945, as well as in 1947, rainfall was above normal in the valley and, in my opinion, it was the rain and seepage from the higher ground, lodging on this low-lying land that brought about the condition complained of, and which affected or prevented cultivation in those years.

In April, 1947, there was a flood throughout the whole valley from purely natural causes, but the data discloses that it lasted about three weeks and then receded.

Edward Kniper, an official of P.F.R.A., and an efficient Hydro engineer, testified that the dam itself or brush had no appreciable effect on the run-off from suppliants' land; also, that close to the river said land is higher than that further back, which would have the effect of retaining at least some of the flood as well as rainwater. Furthermore, he testified that from the official records, the rainfall in June 1945, and 1947, was above normal, and would necessarily have considerable effect on the lands in question, rendering it difficult of cultivation. Mr. Kniper's opinion was based on a most thorough study and examination of the "locus," and official government records.

In 1948, there was again a flood in the whole valley which covered the lands for a distance of about half a mile from the river and, according to the evidence, remaining on the land for about three weeks, after which it receded as it did in 1947. My remarks with regard to the effect of the dam and brush for the year 1947 apply equally to 1948.

George T. Simpson, a witness for the Crown, who heads the land division of P.F.R.A. for the Dominion Government, an experienced valuator of farm lands, and a graduate in agriculture of the Manitoba University, testified that he had made a close examination and detailed study of suppliants' land, and found that it was very heavy alluvial soil due to flood conditions; classified it as "coulter" clay,

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and that it was not "mature" for crop growth. It is underlaid with bluish clay into which water cannot penetrate, and he found a very high water state or condition; in dry years this land will produce abundant crops, but in wet years, plant roots cannot penetrate owing to too great moisture and there would be little or no crop; is good for grass but not for grain; there was evidence of a good many old river channels throughout the property; and he states that there was no grain cultivation of section 9 in 1950; that water was struck at one foot below surface. He found that in the sandhills, fifty feet above Ramsey's land, farmers could not cut hay owing to water which seeped to the lower ground, and that such water could not have come from the river. That between 1939 and 1949, rain averaged 21 inches and varied from 15 inches in 1939 to 25 inches in 1948. Only three years in the period 1883 to 1938 exceeded the average of the last ten year period, and that in 1945, 7·8 inches was the lowest of the eleven year period. In general, Simpson's opinion was that the trouble was due mostly to rains and not flooding.

I have gone into considerable detail as to the facts in regard to the operation and supervision of the dam, and the effect of debris which probably was entirely unnecessary, in view of what I am now about to say.

The evidence is that as of the first day of April, 1945, all four dams were transferred to, and taken over by, the Government of the province of Manitoba from the Dominion Government and were thereafter under the sole control of, and operated and supervised by, officials of that province.

It therefore seems clear, on that ground alone, that under no circumstances can the Federal Government be held liable for damage which may or might have resulted from negligence in the operation of the dams during 1945 and subsequent years. The Dominion Government had nothing further to do with them after that date, and took no part in their operation or supervision, it falling entirely within the jurisdiction of the province of Manitoba. From that time onward, all expenses with regard to operation and supervision were paid entirely by the province of Manitoba, and those operating it were employees of said province, and not of the Dominion.

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In *Lessard* v. *Hull Electric Company*, (1), the headnote reads:

> Upon the evidence and the proper construction of a deed of sale by the respondent company of its light and power system to another electric company, not only was it established that the respondent company, at the time of the accident, was neither the owner of the wire nor had it under its care, control or supervision, but that, on the contrary, the ownership was proved to have been transferred to that other company.—The respondent company, having disposed of the ownership of the wire and not having afterwards assumed or undertaken any supervision or control over it, cannot be held liable.

It seems to me, therefore, that on the authority of the above decision alone, the conclusion must be that the respondent in the action herein, cannot be held liable for damage under the second branch of the case.

There are other grounds in the defence which I might mention and which, in my opinion, are fatal to the suppliants' claim, but which I do not think it necessary to refer to in view of the above findings.

The suppliants, having failed on both branches of the claim, the Petition, therefore, must be dismissed with costs.

Judgment accordingly.

BETWEEN:

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Nov. 5, 6, 7 & 8

HER MAJESTY THE QUEEN.....PLAINTIFF;

AND

1952

Feb. 27

B.V.D. COMPANY LIMITED.....DEFENDANT.

Crown—Action to recover money paid as special subsidies to defendant—Non-compliance with condition on which subsidy paid—Crown not bound by statement made by officer of Crown corporation without authority—Right of Crown to sue—Defendant held liable to repay to Crown amount of subsidy received by it.

The action is one in which the Crown seeks to recover from defendant money paid it as special subsidies by the Commodity Prices Stabilization Corporation, a Crown corporation, in respect of importations of cotton fabrics in 1947, the defendant having been required to invoice and ship the goods manufactured from such cotton fabrics not later than December 31, 1947. The payment of all subsidies was within the discretion of the Wartime Prices and Trade Board which had full power to impose such conditions upon payment of subsidy as it might consider proper.

(1) (1947) S.C.R. 22.

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Held: That the Wartime Prices and Trade Board having imposed a condition on payment of subsidy which condition was accepted by the defendant, the defendant was neither entitled to receive the special subsidy nor to retain it if paid unless that condition were fulfilled, and unless the defendant in some legal manner was released from the necessity of complying with that condition the subsidy received by it must be repaid to plaintiff.

2. That a statement in a letter to defendant signed by a supervising examiner of the Commodity Prices Stabilization Corporation made without authority could not bind either the Wartime Prices and Trade Board, the Commodity Prices Stabilization Corporation or the Crown.

3. That the Commodity Prices Stabilization Corporation was the agent of the Crown and the action is properly instituted in the name of the Crown.

INFORMATION exhibited by the Deputy Attorney General of Canada to recover from defendant money paid it as special subsidies by the Commodity Prices Stabilization Corporation, a Crown corporation.

The action was tried before the Honourable Mr. Justice Cameron at Montreal.

Roger Ouimet, Q.C. and *Luc Couture* for plaintiff.

Jean Martineau Q.C. for defendant.

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

CAMERON J. now (February 27, 1952) delivered the following judgment:

In this information the Crown seeks to recover from the defendant the sum of $39,126.54 paid to it as special subsidies by a Crown corporation—the Commodity Prices Stabilization Corporation (hereinafter to be called "the Corporation")—in respect of importations of cotton fabrics in 1947, it being alleged that the subsidies so paid were paid subject to the condition and undertaking of the defendant that it would invoice and ship the goods manufactured from the said cotton fabrics not later than December 31, 1947. The defendant admits that certain portions of the goods for which it received special subsidies were not invoiced and shipped until after that date, but alleges *inter alia* that the said sum is not recoverable by reason of a letter written by an official of the Corporation

dated October 22, 1947 (Ex. A), and a notice by the Wartime Prices and Trade Board dated September 13, 1947 (Ex. 24).

Paras. 4 to 9 of the information set forth the various claims of the plaintiff which total $81,369.80; and by para. 10 thereof, credit is given for $42,243.26, that sum apparently being made up in part of subsidies to which the defendant was entitled, and in part by repayment of subsidies by the defendant. The plaintiff now claims a balance of $39,126.54 and interest.

At the opening of the trial, the parties filed an admission as follows:

> Should the defendant be found liable in respect of the claim for the refund of special subsidies (C-29 Application) set out in paragraph 7 of the information herein, the parties have agreed to the exactness of the amount mentioned in the conclusion of said information and conceive of judgment accordingly.

In view of that admission, I am relieved of the necessity of inquiring into the particulars of the claims advanced in paras. 4, 5, 6, 8 and 9 of the information.

Para. 7 thereof is as follows:

> An amount of $38,128.27 became due as a necessary refund of special subsidies on goods for which said special subsidies were paid by the corporation to the defendant on the express condition that they be all invoiced and shipped by the defendant, at the latest on the 31st of December, 1947;

In order to understand the powers and duties of the Corporation, it is necessary to set out certain facts. Under the system of price control, maximum price regulations were established on November 1, 1941. It was then found that the administration and enforcement of such regulations was affected by prices prevailing in foreign markets. By Order in Council P.C. 9870, dated December 17, 1940 (Ex. 1), the Minister of Finance was authorized to cause the incorporation of a private company to be wholly owned by His Majesty and to be known as the Commodity Prices Stabilization Corporation.

> With the intent and for the purpose of facilitating, under the direction of the Wartime Prices and Trade Board, the control of prices of goods, wares and merchandise in Canada . . .

Under that Order in Council, and as amended by P.C. 5863, dated July 7, 1942 (Ex. 2), it was provided that upon incorporation of the said company "the said company shall

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have such powers, in addition to those contained in the Letters Patent and in the Companies Act, as are herein contained, and the said company shall further have power to do all such things as may be deemed necessary and expedient for the purpose of carrying out any of the objects of the company and of carrying out the agreement between His Majesty and the said company referred to in section 3 hereof."

2.(1) The Wartime Prices and Trade Board is hereby authorized from time to time to delegate to the said company such of the powers of the said Board, as are now or may hereafter be conferred upon it, as the said Board may deem advisable.

(2) The said company is hereby authorized

(*a*) subject to the terms of the agreement between His Majesty and the said company referred to in section 3 hereof, to pay such sum or sums by way of subvention, subsidy, bonus, or otherwise to any person, firm or corporation as may be deemed advisable; provided, however, that the said company shall not enter into any agreement binding itself to pay any such sum or sums to any person, firm or corporation except with the approval of the Minister of Finance.

By the terms of the Draft Agreement attached to P.C. 5863, it was provided:

1. The payment by the company of any financial assistance to or for the benefit of any person, firm or corporation by way of subvention, subsidy, bonus or otherwise shall be in accordance with principles formulated from time to time by the Wartime Prices and Trade Board and approved by the Minister.

It will be seen, therefore, that the policy to be adopted in connection with payments of subsidies to importers was set by the Wartime Prices and Trade Board and that policy was administered by the Corporation, which also received applications for and paid the regular subsidies. From time to time, the Wartime Prices and Trade Board issued statements of policy and amendments thereto, and notice thereof was given to importers, including the defendant.

Importers of goods into Canada who desired to apply for a subsidy were required to complete and file with the Corporation, Form C4A, in respect of each application (Ex. 11). Prior to using that form, they were supplied with Form C4A-S1, entitled "Instructions and Conditions Respecting the Use of Form C4A" (Ex. 10), which they

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were required to acknowledge on a detachable form at the end thereof, reading as follows:

I/We hereby acknowledge receipt of the "Instructions and Conditions" relative to applications for subsidy (on C.P.S.C. Form C4A or any revised or substituted form) in respect of imported goods which have been or may be processed or manufactured prior to sale by the applicant in Canada.

I/We hereby acknowledge, undertake and agree

(1) that I/we have read and understand the said Instructions and Conditions and hold on file in our office a copy thereof, and

(2) that all applications for subsidy to which the said Instructions and Conditions are applicable will be made in accordance therewith without reservation or qualification.

On each C4A application thereafter, the instructions and conditions were not repeated, but in the certificate of the applicant importer, he certified:

(1) That I/we have received, read and understand the Instructions and Conditions (Form C4A-S1) or as may be amended (applicable to this form).

(2) That all of the goods on which import subsidy is hereby applied for . . . (*e*) have been or will be sold in compliance with Wartime Prices and Trade Board regulations.

The defendant on very many occasions applied for and was granted regular subsidies. On June 19, 1945, it completed and forwarded to the Corporation, duly executed, the detachable portion of Form C4A-S1 (Ex. 14) containing the acknowledgment and undertaking above set forth, and which remained in effect at all relevant times.

Ex. 4 is a "Statement of Policy on Subsidies on Imported Textiles" issued by the Wartime Prices and Trade Board of February 22, 1947. By that statement, an import of cotton fabrics from the United States was not eligible for *any subsidy* unless a prior purchase approval had been obtained for it on C.P.S.C. Form C28 before the purchase. For the first time, the Board stated its policy to protect importers in the event that the general subsidies were removed or reduced. Is purpose was stated in para. 2 as follows:

2. To give importers of cotton fabrics and cotton yarns, from the United States and elsewhere, a means of obtaining a further protection in regard to subsidy. Under the new provisions of this statement, importers may get reasonable protection on their firm forward purchases in the event (i) that price ceilings and existing subsidies are removed before the goods arrive or (ii) that price ceilings are raised and existing subsidies are reduced before the goods arrive.

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It further provided:

Any import of cotton fabrics or cotton yarns from the United States, which is covered by a valid form C28, is automatically eligible for this protection. In addition, any import of such goods from countries other than the United States may be made eligible for the same protection by application to the Cotton Administration.

The protection given to the importer will be subject to the following provisions: . . .

(*d*) *A date or dates before which the goods, or the products made from them, will be sold in Canada must be specified;*

(*e*) Any subsidy payment will be subject to recovery by the corporation (i) to the extent that the actual selling prices of the imported goods or the products made from them exceed the prices designated under (*b*) above, and (ii) to the extent that the subsidized goods are exported . . .

When existing subsidies on imported cotton fabrics or cotton yarns are discontinued, no further subsidy will be paid to any importer of such goods except under the terms of this statement.

This statement of policy shall be effective on and after February 24, 1947.

While that Statement of Policy was in effect, the defendant on May 31, 1947, placed eighteen orders for cotton fabrics in the United States. In each case it applied for and was granted the necessary prior purchase price approval by the Corporation. The goods so ordered, however, were not brought into Canada until late September and October, 1947, the earliest date of entry being September 26, 1947.

In the meantime, the Wartime Prices and Trade Board, by a government notice duly gazetted, and dated June 2, 1947, had issued a further "Statement of Policy on Import Subsidies" effective on that date (Ex. 6). It replaced the Statement of Policy of January 13, 1947, and amendments, and also that of February 24, 1947. Therein it repeated the statement contained in previous ones that payment of subsidies was discretionary, as follows:

1. The payment of subsidies is discretionary, not obligatory; no person has any legal right to an import subsidy or any other subsidy administered by or under direction of the Board. *It follows that subsidies shall not be payable, and if already paid may be recovered, on any imports not falling within the conditions of eligibility for import subsidy herein set forth.*

It also listed in Schedule I the "goods eligible for subsidy subject to the limitations and conditions set forth in section 4(*a*) of the Statement of Policy on Import Subsidies," and in Schedule II those eligible under section 4(*b*) thereof, the

imported goods of the defendant being shown in Schedule I; and it further provided that:

3. Eligibility for subsidy within the above classes is limited to those goods listed or described in Schedules I and II hereto *when sold in compliance with regulations from time to time made effective by the Board,* and subject to the limitations set out elsewhere in this statement. The Board may from time to time make additions to or deletions from the said Schedules; and goods classified by the Department of National Revenue for Customs purposes under a tariff item not in effect on January 1, 1946, are deemed to be included in Schedule II hereto and are subject to all the limitations applying to that Schedule.

Under the heading "Special Subsidy Protection in the Event Existing Subsidies are Removed or Reduced," it provided:

9. (*a*) *General:* From time to time goods may be made ineligible for subsidy by removal from Schedule I or II hereto or may be made eligible for reduced subsidy, with higher maximum prices or suspension from maximum prices being provided concurrently. In such cases the corporation is prepared to give consideration to applications for special subsidy protection for such goods entered for consumption at Customs after the effective date of the change in status provided such importations arise from firm purchase commitments of reasonable character and amount entered into prior to the date of such change but not prior to December 1, 1941. The special subsidy protection which may be available is designed to assure the importer that he will be subsidized, if subsidy is necessary, on a basis appropriate to the price at which in the opinion of the Board such goods can reasonably be expected to be sold in Canada in the changed circumstances.

This special subsidy protection is subject to the following terms and conditions:

(i) The importer must file notice of his intention to apply for the special subsidy on goods imported after the date on which existing subsidies on them have been reduced or removed. He must file this notice with the Corporation at Ottawa on a form provided by the Corporation during the 10 days immediately following the date on which such goods are entered for consumption at Customs.

(ii) The Board will designate a selling price at which in its opinion such goods can reasonably be expected to be sold in Canada under the changed conditions and a corresponding base cost for subsidy purposes. The price so designated will in no case be lower than the maximum price in effect immediately prior to the change in subsidy regulations and will usually be higher.

(iii) *A date or dates before which the goods, or products made from them are to be sold in Canada if the goods are to qualify for special subsidy protection will be specified by the Board.*

(iv) Any subsidy payment under this special protection will be subject to recovery by the Corporation.

(*a*) in an appropriate amount in relation to the extent that the actual selling prices of the imported goods or products made from them exceed the prices designated by the Board,

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(b) to the extent that the subsidized goods are exported, and

(c) to the extent that such special subsidy contributes to profits in excess of 116⅔ per cent of standard profits for the applicant during the fiscal period or periods ending within the 15 months immediately following the date on which the particular goods in question are made ineligible for subsidy.

(b) *Special note on Goods Covered by Validated C28 Forms:* For the past several months special subsidy protection similar to that described in Clause (a) of this section has been provided by the Statement of Policy on Subsidies on Imported Textiles effective February 24th for importations of cotton yarns and fabrics covered by validated C-28 forms. For all purchases covered by properly validated C-28 forms issued on and before May 31, 1947, this special subsidy protection is not subject to the profit limitation described in Clause (c) of paragraph (iv) above. However, on all purchases covered by C-28 forms issued on and after June 2, 1947, the special subsidy protection will be subject to the profit limitation described in that clause. Importers are reminded that to claim the special subsidy protection provided for goods covered by properly validated C-28 forms they must file notice of intention to apply for the special subsidy with the Corporation at Ottawa on Form C-29 during the 10 days immediately following the date on which such goods are entered for consumption at Customs.

In the meantime, also, the Wartime Prices and Trade Board had issued a further government notice entitled "Statement of Policy on Import Subsidies," dated September 12, 1947 (Ex. 25). That statement gave notice that effective September 15, 1947, Schedule I of the Statement of Policy of June 2, 1947, was deleted, the effect of which was to discontinue the general subsidies previously payable on the goods mentioned in that schedule, including cotton fabrics. Under the heading "Important Notice," it was stated:

Applicants who may be interested in the special subsidy provided in paragraph 9 of the Statement of Policy on Import Subsidies effective June 2, 1947, respecting goods removed from Schedule I or Schedule II of the statement should read carefully paragraph 9, particularly 9(a) (i) which requires notification of intent to apply for subsidy within 10 days from date the goods are entered for consumption at customs and 9(a) (iv) (c) which provides that special subsidy will not be paid if it contributes to profits in excess of 116⅔ per cent of standard profits.

As I have said above, the eighteen orders which had been placed by the defendant in the United States on May 31, 1947, were not received in Canada until after September 15, 1947, and in respect of these goods the defendant could not claim the general subsidy previously applicable. Subject to due compliance with the regulations and to the undertakings given by it, the defendant was entitled to apply for the special subsidy. Accordingly, in respect of eighteen

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orders, it prepared Form C29 entitled "Notice of Intent to Apply for Special Subsidy in Accordance with Statement of Policy of Subsidies on Imported Textiles, effective February 24, 1947, as amended, or as may be amended," and in each case under Item 4, stated that the date prior to which it would sell the goods mentioned was April 30, 1948. These forms were sent to the Corporation and on October 22, 1947, one D. I. Shaver, the assistant supervising examiner of the Corporation, wrote the defendant (Ex. A) as follows:

We are in receipt of some 12 C. 29 Forms submitted in triplicate by your good selves in which in Section 4 of the Form we note that you have inserted the date April 30, 1948 as the "date prior to which applicant will sell goods". On the covering Advice Form on which you will be designated appropriate basic costs for special subsidy purposes to be used on any application for subsidy on our Form C4A to be submitted covering these importations we would advise that we shall show in Section (*h*) at the bottom of the Advice Form the date December 31, 1947 as the date prior to which the goods must be invoiced and shipped in order to be priced for subsidy purposes at the figure designated in Section (*f*) of the Advice Form.

At the present time we are able to designate the same basic costs that you have been given by pre-decontrol Price Notifications which take into account the selling price increases effective July 1, 1947. It is evident that such Advice Forms as are issued at the present on this basis allow you to sell the garments on the same basis of subsidy as that in effect prior to decontrol, so long as the garments are invoiced and shipped prior to December 31, 1947, and that such an agreement will stand irregardless of any adjustments of the Canadian price level for comparable fabrics up to the date of December 31, 1947.

You will appreciate that we are unable to afford subsidy assistance on the same basis as that in effect before September 15, 1947 for any longer period than up to the first of next year, since it is our understanding that no agreement has been entered into with the Wartime Prices and Trade Board by the Shirt Manufacturers to hold the price line at the pre-decontrol level beyond the first of next year. *If there is any price increase on an industry-wide basis at that time basic costs for special subsidy purposes will be adjusted upwards to reflect the amount of such an increase.*

We have the alternative of holding the Forms C. 29 in abeyance until such time as the Canadian market level for the fabric covered is clarified for the first quarter of 1948. However, we feel that you may wish to invoice and ship some of the goods prior to December 31, 1947 and we would advise that upon receipt of the Advice Forms covering the C. 29's in question, you are quite free to apply for subsidy on the bases designated on the Advice Forms (showing in Col. J (*a*) of our Form C4A the basic cost designated in Section (*f*) of the Advice Forms) on all garments invoiced and shipped prior to December 31, 1947. On any garments invoiced and shipped subsequent to that date we shall have to await clarification of the Board's policy.

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It is upon that part of the letter I have underlined that the defendant relies in the main, and it will be referred to later. The C.29 forms were duly processed by the Corporation, and in the Advice Forms completed by the Corporation (and as referred to in Ex. A) the date prior to which the goods must be invoiced and shipped was stated to be December 31, 1947. Following the receipt of these Advice Forms, the defendant made eighteen individual applications for special subsidy on Forms C4A in the month of November, 1947.

On December 18, 1947, the Corporation issued and forwarded a Notice to Importers (including the defendant), (Ex. 22), which included the following:

> The Wartime Prices and Trade Board has advised the Corporation that effective at the close of business December 31, 1947, *no subsidy will be available on goods made ineligible for subsidy and not invoiced and delivered by the importer on or before that date.* The Board has instructed the Corporation to recover the subsidy content in the subsidized imported goods listed below, held in inventory at that time (whether in the same condition as imported, in process or in finished state) by the persons or firms who received regular or special subsidy thereon—
>
> Cotton goods, i.e., goods chiefly by weight of cotton
>
> Soya Bean Oil Meal,
>
> Goatskins, Kidskins, Sheepskins, Lambskins, raw, whether dry, salted or pickled.
>
> In view of the foregoing it is necessary that this Corporation receive from you on or before the 15th of January, 1948, a report of your inventory, i.e., goods not invoiced and shipped by you on or before December 31, 1947, in respect of the above noted goods which you have imported and upon which you have received or have made application for either regular or special subsidy, and also in respect of the above noted goods which you have purchased from Commodity Prices Stabilization Corporation Ltd.

On December 27, 1947, the Corporation forwarded a further Notice to Importers dated December 27, 1947, extending the date for taking inventory and making filing returns by one month. It stated, however, that "the foregoing does not in any way affect Forms C.29" and it was therefore wholly inapplicable to the defendant's application for special subsidy, inasmuch as Form C.29 related solely to applications for special subsidy.

The evidence indicates that the Corporation had adopted the practice of paying subsidies to companies as an accountable advance and later reclaiming such as were found on examination and inspection to have been unwarranted by

reason of non-compliance with the regulations and conditions. It was considered necessary to do this in order to avoid long delays in payment of the subsidies. That practice was followed in each of the C.29 applications of the defendant, and the full amount of the subsidy was paid to it without waiting for proof of the fact that all the goods manufactured had been invoiced and shipped prior to December 31, 1947. In respect of five of the applications, no difficulty arises as the goods in respect of which these applications were made were invoiced and shipped prior to December 31, 1947. Those applications are Exhibits 29 to 33.

Ex. 12 contains the other thirteen C4A applications, and in each case there are attached the C.29 Notice of Intent Forms and the Advice Forms specifying the date prior to which the goods must be invoiced and shipped as December 31, 1947, the dates of the latter forms being October 22, October 23 and October 31, 1947. The Advice Forms state that it would now be in order to submit applications for special subsidy on Form C4A, and also "nothing herein contained is to be deemed to imply any assurance or guarantee that subsidy will be paid." It is admitted that the goods referred to in these thirteen applications were not invoiced and shipped until after December 31, 1947.

When this was ascertained, the Corporation made a claim upon the defendant for the full amount of the special subsidies paid in respect of these thirteen items, and issued two debit notes in respect thereof, each being dated May 27, 1948. The first one was for a return of $21,948.69 in respect of Claims 179, 181, 184 and 185; and the other for $38,128.27 in respect of the other nine claims. The defendant declined to repay the said amounts and on June 8, 1949, Mr. G. H. Glass, one of the vice presidents of the Corporation, called upon Mr. Stewart, president of the defendant company. Following the discussion, Mr. Stewart wrote the chairman of the Wartime Prices and Trade Board on the same date (Ex. 26), outlining what had taken place and the nature of the defendant's claim to retain the unpaid balance of $38,903.72. That letter states in part as follows:

> As a result of correspondence between us, Mr. G. H. Glass was kind enough to call on me this morning so that I could present our point of view to him completely and fully. This I did, and at his request I am writing this letter so that the whole picture will be clear to you.

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In May 1947, after receiving approvals we purchased certain fabrics in the U.S.A. which were imported and cleared through Customs before the 31st of October, 1947.

On September 13th, we received a notice from Mr. R. W. Main which led us to believe that this merchandise could be sold at ceiling prices then prevailing and the full subsidy would be paid. It also led us to believe that if the goods were sold above ceiling prices that subsidy would be recovered only to the extent that prices were increased.

On October 22nd, a letter was written to us by the C.P.S.C.L. confirming this opinion as they stated in their letter that if, after the 31st of December, there was any price increase on an industry-wide basis that basic costs for special subsidy purposes would be adjusted upwards to reflect the amount of such an increase.

Having therefore formed this opinion and having had it confirmed by the C.P.S.C.L., we felt that we were perfectly safe-guarded on a just and equitable basis and we, therefore, concentrated our manufacturing efforts on producing merchandise which we had offered and sold to the retail trade for Fall and Christmas delivery, and in this effort we were successful as we shipped and delivered every twelfth of a dozen on time, of the garments which we had sold.

On December 18th, a circular letter was sent to us by the C.P.S.C.L. stating the conditions under which subsidy was to be recovered, and on December 27th an amended notice was sent which specifically disclosed the attitude of the C.P.S.C.L. regarding merchandise held in inventory controlled by Forms C29.

It seems to us that to inform us in this way four days before the order was to go into effect left us in a hopeless position and was absolutely unreasonable.

During our interview yesterday Mr. Glass drew to our attention the fact that on the C.P.S.C.L. basis we owed them $50,632.52, whereas we took the attitude that if the C29 Form merchandise was adjusted on our basis, we only claimed $38,903.72 and he wanted to know what our attitude was concerning this balance. We told him that there was nothing to discuss as we felt that the balance of their claim was perfectly fair and just. He asked us, therefore, if we were prepared to pay this amount and we assured him that we were, as the only other amount in question at all was a small matter of $222.82. He then took up a further claim of $955.78 which was not included in the large amount of $50,632.52. This was for goods purchased from the C P.S.C.L. on which an adjustment was necessary and we immediately acknowledged the justice of this claim.

As a result of this part of the conversation we are enclosing with the copy of this letter which we are sending to Mr. Glass a cheque for $955.78 covering this extra claim together with a cheque for $11,505.98 which covers the difference between $50,632.52 claimed by the C.P.S.C.L. less our claim of $38,903.72 less the amount of $222.82 which Mr. Glass allowed us as he felt that our statements concerning this small difference were fair and justified.

It could not be successfully contended that what took place between Glass and Stewart was a settlement of the matters in dispute. The latter clearly indicates that as a result of the discussion, Stewart was asked to place his view

in writing before the Wartime Prices and Trade Board. However, that letter and Mr. Stewart's evidence do indicate that what was left unsettled was not the claim for the amount of $38,128.27 shown in the second debit note—as urged by counsel for the Crown—but whether in respect of all thirteen claims the defendant was entitled to retain all of the special subsidy less the amounts received by the defendant (who sold the goods after December 31, 1947) in excess of the fixed prices applicable up to that date. There is no evidence whatever that the claims in the first debit note were settled in full at any time.

The sole question for consideration, therefore, is whether the defendant was bound to invoice and ship the goods referred to in Ex. 12 by December 31, 1947, as a condition to its receiving and retaining the special subsidy. Were it not for Shaver's letter (Ex. A), there would be no difficulty whatever. Counsel for the defendant admits that it was within the powers of the Wartime Prices and Trade Board or the Corporation to impose such a condition. It was frequently brought to the notice of all importers that payment of subsidies was discretionary and not obligatory; and Ex. 2 clearly provides that the payment of any subsidy "shall be in accordance with the principles formulated from time to time by the Wartime Prices and Trade Board and approved by the Minister."

In 1947, price controls were gradually being relaxed or dropped. The Wartime Prices and Trade Board was therefore concerned with the necessity of limiting or eliminating the payment of subsidies on goods which would not be sold until after the maximum price regulations applicable thereto had been relaxed or entirely lifted. It therefore adopted the plan of requiring an importer who intended to claim a subsidy to state the date prior to which it intended to invoice and ship the goods. The date so given was not necessarily accepted as satisfactory, but in the Advice Notice sent by the Corporation to the importer, the Corporation stated the date prior to which the goods *must* be invoiced and shipped if subsidy was to be granted in whole or in part, such date being determined by the Wartime Prices and Trade Board and communicated to the Corporation. The first notice of this policy regarding special subsidies, insofar as it would apply to the defendant, was given by the Statement of Policy of February 27,

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1947 (Ex. 4), long prior to the date when the goods in question were ordered. That statement intimated in very clear terms that the protection (i.e. special subsidy) to be given to the importer would be subject to certain specific provisions, including "a date or dates before which the goods or the products made from them would be sold in Canada must be specified." Then, by the Statement of Policy of June 2, 1947 (Ex. 6), it was provided:

> This special subsidy protection is subject to the following terms and conditions;
>
> (iii) a date or dates before which the goods, or products made from them, are to be sold in Canada if the goods are to qualify for special subsidy protection will be specified by the board.

It is true that the defendant did ask to be allowed to sell its goods prior to April 30, 1948, but that application was disallowed, and in all the Advice Notices issued in October, the defendant was formally notified that in each case the goods *must* be invoiced and shipped before December 31, 1947. The Advice Notice also contained the following: "if extension of terminal date is desired, your application must be made to your administrator of the W.P.T.B. not less than ten days before the date shown in Item (*h*) above."

No application, however, was made by the defendant under that provision. Finally, the further Notice to Importers issued by the Wartime Prices and Trade Board on December 18, 1947 (Ex. 22), gave formal and final notice to the defendant that no subsidy would be available on goods made ineligible for subsidy which were not invoiced and delivered on or before December 31, 1947; and that the Board had instructed the Corporation to recover the subsidy content in the subsidized goods listed (including cotton goods) and held in inventory at that date by those who received regular or special subsidy. The defendant received that notice also, but did nothing about the matter. Each of the C4A applications for special subsidy contained certificates that the defendant had received, read and understood the instructions and conditions (Form C4A-S1—or as may be amended), and that all the goods on which import subsidy was applied for "have been or will be sold in compliance with Wartime Prices and Trade Board regulations." These certificates by the defendant were given after it had been notified that it must dispose of the goods before December 31, 1947.

It seems to me that as all subsidies were discretionary and as the Board had full power to impose such conditions upon payment of subsidy as it might consider proper; and as it did impose such a condition which was duly communicated to and accepted by the defendant, the defendant, *prima facie,* was neither entitled to receive the special subsidy nor to retain it if paid unless that condition were fulfilled. The payments so made to the defendant were made contrary to the declared policy of the Board. Unless, therefore, the defendant in some legal manner was released from the necessity of complying with that condition, the subsidy must be repaid.

Mr. Shaver's letter of October 22, 1947 (Ex. A), is written on the stationery of the C.P.S. Corporation, Ltd., and is signed by him over the name of his office, "Assistant Supervising Examiner." After acknowledging receipt of the C.29 Forms, and noting that the defendant wished to have April 30, 1948, fixed as the terminal date, the letter gives specific notice that the Advice Forms will fix December 31, 1947, as the terminal date; and such Advice Forms when issued were in accordance with that statement. In para. 3, he gives the reason for the terminal date being so fixed, namely, that no agreement had been entered into by shirt manufacturers with the Wartime Prices and Trade Board to hold the price line beyond that date. Then he adds the sentence which has given rise to the whole dispute:

> If there is any price increase on an industry-wide basis at that time basic costs for special subsidy purposes will be adjusted upwards to reflect the amount of such an increase.

The defendant relied on that single sentence as being an authoritative statement of policy under which it could keep its goods in inventory after December 31, 1947, and thereafter receive a special subsidy on the adjusted basic costs if there were a price increase on an industry-wide basis thereafter.

Now, there is no evidence that any such policy as is suggested in that sentence was ever adopted by the only policy-making body—the Wartime Prices and Trade Board —and no supervising examiner of the Corporation would have the right to set such a policy or anticipate that the Board would do so. It is in evidence that in no such case was the time extended beyond December 31, 1947, to any importer. That statement of Shaver's was made without

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any authority whatsoever and could not bind either the Board, the Corporation, or the plaintiff herein. The concluding sentence of the letter is of great importance and states precisely the situation; namely, "On any garments invoiced and shipped subsequent to that date we shall have to await clarification of the Board's policy." That was a clear warning to the defendant that if it did not ship and invoice the goods prior to the terminal date, it would do so at its own risk.

In the letter, Shaver stated in effect that the existing policy of the Board was to require all goods to be disposed of prior to the terminal date, but as to goods not so disposed of, the Board's policy had not yet been established. That letter reasonably interpreted should have constituted a warning to the defendant that it must dispose of the goods by the date fixed or be faced with the loss of all the special subsidy unless the Board later decided that the subsidy would be paid on goods held in inventory at that date, on some specific basis. Instead of heeding the clear warning given in the concluding sentence, the defendant chose to rely on the one sentence in para. 3. The whole letter might conceivably have led to an uncertainty in the minds of the officials of the defendant company as to their true position, and that uncertainty could have been resolved by asking for a formal ruling by the Corporation; or by an application to its administrator as provided for in the Advice Notice. In my opinion, the letter, insofar as it purports to settle the policy to be applied to goods in inventory after December 31, 1947, was written without authority and was totally insufficient to relieve the defendant from the full observance of the prescribed condition.

To a minor extent the defendant relied also on the notice of the Wartime Prices and Trade Board dated September 12, 1947, entitled "Notice to Users of Imported Cotton Fabrics—Recovery of Subsidy in Inventories" (Ex. 24). I have read it carefully and cannot find that it is of any assistance whatever in supporting the defendant's contention. Its provisions relate solely to the subsidy content of goods in inventory at the date of decontrol, i.e., September 15, 1947, and on that date the goods in question were not in the defendant's inventory. It merely provides that, contrary to the usual practice of recovering the subsidy

content in goods at the time of decontrol, the subsidy content in goods in the hands of the cutting up trades on September 15, 1947, would not be recoverable provided the importers lived up to their undertaking not to raise prices until all such goods had been disposed of; but to the extent that they did raise prices, subsidy would be recoverable. It is true that the attention of the importers is drawn to the profit limitations placed on the special subsidy granted on C.28 applications made after June 2, 1947, but it does not in any way affect the other requirements of the Statement of Policy of that date, one of which was that the goods must be sold by the terminal date.

That statement (Ex. 24) was not intended and did not affect goods which were not in inventory on September 15, 1947. The final paragraph requiring the Corporation to obtain inventory figures as of that date establishes that beyond question. The undertaking of the trade related only to such inventories; and it was for that reason and the further reason given by Shaver in the letter of October 22 (Ex. A), namely, that the shirt manufacturers had not agreed to "hold the line" beyond December 31, 1947, that a terminal date had to be established as of that date. I can find nothing in that statement which would in any way relieve the defendant from the condition laid down by the Corporation with the approval of the Wartime Prices and Trade Board and accepted by the defendant, that to receive the special subsidy on goods imported after decontrol, the goods must be invoiced and shipped by the terminal date.

In argument, counsel for the defendant submitted that the proceedings should have been instituted in the name of the Corporation rather than in the name of His Majesty. The Letters Patent incorporating the C.P.S. Corporation Ltd. are not in evidence, but it is submitted that under the provisions of clause (2) of the agreement attached to Ex. 1, the Corporation could sue or be sued in its own name. In my opinion, the defendant cannot at this stage raise any such objection. The issue was not raised in the pleadings and following the filing of the Admission of Parties, the whole controversy at the trial was related to the single question as to whether the defendant had been released from the condition imposed by the Wartime Prices and

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Trade Board. In fact, the admission itself seems to indicate that if that question were answered in the negative, the defendant consented to judgment as prayed. Moreover, the Statement of Defence in para. 12 states that the defendant has paid to the plaintiff certain sums in respect of the total claim, thereby recognizing the right of the plaintiff to recover any additional amount that might be found payable.

Quite apart from these considerations, I think the plaintiff is entitled to bring these proceedings. That the Corporation was the agent of the plaintiff was well known to the defendant. The information alleges that the subsidies were paid by the Corporation "for and on behalf of His Majesty" and that it is admitted by the Statement of Defence. I think it cannot be questioned that whether or not the agent (the Corporation) could sue on its own behalf, the principal (the plaintiff) would have a concurrent right to sue. In Bowstead's Digest of The Law of Agency, 11th Ed., p. 193, it is stated:

> Every principal, whether disclosed or undisclosed, may sue or be sued in his own name on any contract duly made on his behalf and in respect of any money paid or received by his agent on his behalf. Provided always that the right of the principal to sue, and his liability to be sued, on a contract made by his agent, may be excluded by the terms of the contract.

Then, in Article 90 on p. 192 of the same volume, it is stated:

> The Crown may sue . . . on any contract duly made on its behalf by a public agent.

and,

> "Public agent" means an agent of the Crown or Government.

I think that the principles above mentioned are of equal application to this case and I therefore reject the submission made by counsel for the defendant.

I find, therefore, that the defendant is liable in respect of the claim for refund of special subsidies (C. 29 Applications) set out in para. 7 of the information; and in accordance with the admission filed, there will be judgment against the defendant for the sum of $39,126.54, with interest at 5 per cent thereon from February 23, 1950, to this date, together with costs to be taxed.

Judgment accordingly.

BETWEEN:

JOE DIANO .....SUPPLIANT;

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Jan. 16
Feb. 28

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of right—Suppliant's motor vehicle struck by trailer and gun which became detached from respondent's tractor while latter driven by a servant of the Crown acting within the scope of his duties —Article 1054 of the Civil Code of the Province of Quebec not applicable to Crown in the right of Canada—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c)—Onus on suppliant to establish negligence of servants of the Crown—Action dismissed.

On January 30, 1946, suppliant's truck was proceeding north of St. Lawrence Blvd., in the city of Montreal, and respondent's tractor towing a Bofor gun mount was being driven south on the same boulevard by a member of the military forces of Her Majesty acting within the scope of his duties. Just before the two vehicles were about to pass each other, the trailer and gun became detached from the tractor and crossed the boulevard, at an angle, striking the left hand side of the suppliant's truck causing damage. Invoking the presumption of fault created in his favor by Article 1054 of the Civil Code of the Province of Quebec and alleging negligence on the part of those who had the care and control of, and who were driving, that tractor and piece of artillery, suppliant now seeks to recover the damages to his truck.

Held: That the provisions of Article 1054 of the Civil Code of Quebec do not apply to the Crown in the right of Canada. *Labelle* v. *The King,* (1937) Ex. C.R. 170 referred to and followed.

2. That under section 19(c) of the Exchequer Court Act the suppliant had the onus of establishing that the breaking loose of the trailer and gun was the result of the negligence of the servants of the Crown. *The King* v. *Moreau,* (1950) S.C.R. 18; *Ginn et al* v. *The King,* (1950) Ex. C.R. 208 referred to and followed.

3. That the suppliant has failed to discharge that onus.

PETITION OF RIGHT by the suppliant seeking damages for injury to his motor vehicle struck by a trailer and gun which became detached from respondent's tractor while the latter was being driven by a servant of the Crown acting within the scope of his duties.

The action was tried before Mr. Guillaume Saint Pierre, Q.C. Deputy Judge of the Court, at Montreal.

George I. Harris for suppliant.

Desiré Desbois, Q.C. for respondent.

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

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SAINT PIERRE *D.J.* now (February 28, 1952) delivered the following judgment:

Cette cause a d'abord été entendue devant le Juge O'Connor, les 22 et 23 septembre 1949 et par suite de la mort du dit Juge avant jugement, comme la preuve avait été transcrite, une nouvelle audition a été présentée devant moi. J'ai pris connaissance du dossier et des plaidoiries.

Le requérant dans sa requête allègue ce qui suit:

1° Que le ou vers le 30 janvier 1946 il était propriétaire enrégistré d'un camion portant le numéro de licence de Québec F13-049 (1945).

2° Que à la dite date à 3:00 heures de l'après-midi le dit camion était conduit d'une façon légale et prudente, dans la direction nord sur le boulevard St-Laurent dans la Cité de Montréal.

3° Que dans les environs du numéro civique 9151, boulevard St-Laurent, le dit camion a été frappé et endommagé par une pièce d'artillerie qui s'est détachée d'un camion portant le numéro de licence de Québec F3030 (1945) qui procédait sur le boulevard St-Laurent dans une direction opposée, du nord au sud.

4° Qu'au moment de l'accident, la dite pièce d'artillerie et le camion portant le numéro de licence F3030 étaient la propriété et enrégistrés au nom du département de la Défense nationale, Armée, à une succursale située au dépôt de la Longue Pointe, dans la Cité de Montréal, qu'ils étaient sous les soins et le contrôle, étaient conduits par un ou des membres des forces de Sa Majesté, qui étaient alors dans l'exercice de leurs fonctions régulières pour lesquelles ils étaient engagés.

5° Que le requérant invoque spécifiquement la présomption de faute en sa faveur de l'article 1054 du code civil de la province de Québec.

6° Que sans préjudice et strictement sous réserve, le requérant allègue que le dit accident et les dommages soufferts par lui sont dus à la seule faute, négligence, imprudence et manque de savoir de la part de la personne ou des personnes qui avaient soin et le contrôle et qui

conduisaient la dite pièce d'artillerie et camion au moment de l'accident et d'une façon particulière, en ceci:

a) La dite pièce d'artillerie et le camion étaient conduits à une vitesse excessive et illégale étant donné les conditions de la route;

b) Les dits véhicules n'étaient pas sous un vrai contrôle;

c) Les personnes en charge n'ont pas bien regardé;

d) Le chauffeur du dit camion était incompétant et sans expérience;

e) Les dits véhicules étaient équipés et conduits avec des pneus et tubes défectueux;

f) Les dits véhicules étaient équipés et conduits et étaient attachés par un crochet ou autre objet qui était défectueux, mal placé dans sa position et ne pouvant servir à l'usage auquel il était destiné;

g) Ils ont permis à la dite pièce d'artillerie de se détacher du camion et de traverser du mauvais côté de la rue St-Laurent par elle-même et sans que personne en ait le contrôle;

h) Ils n'ont rien fait pour éviter l'accident qui aurait pu être évité.

7° Que comme résultat de cet accident, le requérant a souffert des dommages pour $303.58 qui sont détaillés au dit paragraphe.

8° Que le requérant a requis le département de la Défense nationale de lui payer cette somme de $303.58.

9° Que le requérant n'a pas contribué au dit accident et est en droit de se faire rembourser les dommages mentionnés plus haut, et il conclut à ce que le montant de $303.58 lui soit payé.

L'intimé a plaidé à cette requête de la façon suivante:

1° L'intimé admet les allégations 1, 2, 3 et 4 de la requête.

2° L'intimé nie l'allégation 5 comme mal fondée en droit.

3° L'intimé nie l'allégation 6 ainsi que les sous-paragraphes a, b, c, d, e, f, g et h de la dite allégation 6.

4° L'intimé nie les allégations 7, 8, 9 et 10 et l'intimé ajoute:

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5. On the 30th January 1946, private Gerard Gaudet was driving the D.N.D. vehicle 60-893, F.W.D. tractor, on St. Lawrence St., from north to south, in the city and district of Montreal, province of Quebec, at a speed of 15 miles an hour towing a 40mm gun, which was fastened to the chassis of the said vehicle by a spring safety catch, commonly called "Tow hook assembly", the function of which is to keep solidly attached the gun to the vehicle;

6. The said private Gerard Gaudet was towing the said gun from the warehouse of the D.I.L. on St. Lawrence St., to the depot of the Ordnance at Longue Pointe;

7. The said gun was hooked by its shaft to the said "Tow hook assembly" by a safety hook joining the shaft of the said gun to the vehicle.

8. All the parts of the said "Tow hook assembly" comprising the safety catch (or hook) were in good order, and the shaft of the said gun had been solidly tied to the said vehicle, but during the trip the spring of the tow hook joining the shaft of the said gun to the vehicle suddenly broke and the shaft of the said gun came out of the "Tow hook assembly", and the gun, towed as aforesaid, veered to the left of the road and came in contact with the rear end of the suppliant's truck, which was accidental, without fault on the part of the respondent or its employees within the scope of their duties;

9. In fact, the driver of the said vehicle, Gerard Gaudet, is an experienced and prudent employee, and he was driving the said vehicle at a speed of not more than 15 miles an hour, which was a fair speed considering the state of the road;

10. The said driver had the said vehicle under his control and was driving it carefully; he could not in any way do anything to prevent the accident;

11. The tires and tubes of the said vehicle had no defects and were in good order and condition;

12. The assembly holding the gun to the vehicle, the "Tow hook assembly" included, and the safety catch and spring, was in good order and the usual type used for the purpose and had been assembled by experienced soldiers for that type of work;

13. If the said gun unhooked itself from the said vehicle, this was accidental, as stated above, and was not due to any fault or negligence on the part of the driver of the said vehicle or other employees of the respondent who assembled the gun to the vehicle; the said collision was altogether accidental and the immediate and determinating CAUSA CAUSANS of the accident is not due to their deed or to their negligence or fault of the said employees;

14. Article 1054 of the Civil Code of the province of Quebec is illegally invoked by the suppliant, and, in fact, the said article 1054 cannot apply to respondent in the present case because the latter cannot be responsible for damages caused by "choses" under its care, unless negligence is proved on behalf of the employees of the Crown, in the exercise of their duty, or of their employees, which is entirely denied in the present case, as already stated above, and the said allegation 5 of the petition of right is wrongly founded in law;

15. Without prejudice to the above allegations and without admitting any responsibility, the said respondent alleges that the damages sustained by the said suppliant in the above circumstances amount to the utmost to the sum of $125.

Le requérant a produit une réplique:

1° Il prend acte des admissions contenues au paragraphe 1° de la défense;

2° Il se joint à l'intimée quant aux paragraphes 2, 3 et 4;

3° Il nie le paragraphe 5;

4° Il ignore les paragraphes 6 et 7;

5° Il prend acte de l'admission mentionnée au paragraphe 8 à l'effet que le ressort du crochet s'est brisé et que le canon a frappé le camion du requérant et quant au surplus il nie le dit paragraphe;

6° Il nie les paragraphes 9, 10, 11, 12, 13, 14 et 15;

7° Le plaidoyer de l'intimée est mal fondé en fait et en droit.

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A l'enquête le requérant a fait entendre les témoins suivants:

1° Jean-Paul Desrochers, le chauffeur du camion appartenant au requérant, qui était en charge du camion le 30 janvier 1946. Il se dirigeait vers le nord avec son camion quand le canon traîné par un tracteur a laissé le tracteur et est venu frapper l'arrière du camion du requérant et il explique les dommages soufferts.

2° Marcel Martin, chauffeur, conduisait un camion rue St-Laurent et suivait le camion du requérant et il a vu le canon se détacher du tracteur et venir frapper le camion du requérant.

3° Arthur John Gittins, gérant, General Motors, a examiné les dommages subis par le camion du requérant et il produit l'exhibit P1 étant un estimé des dommages.

4° Joe Diano, le requérant a fait examiner son camion par General Motors, et il a vendu son camion sans le faire réparer et il a dû faire une réduction de $300.

La Couronne a fait entendre les témoins suivants:

1° Gérard Gaudet, en 1946 était chauffeur dans l'armée et a conduit le camion N° 60-893 depuis un mois, ce camion était en bonne condition. Il conduisait son camion à 15 milles à l'heure quand l'accident est arrivé à 200 pieds de l'endroit où il était parti. Le canon était attaché au camion genre semi-tracteur par un crochet. L'attachement se fait par une équipe spéciale à cet effet. Quand il est parti, tout semblait normal, quand soudainement, soit vibration ou, vu que c'était en hiver, la route a pu briser le crochet. Après que le crochet se fut détaché, il a immédiatement arrêté et il s'est rendu pour voir l'officier en charge du dépôt qui a fait venir des hommes pour ramener le canon au dépôt.

Le matin de l'accident il a examiné le ressort et il a constaté que le ressort était en haut. Après l'accident il a examiné le crochet et il a constaté que le ressort était en bas, ce qui indiquait que le ressort était brisé. Le ressort n'est pas visible de l'extérieur. Il a examiné le crochet le matin et l'a trouvé en bonne condition mais il ne l'a pas examiné dans l'après-midi.

2° Le Capitaine Cooper explique que le "Stacey Tow Hook" est fait spécialement pour être attaché au camion qui traîne un canon. Il explique le fonctionnement de ce crochet qui contient un ressort qui maintient le crochet dans sa position.

Voici ce qu'il dit à la page 32 de sa déposition:

Now, the theory is, when we press down on the safety catch to permit something to be hooked on the tow hook, the spring is compressed and, as the spring is compressed, it puts an ever-increasing pressure on the safety catch. As soon as the tow-eye, or whatever may be hooked to this hook, is below the safety catch, the safety catch is released and the spring re-asserts itself and pulls the safety catch back into place, and then the tow-eye cannot be passed by, off the tow hook, because of the safety catch.

Il déclare de plus que le système employé par l'armée pour attacher un canon à un camion est le "Stacey Tow Hook" et il n'en connaît pas d'autre. Il ne peut expliquer comment le crochet s'est détaché et a permis au canon de traverser la rue. Il n'a pas examiné le crochet et son contenu après l'accident.

3° Allan Weston a examiné le camion du requérant quant aux dommages.

4° Marcel Martin a été ré-examiné quant aux dommages.

Il résulte donc des plaidoiries que le requérant base sa cause:

1° Sur l'article 1054 du code civil;

2° Sur la négligence mentionnée au paragraphe 6 de sa requête.

La Couronne a plaidé:

1° Que l'article 1054 ne s'applique pas;

2° Que les officiers n'ont pas commis aucun acte de négligence;

3° Et dans le cas où l'article s'appliquerait le procureur de la Couronne a plaidé qu'il s'agissait d'un simple accident vu que le crochet et son contenu étaient en bon ordre.

La première question à résoudre est donc de savoir si l'article 1054 s'applique.

Cet article 1054 du code civil de la province de Québec se lit comme suit:

1054. Elle est responsable non seulement du dommage qu'elle cause par sa propre faute mais encore de celui causé par la faute de ceux dont elle a le contrôle et par les choses qu'elle a sous sa garde.

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La responsabilité ci-dessus a lieu seulement lorsque la personne qui y est assujettie ne peut prouver qu'elle n'a pu empêcher le fait qui a causé le dommage.

Dans la cause de *Labelle* v. *le Roi* (1) le Juge Angers dit ceci à la page 174:

> Contrairement à la prétention émise par les procureurs du pétitionnaire, le cas qui nous occupe n'est pas régi par les articles 1053 et 1054 du code civil de la province de Québec; il est assujetti aux dispositions du paragraphe c de l'article 19 de la loi de la Cour de l'Echiquier. Je noterai en particulier que la Couronne n'est pas responsable du dommage causé par le fait d'une chose sous sa garde à moins que la victime rattache le fait de cette chose à la négligence d'un employé ou serviteur de la Couronne agissant dans l'exercice de ses fonctions.

Je suis également d'opinion que l'article 1054 ne s'applique pas.

Le requérant a-t-il fait la preuve de la négligence mentionnée à l'article 6 de sa requête?

Le requérant a fait entendre le chauffeur du camion du requérant qui a expliqué comment l'accident est arrivé, à savoir que le canon s'est détaché du tracteur qui le traînait et est venu frapper son camion. Le requérant n'a pas fait entendre de témoin pour expliquer ce fait et pour démontrer la négligence des officiers de la Couronne dans l'exercice de leurs fonctions. Il prétend que le fait par le canon d'avoir traversé la rue seul et d'être venu frapper le camion constitue une présomption qu'il y a eu négligence de la part des officiers de la Couronne.

Est-ce bien ce qui résulte de l'article 19c de la loi de la Cour de l'Echiquier. Voyons la jurisprudence sur ce point.

Dans la cause de *His Majesty The King* v. *Moreau* (2) à la page 24, l'Honorable Juge Rinfret s'exprime ainsi:

> Or le raisonnement du juge de première instance, en posant le principe qu'il incombait aux officiers militaires en charge de fournir une explication ou une excuse pour la présence de la fusée dans le fossé, pèche donc, à mon humble avis, par deux côtés essentiels: premièrement, il suppose que la Couronne avait le fardeau de la preuve et qu'elle devait s'exculper, alors que l'article 19 *c* ne permet le maintien d'une réclamation contre la Couronne, à raison de la mort ou du dommage causé à la personne ou à la propriété, que dans le cas où elle résulte de la négligence de l'officier ou du serviteur de la Couronne. Il faut évidemment, dès lors, que le pétitionnaire, ou le réclamant, prouve cette négligence. Cette preuve ne peut résulter de conjectures ou de suppositions comme celles que nous avons ici. Je ne trouve aucun fait qui puisse donner lieu à des présomptions; et, en plus, il faudrait que telles présomptions fussent graves, précises et concordantes. Il n'y a rien de tel dans l'espèce actuelle.

(1) (1937) Ex. C.R. 170.

(2) (1950) S.C.R. p. 18.

Dans une cause de *Ginn et al* v. *The King* (1) l'Honorable Juge Thorson, président de la Cour de l'Echiquier, a suivi le jugement de la Cour Suprême du Canada ci-dessus mentionné, dans le cas où des enfants avaient trouvé une grenade qui avait explosé dans leurs mains. Il s'est appuyé sur l'article 19*c* de la loi de la Cour de l'Echiquier pour déclarer que le requérant n'avait pas prouvé la négligence des employés de la Couronne agissant dans les limites de leur devoir et de leurs fonctions.

Il résulte donc de ces jugements qu'il appartient au réquérant de prouver cette négligence soit par des témoins soit par des présomptions qui fussent graves, précises et concordantes.

Le requérant n'a pas fait entendre de témoins pour prouver aucune faute contre l'intimée, il s'est contenté de prendre acte de l'admission que le ressort qui retenait le crochet s'est brisé et que le canon a frappé le camion du pétitionnaire.

Est-ce que ce fait constitue une présomption grave, précise et concordante, qu'une négligence avait été commise par un officier ou serviteur de la Couronne agissant dans les limites de ses devoirs et de ses fonctions?

Je suis d'opinion que ce fait ne constitue pas une négligence pouvant engager la responsabilité de la Couronne mais que le requérant devait prouver la négligence des officiers de la Couronne.

Le requérant se base sur un jugement de l'Honorable Juge Thorson rendu le 23 février 1950 dans la cause de *Root et al* v. *The King* (non rapportée) où il s'agit d'une cause analogue à la présente mais avec cette différence que dans cette cause le requérant a fait la preuve de la négligence de la Couronne.

Voici ce que dit le Juge Thorson:

In a claim under section 19(*c*) of the Exchequer Court Act it is necessary to show such negligence on the part of an officer or servant of the Crown while acting within the scope of his duties or employment as would render him liable if an action were taken against him personally. It is only for such negligence that the Crown is made responsible. Its liability is solely a vicarious one, as Rand J. pointed out in *The King* v. *Anthony* (1946) S.C.R. p. 569 at p. 571, where he said: "It is vicarious liability based upon a tortious act of negligence committed by a servant while acting within the scope of his employment; and its condition is

(2) (1950) Ex. C.R. p. 208.

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that the servant shall have drawn upon himself a personal liability to the third person." This does not mean that the liability for which the Crown is made to answer vicariously must be that of only one officer or servant of the Crown. It may be that of more than one.

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Dans la première requête le Juge Thorson l'a rejetée avec dépens parce que la négligence était attribuée au soldat Monger et la preuve n'a pas été faite que le canon s'est détaché par la faute du dit soldat Monger.

Dans la seconde requête la négligence était attribuée au Capitaine Hawreliak, au Sergent Anderson, au Caporal Sinclair et au soldat Freedy et les détails de la négligence étaient indiqués et les requérants ont fait la preuve que le jour de l'accident le Major McLean avait examiné le ressort dans le crochet et avait constaté qu'il était dans une condition inserviable. A la suite de cette preuve le Juge Thorson a trouvé que les requérants avaient fait la preuve de la négligence alléguée et il a condamné la Couronne.

Cette cause diffère de la présente cause, car dans la présente cause le requérant a bien allégué au paragraphe 6 que les officiers avaient équipé et conduit des véhicules qui étaient joints par un crochet ou autre objet qui était défectueux ou improprement placé dans leur position, mais il n'en a pas fait la preuve.

Le requérant aurait pu comme dans la cause de *Root et al* v. *le Roi,* mentionnée ci-dessus, alléguer que les officiers qui ont placé le ressort dans le crochet l'avaient examiné avant de l'employer et l'avaient trouvé usé ou défectueux et à l'enquête faire, par ces officiers, la preuve de ces allégués et alors il aurait prouvé négligence mais il ne l'a pas fait.

Je suis donc d'opinion, comme le Juge Rinfret, dans la cause de *Moreau* v. *le Roi,* citée plus haut, et comme le Juge Thorson dans la cause de *Root et al* v. *le Roi,* que la première chose que le requérant doit faire c'est de prouver négligence en vertu de l'article 19(*c*) de la loi de la Cour de l'Echiquier et à défaut de preuve de cette négligence, il ne peut réussir dans sa demande.

La Couronne ayant à faire face à l'article 1054 a plaidé et a prouvé qu'il s'agissait d'un simple accident, ce plaidoyer était-il suffisant pour repousser la responsabilité légale attribuée par l'article 1054. Je suis d'opinion que non. Dans la cause de la *Cité de Montréal* v. *Lesage* (1) rap-

(1) (1923) S.C.R. 355.

portée en Cour Suprême, celle-ci a décidé que l'ignorance de la cause de l'accident ne faisait pas repousser cette responsabilité légale.

Vu que le requérant n'a pas prouvé la négligence de la part des officiers de la Couronne dans l'exercice de leurs fonctions, la requête est rejetée sans frais.

Vu les conclusions auxquelles j'en suis venu dans la présente cause, je n'ai pas à me prononcer sur la question de savoir si la doctrine *res ipsa loquitur* s'applique dans la présente espèce.

Judgment accordingly.

BETWEEN:

WILLIAM F. ANGUS *et al.* .....APPELLANTS;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

Revenue—Succession Duty—The Dominion Succession Duty Act, S. of C. 1940-41, 4 Geo. VI, c. 14, ss. 4(1), 31—Civil Code of the Province of Quebec, articles 607, 891—General power to appoint any property given to a person—Intent of section 31 of the Dominion Succession Duty Act—Provisions of Civil Code not applicable since question one of statutory law related to federal taxation—Appeal dismissed.

The appellants are the executors of the estates of Dr. W. W. Chipman and his wife, the latter separated as to property of her husband, who both died domiciled in the province of Quebec, Mrs. Chipman in January, 1946, and Dr. Chipman in April, 1950. It was agreed that the law of the province governs the administration and the devolution of Mrs. Chipman's estate. By her will Mrs. Chipman bequeathed the whole of her property to her husband and two of the appellants as trustees and in trust to be administered and disposed by them as follows:—

"(*f*) to pay to my husband, the said Walter William Chipman, during the remainder of his lifetime, the net interest and revenues from the residues of my estate *and* in addition thereto to pay to my said husband from time to time and at any time such portion of the capital of my estate as he may wish or require and upon his simple demand, my said husband to be the sole judge as to the amount of capital to be withdrawn by him and the times and manner of withdrawing the same, and neither my said husband nor my executors and trustees shall be obliged to account further for any capital sum so paid to my said husband.

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(*g*) upon her husband's death to dispose of the estate, 'as it may then exist' as follows:

6. To divide the capital of the residue of my estate between my brothers, sisters, niece and nephews as follows:— . . .; and I hereby constitute my said brothers, sisters, niece and nephews my universal residuary legatees in the aforesaid proportions."

* * *

Dr. Chipman was assessed for succession duties in respect of the power to demand such portions of the capital as provided in clause (*f*) of his wife's will on the basis that such power was a succession to him. The appellants appealed to this Court from the assessment.

Held: That the intent of section 31 of the Dominion Succession Duty Act, 4-5 Geo. VI, c. 14, is to include any person who has a general power to appoint any property and to determine the succession duties this person shall pay or when. *Cossit* v. *Minister of National Revenue,* (1949) Ex. C.R. 339 followed.

2. That the provisions of section 31 apply to Mrs. Chipman's will.

3. That the articles of the Civil Code of the province of Quebec are not applicable since the question here is one of statutory law related to federal taxation.

APPEAL under the Dominion Succession Duty Act.

The appeal was heard before Mr. Guillaume Saint Pierre, Q.C., Deputy Judge of the Court, at Montreal.

James Mitchel, Q.C. for appellants.

Claude Prevost, Q.C. and *I. G. Ross* for respondent.

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

SAINT PIERRE D.J. now (March 18, 1952) delivered the following judgment:

Il s'agit de l'appel d'une décision du Ministre du Revenu National qui a, le 17 septembre 1946, fixé à $188,165.20 le montant des droits dus par le Dr Chipman sur la succession de son épouse Maud Mary Angus.

Le 9 août 1946, $113,917.30 ont été payés mais le montant réclamé par le Ministre est de $74,247.90 plus les intérêts à la date du compte $1,249.92 soit un total de $75,497.82.

La question qui est soumise est celle de savoir si le paragraphe (*f*) de la clause 3 du testament de Maud Mary Angus Chipman tombe sous les dispositions de l'article 31 de la loi ayant pour objet d'autoriser le prélèvement de droits successoraux.

La clause 3 du testament se lit comme suit:

Tout d'abord la testatrice nomme comme fiduciaires son mari, le Dr Chipman, son frère D. Forbes Angus et le The Royal Trust Company pour administrer et disposer de la façon suivante de la fiducie:

a) to pay all debts, funeral expenses and succession duties,

b) to deliver a special bequest of jewellery to her niece Mrs. Vanklynn,

c) to give her husband the use of her home so long as he may desire,

d) to give her husband the use of her furniture and effects during his lifetime,

e) to divide the sum of $5,000 amongst her employees,

f) to pay to my husband, the said Walter William Chipman, during the remainder of his lifetime, the net interest and revenues from the residues of my estate *and* in addition thereto to pay to my said husband from time to time and at any time such portion of the capital of my estate as he may wish or require and upon his simple demand, my said husband to be the sole judge as to the amount of capital to be withdrawn by him and the times and manner of withdrawing the same, and neither my said husband nor my executors and trustees shall be obliged to account further for any capital sums so paid to my said husband.

g) upon her husband's death to dispose of the estate, "as it may then exist" as follows:

1. My jewellery, pictures, household furniture and household effects shall be disposed of in accordance with any memorandum I may leave with respect to the same and failing any such memorandum then the same shall be divided among my *residuary legatees* hereinafter named in the same manner as the *residue* of my estate.

2. To pay to The Royal Institution for the Advancement of Learning (McGill University), of Montreal, the sum of fifty thousand dollars as a special legacy.

3. To pay to the Royal Victoria Hospital, Montreal, the sum of fifty thousand dollars as a special legacy.

4. To pay to The Art Gallery, presently situate at the corner of Ontario Avenue and Sherbrooke Street West, Montreal, the sum of fifty thousand dollars as a special legacy.

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5. To pay to The Church of St. Andrew and St. Paul, presently on Sherbrooke Street West, Montreal, the sum of twenty-five thousand dollars. The receipt of the treasurer for the time being of each of the foregoing institutions shall be a good and valid discharge to my executors and trustees.

6. To divide the capital of the residue of my estate between my brothers, sisters, niece and nephews as follows: One-sixth thereto to my brother, D. Forbes Angus, of the city of Montreal; one-sixth thereof to my brother William Forrest Angus of the city of Montreal; one-sixth thereof to my brother, David James Angus, presently of Victoria, British Columbia; one-sixth thereof to my sister, Margaret Angus wife of Dr. Charles Ferdinand Martin, of the city of Montreal; one-sixth thereof to my sister, Dame Bertha Angus widow of Robert MacDougall Paterson, of the city of Montreal; one-eighteenth thereof to my niece, Gyneth Wanklyn widow of Durie McLennan, of the city of Montreal; one-eighteenth thereof to my nephew, David A. Wanklyn, of the city of Montreal; and one-eighteenth thereof to my nephew, Frederick A. Wanklyn, presently of Nassau, Bahamas; and I hereby constitute my said brothers, sisters, niece and nephews my universal residuary legatees in the aforesaid proportions.

The share of any of my brothers or sisters who may have predeceased leaving lawful issue shall accrue in favour of such issue equally by roots and failing issue such share shall be divided among my remaining brothers and sisters or their lawful issue by roots.

The share of either of my said nephews or niece who may have predeceased leaving lawful issue shall accrue to such issue equally by roots and failing issue such share shall be divided between my remaining nephews or niece and the issue of any predeceased nephew or niece by roots.

Should any beneficiary become entitled to a share of my estate under any of the foregoing provisions while a minor the net revenues therefrom shall be expended for his or her maintenance, education and support by my executors and trustees through such channels as they may think advisable, but it shall not be necessary to spend the whole of such net revenue unless my executors and trustees so decide and such net revenues may be allowed to accumulate in whole or in part and spent later as may be decided, the whole in the discretion of my executors and trustees, and after such beneficiary attains the age of majority the capital of his or her share or so much thereof as then remains shall be made over to him or her in absolute ownership.

Il résulte donc de la clause 3(*f*) que le Dr Chipman avait le pouvoir de s'adresser aux fiduciaires et de se faire payer sur simple demande le capital qu'il désirait avoir et ni le Dr Chipman ni les fiduciaires étaient tenus de rendre compte des montants ainsi payés au Dr Chipman.

En face de cette clause le Dr Chipman avait deux alternatives, l'accepter et se faire payer les montants qu'il désirait ou la refuser. Il ne fait pas doute que s'il refusait la clause les dispositions de l'article 31 ne pouvaient

s'appliquer à lui. D'un autre côté ayant accepté la clause 3(*f*) du testament, la clause 31 de la loi des droits successoraux s'applique-t-elle?

Cette clause 31 se lit comme suit:

31. Lorsqu'il est donné à une personne un pouvoir général de transmettre un bien soit par acte entre vifs, soit par testament, ou par les deux à la fois, les droits prélevés au sujet de sa succession sont exigibles de la même manière et dans le même délai que si le bien lui-même avait été donné ou légué à la personne qui a reçu ledit pouvoir.

Cet article 31 est complété par l'article 4, paragraphe 1 qui se lit comme suit:

Une personne est répartie habile à disposer de biens si elle possède un avoir ou un intérêt dans cet avoir ou tel pouvoir général, si elle était sui juris, lui permettrait de les aliéner et *l'expression "pouvoir général" comprend toute faculté ou autorisation permettant au donataire ou autre détenteur de transmettre ou d'aliéner des biens selon qu'il le juge opportun, qu'elle puisse s'exercer par un acte entre vifs ou par testament, ou les deux, mais à l'exclusion de tout pouvoir susceptible d'être exercé à titre judiciaire en vertu d'une disposition qu'il n'a pas faite lui-même, ou susceptible d'être exercé en qualité de créancier hypothécaire.*

Il résulte donc de ces deux articles que le pouvoir général de transmettre un bien comprend la faculté ou l'autorisation permettant au donataire ou autre détenteur de transmettre ou d'aliéner des biens.

Or dans le cas de l'article 3 parag. (*f*) du testament de Mme Chipman elle donne à son mari le pouvoir général de se faire payer le capital qu'il désirera et comme conséquence de ce paiement du capital il s'en suit qu'il obtient par le fait même le pouvoir général de transmettre les capitaux qu'il aura retirés soit par donation soit par testament.

L'article 31 contient deux parties, la première pour constater le fait d'un état existant dans un testament et la deuxième pour déterminer comment dans ce cas seront prélevés les droits de succession.

Si un état de chose existe comme celui fixé par la première partie à savoir qu'une personne par son testament a donné à une autre personne un pouvoir général de transmettre un bien soit par acte entre vifs ou par testament, ou par les deux à la fois, alors la deuxième partie s'applique et dans ce cas les droits prélevés au sujet de la succession d'une personne qui a donné tel pouvoir général, sont

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exigibles de la même manière et dans le même délai que si le bien lui-même avait été donné ou légué à la personne qui a reçu ce pouvoir.

Dans le présent testament de Madame Chipman, vu qu'elle a donné à son mari un pouvoir général sur les capitaux de sa succession, alors le Dr Chipman qui a obtenu ce pouvoir doit payer les droits au sujet de la succession de Mme Chipman de la même manière et dans le même délai que si le bien lui-même lui avait été donné ou légué.

L'article 31 a pour objet d'atteindre celui qui a un pouvoir général de transmettre et de déterminer quels droits il devra payer ou dans quel délai. Je suis donc d'opinion que les dispositions de l'article 31 s'appliquent au testament de Mme Chipman.

Le procureur de la Couronne s'appuie spécialement sur la cause de *Cossitt* v. *Ministre du Revenu National* (1). Il s'agit d'une clause de testament analogue à la présente cause et l'Honorable Juge O'Connor a jugé que l'article 31 s'appliquait dans ce cas.

La clause dans le cas de Cossitt se lisait comme suit:

3(*f*). To invest and keep invested the residue of my estate and to pay the net income derived therefrom to my said son Edwin Comstock Cossitt during his lifetime, with power to him at any time to use for his benefit such amount or amounts out of the capital of the said residue as he may wish.

(*g*). Upon the death of my said son, the residue of my estate or the amount thereof remaining shall be held in trust for the issue of my said son or some one or more of them in such proportion and subject to such terms and conditions as my said son may by his last will direct, provided.

L'Honorable Juge O'Connor déclare ce qui suit à la page 343:

The effect of section 31, in my opinion, is that where a general power to appoint any property is given to any person, such person shall be deemed to have derived a succession of such property from the decease.

In my opinion, there was not a succession within section 2(*m*) but there was a succession within section 31.

And under section 31, the duty levied in respect of such succession is payable in the same manner and at the same time as if the property itself had been given to the appellant.

Je partage les vues exprimées par l'Honorable Juge O'Connor dans cette cause de *Cossitt* v. *Ministre du Revenu National.*

(1) (1949) Ex. C.R. p. 339.

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En conséquence pour les raisons ci-dessus mentionnées je renvoie l'appel avec dépens.

J'ai examiné les autorités citées par les procureurs des deux parties et je ne partage pas les vues du procureur de l'appelant d'appliquer les articles du code civil dans cette cause où il s'agit du droit statutaire relativement à l'imposition de taxes fédérales.

Judgment accordingly.

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Mar. 26

Mar. 28

BETWEEN:

HARRY C. McLAUGHLIN.....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE.....RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 3, 32(2) —Transfer of property from husband to wife—Words of s. 32(2) both precise and unambiguous—Meaning of "substituted property"—Language used in s. 32(2) so explicit as to exclude suggestion it means only substitution made by transferor or those contemplated by transferor and transferee at time of original transfer—Meaning of the words "as if such transfer had not been made"—S. 32(2) does not provide basis of liability to continue to be on the income as it existed at time of transfer—Appeal from decision of Income Tax Appeal Board dismissed.

In 1939 the appellant transferred to his wife 400 preferred shares of McCaskey Systems Ltd. as a gift, but having been assessed and having paid tax on dividends paid by the company on these shares the appellant agreed with his wife to revoke the gift and the wife purchased the same shares for which she gave a promissory note for $40,000 to her husband. Because of the admission made by the appellant that this agreement in no way affected his liability to tax on income derived from such shares the Court was not called upon to determine whether or not a bona fide sale of property from husband to wife is within s. 32(2) of the Income War Tax Act. In 1942 one C. sold to the appellant 500 common shares of Whitehall Machine and Tools Ltd., part of the consideration therefor to C. being the 400 preferred shares of McCaskey Systems Ltd. that the appellant's wife transferred to C. in exchange of 400 shares of the Whitehall stock. In 1948 the appellant's wife received $30,000 in dividends on these 400 shares, which amount was added to the appellant's declared income for 1948, on the ground that it was taxable as part of his income as being "income derived from property substituted for that which he had transferred to her in 1939". The appellant appealed to the Income Tax Appeal Board which dismissed his appeal.

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Held: That the words of section 32(2) of the Income War Tax Act, R.S.C. 1927, c. 97 are both precise and unambiguous. "Substituted property" means that property which replaces, or takes the place of, that property which was originally transferred.

2. The language used in the section is so explicit as to exclude the suggestion that it can mean only substitutions made by the transferor or substitutions contemplated by the transferor and transferee at the time of the original transfer. To limit the interpretation in that manner would make it necessary to read into the section words which Parliament has not seen fit to include, nor intended should be included.

3. That by virtue of section 32(2) the appellant was liable to be taxed in respect of that income "as if the transfer to his wife had not been made".

4. That the provisions in section 32(2) of the Act that the transferor shall be liable to be taxed "as if such transfer had not been made", means that he shall be liable to be taxed as though the property transferred or that which was substituted for it, were his property and not that of the transferee.

5. That section 32(2) of the Act also means that, while the property originally transferred remains in its original form, the income therefrom shall be taxable as income in the hands of the transferor, but that, if other property be substituted therefor, then the income from such substituted property shall be taxable as income in the hands of the transferor.

APPEAL from the decision of the Income Tax Appeal Board dismissing the appellant's appeal against his 1948 assessment.

The appeal was heard before the Honourable Mr. Justice Cameron at Toronto.

E. Bristol, Q.C. for appellant.

J. de N. Kennedy, Q.C. and *J. E. Jackson* for respondent.

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

CAMERON J. now (March 28, 1952) delivered the following judgment:

This is an appeal from a decision of The Income Tax Appeal Board dated August 28, 1951, by which that Board dismissed the appellant's appeal from a Notice of Assessment dated June 30, 1950, for the taxation year 1948.

In that Notice of Assessment, the respondent had added to the appellant's declared income, the sum of $30,000, which amount was received by the appellant's wife—and

not by the appellant personally—by way of dividends on certain shares under the circumstances presently to be mentioned.

It may be noted here that the appellant, under protest, has paid the full amount of the assessment, including interest accrued.

In 1939 the appellant, a resident of Galt, Ontario, was vice-president of McCaskey Systems, Ltd. From the Statement of Facts contained in the notice of appeal to this court, it is shown that on January 24, 1939, the appellant transferred from his own name to that of his wife 400 preferred shares of McCaskey Systems, Ltd., such transfer being made as a gift, the purpose being to bring about a possible savings in succession duties for his estate, if he should survive the statutory period.

It is also shown that, in 1939, that company paid a substantial dividend representing accumulated arrears on its preferred shares and under section 32, of subsection 2, of The Income War Tax Act, the appellant was assessed for and paid tax thereon as though he had personally received such dividend.

In view of that situation, that is, that the appellant was required to pay income tax on the stocks which he had transferred to his wife, the appellant and his wife agreed verbally to revoke the earlier gift, and his wife agreed to purchase the same shares from the appellant at their par value of $100. As a result thereof, his wife gave to the appellant her promissory note dated April 15, 1940, for $40,000 payable on demand and without interest. Exhibit "B" is an agreed copy of that note.

Section 32, subsection 2 of The Income War Tax Act, Revised Statutes of Canada 1927, chapter 97, as it was from 1927 to December 31, 1948, was as follows:

> 32(2). Where a husband transfers property to his wife, or vice versa, the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made.

Certain other facts will be later referred to, but I considered it advisable to quote the section at this point because of certain admissions made at the hearing.

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Counsel for the appellant, for the purposes of this case only, has admitted

(*a*) that had nothing further occurred beyond the facts which I have above stated, the transaction would have fallen within the provisions of Section 32, subsection 2, and the appellant would have been personally assessable to tax on dividends received by his wife from the 400 shares of McCaskey stock so transferred to her: and

(*b*) that the agreement with his wife to revoke the original gift, and to sell the shares to her for $40,000 in no way affected the appellant's liability to tax on income derived from such shares, inasmuch as he was satisfied that the word "transfer" was wide enough in its meaning to include a "sale" for value.

Because of that admission I am relieved of the necessity of determining whether or not a bona fide sale of property from husband to wife is within Section 32, subsection 2.

There were certain other occurrences, however, on which the appellant relies.

A short time prior to April 11, 1940, the appellant heard that one, A. G. Colvin, was desirous of selling his controlling interest in Whitehall Machine & Tools Limited. He felt that, if he could gain control, and bring Whitehall under his own efficient management, it would turn out to be a successful investment. Negotiations to that end were entered upon, and in the result Colvin and the appellant entered into an agreement on April 11, 1940—Exhibit "A". By that agreement Colvin agreed to sell, and the appellant to purchase, 500 shares, fully paid common stock of Whitehall. The consideration payable therefor to Colvin was 400 shares of the 7 per cent cumulative preferred stock of McCaskey Systems Ltd. and $35,000 payable as therein provided. The appellant, however, then owned no preferred stock in McCaskey. He states that, in agreeing to convey 400 such McCaskey shares to Colvin, he was acting on behalf of and with the approval of his wife, and that it was her 400 shares in McCaskey that were to be transferred to Colvin. He states also that, when his wife heard of the negotiations with Colvin, she desired to participate therein, and that she insisted that she receive an equal

number of Whitehall shares for her 400 McCaskey shares. Presumably this agreement between the appellant and his wife was arrived at prior to April 11, 1940, the date of the agreement with Colvin, and, therefore, before the date of the note—Exhibit "B".

A disagreement arose between Colvin and the appellant, the details of which are not here of importance. After a long period of litigation, the agreement of April 11, 1940, was specifically carried out in June, 1942. At that time Colvin received Mrs. McLaughlin's 400 preferred McCaskey shares, together with dividends which had accrued, and the balance of the expressed consideration. Mrs. McLaughlin received 400 shares of Whitehall stock, the remaining 100 shares going to the appellant or his nominee.

Under the appellant's management Whitehall apparently prospered, but no dividends were paid on its stock until December, 1948, when Mrs. McLaughlin received $30,000 in dividends on her 400 shares.

It was the amount of that dividend which was added to the appellant's declared income for 1948, on the ground that it was taxable as part of his income, as being "income derived from property substituted for the property which he had transferred to her in January, 1939."

It is shown that, in December 1949, the note given by the appellant's wife to him, was paid in full, together with one year's interest. I do not think, however, that that fact is of any importance in this case in view of the admissions made, nor do I think it is of any importance to determine in this case the precise value of the 400 McCaskey shares which Mrs. McLaughlin received from the appellant, or the value of the 400 Whitehall shares which she got in exchange therefor.

The sole point I am called upon to decide is whether the sum of $30,000 was properly added to the appellant's income.

The submissions on behalf of the appellant may be best expressed by quoting a portion of his Notice of Appeal.

Paragraph 2 of the reasons are as follows:

2. (a) The Income War Tax Act does not, by Section 32 or otherwise, in clear and express terms impose a tax upon the appellant in respect of income derived by his wife from the Whitehall Company shares substituted for the McCaskey shares transferred to her by the appellant unless it is

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shown that the appellant at the time or by the terms of the transfer from him to her was a party to such substitution:

(*b*) The uncontradicted evidence clearly establishes that the said substitution took place long after the transfer of the McCaskey shares from the appellant to his wife, and was not contemplated by either of them at the time of said transfer, that said substitution was made by the wife as her own act, and that the appellant was not a party thereto:

(*c*) If the word "substituted" in Section 32(2) does not mean substituted by the husband or by agreement with the husband made at or before the time of transfer, it would mean that the husband might be liable over an indefinite period and even after the death of his wife, in respect of any number of substitutions made by her or her personal representatives or heirs.

In support of this submission, there is cited the case of *Attorney General* v. *Eyres* (1). That was a case under the English Succession Duty Act, 1853, in which the Court was called upon to determine whether the compensation payable to a substituted trustee of a trust settlement was a disposition of property "by way of substitutive limitation". With respect, I do not think that the interpretation placed on the words "substitutive limitation" under that English Act, affords any guide to the meaning of the words "or from property substituted therefor" as found in Section 32, subsection 2 of the Income War Tax Act.

In the case of *Commissioners* v. *Pemsel* (2), Halsbury, Lord Chancellor, stated in a few words the basic principle to be applied in the interpretation of Statutes, where, at page 543, he said:

> The only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act.
>
> If the words of the Statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such cases best declare the intention of the law-giver.

That precept of the Lord Chancellor is, in my view, particularly appropriate to the circumstances of this case, for, in my opinion, and so far at least as this problem is concerned, the words of Section 32, subsection 2 are both precise and unambiguous. The subsection provides, in the clearest terms, that, when a husband transfers property to his wife, or vice versa, the transferor shall be liable to be taxed on the income derived from the property so transferred, or, if other property be substituted for that originally

(1) (1909) 1 K.B. 723.

(2) (1891) A.C. 531 at 543.

transferred, then upon the income derived from such substituted property. "Substituted property" means that property which replaces, or takes the place of, that property which was originally transferred. In my view the language used is so explicit as to exclude the limitations suggested by the appellant, namely, that it can mean only substitutions made by the transferor or substitutions contemplated by the transferor and transferee at the time of the original transfer. To limit the interpretation in the manner suggested, it would be necessary to read into the section words which Parliament has not seen fit to include, and which I do not think it intended should be included.

The intent of the subsection is clearly discernible, namely, that the national revenue to be derived from income shall not be lessened by transfers of property between husband and wife. It provides, therefore, that if such a transfer took place, the transferor shall continue to be liable on income arising from the property so transferred "as if such transfer had not been made." No doubt realizing that, if the provision went no further than that, its intention could be completely frustrated by a quick sale or exchange of the property transferred, Parliament did go further, and provided that the same results would follow in respect of income from property substituted for that originally transferred.

Now in this case it is admitted that the 400 McCaskey shares transferred by the appellant to his wife constituted a transfer of property within the provisions of Section 32, subsection 2. The evidence establishes that the 400 shares of Whitehall stock, later received by Mrs. McLaughlin, constituted property substituted for the original property transferred; that the $30,000 received by Mrs. McLaughlin in December, 1948, represented income from such substituted property.

By virtue of the subsection, therefore, the appellant was liable to be taxed in respect of that income, "as if the transfer to his wife had not been made."

A further minor point is raised by the appellant in paragraph 2(*h*) of his reasons, as follows:

> 2. (*h*) In any event, Section 32(2) while saying that the husband is "liable to be taxed on the income derived" from the substituted property, does not state or provide, as in other sections of the Act, that such income shall be deemed to be received by, or deemed to be income of, the husband.

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With that submission I cannot agree.

The subsection provides that the transferor shall be liable to be taxed "as if such transfer had not been made", which means, I think, that he shall be liable to be taxed as though the property transferred or that which was substituted for it, were his property and not that of the transferee. Being his property the income derived therefrom would constitute "income" as defined in Section 3 of the Act.

Finally, it is contended in the alternative, that, if the appellant be liable in respect of any income from the property transferred, it would be limited to the sum of $2,800, that being the annual dividend of 7 per cent payable on the 400 McCaskey shares.

It is pointed out that the subsection provides that the transferor shall be liable to be taxed "as if such transfer had not been made". Those words, however, refer to both situations previously mentioned, namely, the property originally transferred, and to the property substituted therefor. The section does not provide that the basis of the liability shall continue to be on the income as it existed at the time of the transfer. It means merely that, while the property originally transferred remains in its original form, the income therefrom shall be taxable as income in the hands of the transferor; but that, if other property be substituted therefor, then the income from such substituted property shall be taxable as income in the hands of the transferor.

It may be noted that, in the present case, no income was derived from the Whitehall stock for the years 1940 to 1947, and, therefore, the appellant was not liable throughout that period in respect of any income from the property transferred or property substituted therefor.

In my opinion this appeal must fail. The appeal will be dismissed and the assessment affirmed. The respondent is entitled to costs after taxation, and there will be judgment accordingly.

Judgment accordingly.

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Jan. 26, 29, & 30

Sept. 22

BETWEEN:

F. H. MULHOLLAND .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

AND BETWEEN:

J. L. SPRATT .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

AND BETWEEN:

S. L. HOLLAND .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT;

Crown—Re-negotiation of supply contracts by the Minister of Reconstruction and Supply—The Department of Munitions and Supply Act, 1939, Second Sess., c. 3, s. 13 as amended by S. of C., 1943-44, c. 8, s. 7 and by The Department of Reconstruction and Supply Act, S. of C. 1945, c. 16, s. 11(1), (2) and (3)—Appeals from orders and directions of the Minister—Onus on appellants to establish error in said orders and directions—Whether or not relationship of master and servant exists a question of fact—Difference between relations of master and servant, and of principal and agent—The Minister's power of re-negotiation of supply contracts not limited to those entered into with the Crown or with those having a government contract—"Supply contracts"—Evidence—Oral or written statements by persons not parties and not called as witnesses inadmissible to prove truth of matter stated—Practice—Rule 169 of the General Rules and Orders—The Exchequer Court Act, R.S.C. 1927, c. 34, ss. 61, 72—Evidence taken on commission can be used in evidence only by direction of the Court or a Judge unless provisions of s. 72 of the Act complied with—Commission evidence rejected as inadmissible since Commissioner's affidavit taken before a Justice of Peace and not before one of the persons mentioned in s. 61 of the Act—Appeals dismissed.

In January, 1940, certain verbal arrangements were made between a company which manufactured and sold a large variety of cutting tools in Canada and the appellants Spratt and Mulholland who had previously been employed as salesmen by a manufacturers' agent representing the company. The arrangements were that the appellants would have an office in Toronto, represent no firms other than the company, sell the company's products in all of Ontario except the eastern portion, promote goodwill on the company's behalf, provide free space to store such of the company's goods as were kept on hand in Toronto and pay all their operating costs, including salaries and expenses of their salesmen and office staff. In return for these services the company agreed to pay them in equal shares a straight

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ten per cent commission on all sales made by the company in their area, whether or not such sales were made by them. The appellants Spratt and Mulholland carried on accordingly until December, 1941, when new verbal arrangements were made, this time, with the three appellants and by which the territory would now cover all of Ontario and the commission would thereafter be divided in three equal parts. These new arrangements were then continued. On June 20, 1947, by a separate order and direction of the Minister of Reconstruction and Supply served on each appellant and made under the provisions of The Department of Munitions and Supply Act, Statutes of Canada, 1939 (Second Session) c. 3 as amended, each appellant's costs of operation and profits in respect of certain contracts during a period ending December 31, 1945, were fixed at a certain amount and each was directed to pay the sum received by him in excess of the amount so fixed. From this order and direction of the Minister each appellant now appeals.

Held: That the onus is on the appellants to establish error in the orders and directions of the Minister.

2. Whether or not in any given case the relationship of master and servant exists is a question of fact; but in all cases the relation imports the existence of power in the employer not only to direct what work the servant is to do, but also the manner in which the work is to be done. The difference between the relations of master and servant, and of principal and agent, may be said to be this: a principal has the right to direct what work the agent has to do; but the master has the further right to direct how the work is to be done.

3. That on the facts none of the appellants was at any relevant time an employee of the company, but on the contrary, they were in business on their own account as manufacturer's agents, but limiting their activities to the one manufacturing concern—namely, the company.

4. That the Minister's power of re-negotiation of supply contracts under s. 13 of The Department of Munitions and Supply Act is not limited to those entered into with His Majesty or with those having a government contract.

5. That the contracts or arrangements existing between the appellants and the company were "supply contracts" which the Minister had the power to re-negotiate.

6. That insofar as the appellants Spratt and Mulholland are concerned there were two supply contracts entered into by them with the company, that of January, 1940 and the arrangements made in December, 1941, with all three appellants must be considered as a second contract and not merely as a variation of the first contract.

7. That notwithstanding a slight error in the Minister's order and direction as to the appellant Holland, the basis of the claim for repayment has not been affected.

8. That oral or written statements made by persons who are not parties and are not called as witnesses are inadmissible to prove the truth of the matter stated.

9. That by reason of the provisions of Rule 169 of the General Rules and Orders of the Court evidence of a witness taken on commission can be given in evidence only by the direction of the Court or a Judge, unless the provisions of s. 72 of the Exchequer Court Act, R.S.C. 1927, c. 34 have been complied with.

10. That as the affidavit which the commissioner was required to take before proceeding with the examination of the witness was taken before a Justice of the Peace and not before one of the persons authorized by s. 61 of the Exchequer Court Act to take affidavits which can be used in the Court, the whole of the commission evidence must be rejected as inadmissible.

11. That each of the three appeals is dismissed.

APPEALS from orders and directions of the Minister of Reconstruction and Supply made under the provisions of The Department of Munitions and Supply Act, S. of C. 1939, Second Sess., c. 3 as amended.

The appeals were heard before the Honourable Mr. Justice Cameron at Toronto.

John Jennings, K.C. and *W. Z. Estey* for appellants.

J. W. Pickup, K.C. for respondent.

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

CAMERON J. now (September 22, 1951) delivered the following judgment:

At the request of the parties these three appeals were heard together, it being agreed that the evidence adduced should apply to all. In each case an appeal is taken from an order and direction of the Minister of Reconstruction and Supply, dated June 20, 1947, and made under the provisions of the Dept. of Munitions and Supply Act, Statutes of Canada, 1939, Second Sess., c. 3, as amended. Section 13 of that Act confers powers on the Minister to renegotiate certain supply contracts and when he is satisfied that the total amount paid or payable thereunder is in excess of the fair and reasonable cost of performing the contract together with a fair and reasonable profit thereon, he may fix the fair and reasonable cost of performing the contract, the fair and reasonable profit thereon, and may direct the person to whom the excess amount has been paid to pay such excess to the Receiver General of Canada. Sections 13(6) and (7) provide for an appeal from such order and direction of the Minister to this Court.

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Each of the appellants upon being served with an order and direction of the Minister appealed therefrom. Pleadings were directed by order of this Court and in their statements of claim each appellant asked for a declaration declaring the orders and directions null and void, that they be set aside and that it be declared that there is nothing due and owing to the Receiver General of Canada thereunder.

Ex. 1 is the order and direction given to the appellant Spratt, and is as follows:

ORDER AND DIRECTION

WHEREAS Mr. J. L. Spratt was a party to two or more supply contracts (as defined in Section 13 of the Department of Munitions and Supply Act) and the undersigned is satisfied that the total amount paid or payable to him thereunder is in excess of the fair and reasonable cost of performing the said contracts, together with a fair and reasonable profit;

NOW, THEREFORE, pursuant to the powers conferred by the Department of Munitions and Supply Act and the Department of Reconstruction and Supply Act, 1945;

1. It is hereby ordered that the amount that Mr. J. L. Spratt is entitled to retain or receive in respect of supply contracts during the sixty month period ending December 31, 1945, as the fair and reasonable cost of performing the said contracts together with a fair and reasonable profit thereon during the said period be and it is hereby fixed at the sum of $104,603.

Mr. J. L. Spratt is hereby directed to pay forthwith to the Receiver-General of Canada the sum of $223,897, being the amount which he has received in respect of the said supply contracts during the said period in excess of the amount so fixed in respect thereof.

Dated at Ottawa this 20th day of June, 1947.

C. D. HOWE
Minister of Reconstruction and Supply.

That given to the appellant Mulholland (Ex. 3) is identical in terms and amounts; and that given to the appellant Holland (Ex. 2) differs only in that his contract was stated to be for a period of forty-eight months, his costs of operation and profit were fixed at $83,180 and he was directed to pay $172,783.

The appellants sold a large variety of cutting tools on behalf of Union Twist Drill Company, Butterfield Division, of Rock Island, Quebec. The Union Twist Drill Company is an American corporation having a Massachusetts charter, but operating its Butterfield Division at two plants in close proximity, one at Rock Island, Quebec, and the other at

Derby Line, Vermont. These two plants operated under one management but it appears that the goods which the appellants sold were manufactured at Rock Island. For purposes of brevity I will hereafter refer to the Union Twist Drill Company, Butterfield Division, as "the company." It is not disputed that each of the appellants over the periods in question received from the company the sum of the fixed costs and profit and of the amount which each was directed to pay to the Receiver General.

After the statement of defence was delivered, the appellants demanded particulars of para. 2 thereof and in reply the respondent furnished the following particulars:

> The Attorney-General of Canada on behalf of His Majesty says that the contract or arrangement referred to in paragraph 2 of the Statement of Defence was a contract or arrangement such as is described in said paragraph 2 made between the Appellant and Union Twist Drill Company. The terms and details of such contract or arrangement are unknown to the Respondent but are known to the Appellant.

It will be seen, therefore, that the "supply contracts" mentioned in the orders and directions refer not to the selling contracts negotiated by the appellants for the sale of the company's products, but to the contract or contracts entered into between the appellants and the company. The dispute centres around the interpretation to be placed on the words "supply contract," it being submitted by the appellants that their arrangements or contracts with the company were not "supply contracts" within the meaning of that term as defined in section 13(1).

The first point to be determined is whether the onus is on the appellants or the respondent. Mr. Jennings, counsel for the appellants, submits that it lies on the respondent and that he must not only satisfy the Court that the contracts of the appellants with the company were "supply contracts," but also must prove affirmatively that the amounts fixed by the Minister for costs of performance and for profits were, in fact, fair and reasonable under all the circumstances.

The appeal provisions are as follows:

> 13. (6) A person affected by an order or direction made by the Minister under this section may within thirty days after the receipt of a copy of such order or direction inform the Minister of his intention to appeal against such order or direction to the Exchequer Court of Canada and within such period of thirty days file a notice of such intention in the Court, whereupon all proceedings under such order or direction shall be stayed pending the disposition of the appeal by the Exchequer Court.

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(7) On the filing of the notice of appeal, the Exchequer Court shall, on the application of the Minister or of the appellant give directions relative to the disposition of the appeal, and shall upon the hearing of the appeal have jurisdiction to review any direction or decision of the Minister under this section and may confirm the Minister's order or direction or vary the same as it deems just and the decision of the Court shall be final and conclusive.

In my opinion, the onus is on the appellants to establish error in the orders and directions of the Minister. These matters are before the Court by way of an appeal from such orders and directions made after the Minister is satisfied of the existence of certain facts (section 13(3)(4)). Then subsection (6) provides for the giving and filing of notice of intention to "appeal" and subsection (7) refers to the disposition of the "appeal." It seems to me that in using the word "appeal" throughout, Parliament indicated that upon the hearing of the appeal, the procedure to be followed would be the same as normally follows from an appeal from an inferior court to a superior court, namely, that when the legislation does not otherwise provide, the one making the appeal is required to establish error in fact or in law in the order or judgment from which the appeal is taken.

I have given the most anxious consideration to this question, more particularly because of the provision in section 13(7), that "the decision of the Court shall be final and conclusive," and because the matter has not previously been the subject of judicial interpretation. A careful examination of all the provisions of section 13 has convinced me that Parliament conferred on the Minister very wide powers in the re-negotiation of supply contracts—including the power when satisfied that the total amount paid thereunder is in excess of a fair and reasonable cost of performing the contract, together with a fair and reasonable profit thereon—to make an *order and direction* fixing the amount which a contractor is entitled to retain and ordering the repayment of any excess. It is a ministerial order made under statutory authority and is valid until, upon appeal, it is established by an appellant upon affirmative evidence that it contains errors in fact or in law. The extent to which the order and direction is made valid is shown by the provisions of ss. (8) and (9) of section 13. Under the former, one who fails to comply with any order or direction is declared to be guilty of an offence under the

Act; and in the latter the amount directed to be paid to the Receiver-General in such an order and direction is recoverable with costs *as a debt due to His Majesty,* notwithstanding that proceedings have been taken under subsection (8).

At first sight the powers conferred on the Minister would seem to be somewhat arbitrary, but it is to be noted that section 13(2) requires any person entering into a supply contract to keep detailed records and accounts of the cost of carrying out the contract and to make them available to the Minister's representative. It may be assumed, therefore, that if the subsection were complied with, an appellant would have no great difficulty in presenting such evidence as would enable the Court to properly review the Minister's order and direction.

It may be noted, also, that in this case formal pleadings were directed and that the appellants were ordered to deliver a statement of claim. They are, therefore, in the position of plaintiffs and must prove the allegations in their statements of claim.

In many ways the right of appeal here granted is similar to that found in Part VIII (Appeals and Procedure) of the Income War Tax Act, R.S.C. 1927, c. 97, as amended. It is well established that in an appeal under that Act, and notwithstanding the language used in section 63(2) thereof (that upon the Minister transmitting certain documents to the Court "the matter shall thereupon be deemed to be an action in the said Court ready for trial or hearing") the burden of proof is upon the appellant and the taxpayer must establish the existence of facts or law showing an error in relation to the tax imposed upon him (*Johnson* v. *Minister of National Revenue* (1)).

In the present appeals I am also of the opinion that the burden of showing error in the orders and directions of the Minister lies upon the appellants.

As I have said, the appellants' submission is that their arrangements or contracts with the company did not fall within the definition of "supply contract" and that, there-

(1) (1948) S.C.R. 486.

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fore, the Minister had no power to direct repayment of any amounts. The applicable parts of section 13 are as follows:

13. (1) In this section,

(a) "supply contract" means a contract, including a sub-contract, entered into on or after the ninth day of April, 1940, or entered into but not fully performed and completed before the said day,

(i) to manufacture, produce, finish, assemble, transport, repair, maintain, service, store or deal in or which in any way relates to munitions of war or supplies; or

(ii) to construct or carry out or which in any way relates to a project;

(b) "sub-contract" includes any contract or arrangement

(i) to perform all or any part of the work or service, or to make or furnish any article or material, for the performance of any other supply contract; or

(ii) under which any amount payable is contingent upon the entry into of any other supply contract or determined with reference to any amount payable under or otherwise by reference to any other supply contract; or

(iii) under which any part of the services performed or to be performed consists of soliciting, attempting to negotiate or negotiating any other supply contract; and

(c) "contract" includes sub-contract.

(3) If the Minister is satisfied either before or after the performance, in whole or in part, of a supply contract, that the total amount paid or payable thereunder to any person is in excess of the fair and reasonable cost of performing the said contract together with a fair and reasonable profit, he may by order reduce the amount that the said person is entitled to retain or receive thereunder to such amount as he may fix as the fair and reasonable cost of performing the said contract together with a fair and reasonable profit thereon and the Minister may direct the said person to pay to the Receiver General of Canada forthwith any amount which the said person has received under the said contract in excess of the amount so fixed.

(4) If any person is a party to two or more supply contracts the Minister may

(a) by one order reduce the total amount that the said person is entitled to retain or receive under any two or more or all of the said contracts to such amount as he may fix as the fair and reasonable cost of performing the said contracts together with a fair and reasonable profit thereon; or

(b) by order fix the amount that the said person is entitled to retain or receive in respect of supply contracts during such period as may be designated by the Minister as the fair and reasonable cost of performing the said contracts together with a fair and reasonable profit thereon during the said period, and, if the said person has during the said period carried on business other than the performance of supply contracts the Minister may, for the purpose of determining the fair and reasonable cost of performing supply contracts, or the fair and reasonable profit thereon, during the said period, determine the share or part of the gross

income of the said person, or of the costs incurred by him, during the said period that is to be regarded as being attributable to such other business;

and the Minister may direct the said person to pay to the Receiver General of Canada forthwith any amount which the said person has received under the said contracts or in respect of supply contracts during the said period in excess of the amount so fixed in respect thereof.

Much of the evidence adduced by the appellants had to do with the terms of the contracts between them and the company, it being submitted on their behalf that on that evidence the Court should find that they were mere servants or employees of the company. The matter is of importance in that, presumably, if they were servants of the company, the only re-negotiation which the Minister could then enter into would be the contracts of the company and by disallowing to the company any excess amounts paid by it to the appellants as being in excess of the fair and reasonable cost of performing its contracts. As a matter of fact, the contracts of the company were re-negotiated and all the amounts paid to the appellants, as well as to the three other firms representing the company in other parts of Canada, were allowed in full.

None of the arrangements or contracts with the appellants was in writing. It becomes necessary, therefore, to consider carefully the evidence as to the formation of the agreements and what was done thereunder insofar as they indicate the relationship between the appellants and the company.

Whether or not in any given case the relationship of master and servant exists is a question of fact; but in all cases the relation imports the existence of power in the employer not only to direct what work the servant is to do, but also the manner in which the work is to be done. The difference between the relations of master and servant, and of principal and agent, may be said to be this: a principal has the right to direct what work the agent has to do; but the master has the further right to direct how the work is to be done (Halsbury, Second Edition, Vol. 22, p. 113).

The company has sold its products for many years in Canada. In January, 1940, it sold them through four agencies, all being manufacturers' agents handling not only the company's products but those of other manufacturers as well. Its Ontario representative was one Harrison, a manufacturers' agent who handled several other lines as

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well and was interested in a manufacturing concern also. His territory covered all of Ontario except the eastern portion. His contract with the company was similar to those of the other three agencies, namely, that he was to sell the company's products in his area, promote goodwill on its behalf, provide free space to store such of the company's goods as were kept on hand in Toronto, and pay all his operating costs, including salaries and expenses of his salesmen and office staff. His premises and offices were at Mimico adjacent to Toronto. In return for these services he was paid a straight 10 per cent commission on all sales made by the company in his area, whether or not such sales were made by him. Harrison died in January, 1940, and upon his death Mr. G. F. Holland, the General Manager of the company, made verbal arrangements with the appellants Spratt and Mulholland (both of whom had previously been salesmen employed by Mr. Harrison) to represent the company for the same area and on the same terms as to payment, and with the same duties as were carried out previously by Harrison. The arrangement was subject to three conditions, all of which were agreed to, namely, that those appellants would move their office to Toronto, that they would represent no firms other than the company and that the commission of 10 per cent would be divisible between them in equal shares. Spratt and Mulholland carried on accordingly. They secured quarters on King Street, Toronto, taking the lease in their own names or in the name of Spratt and Mulholland Tool Sales. They purchased office equipment and supplies, having first secured a loan for that purpose from the company. Upon the door of that office and in the telephone directory they used the names "Union Twist Drill Company, Butterfield Division," and also "Spratt and Mulholland Tool Sales, Co-distributors." At their own expense they provided space for storage of the company's products in Toronto, but the company paid insurance on such goods. They paid all the costs of operation, including the rent, office and salesmen's salaries, and all travelling expenses. They sold the products of the company, in very large quantities, all in the name of the company, and selling nothing on their own account. They shipped such goods as they had on hand in Toronto direct to purchasers, but otherwise the orders were filled by the company and shipped direct to

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the customers. All invoices and accounts were rendered by the company to the customers and the company collected all its own accounts. If freight were paid by the appellants, they were re-imbursed by the company which also supplied the appellants with its own order forms and letterheads and for a time paid certain telegraph and telephone charges.

Shortly after the end of each month the appellants Spratt and Mulholland each received individually from the company a cheque for 5 per cent of the commission earned in the preceding month. These cheques were then deposited by them in a joint account which required the signatures of both Spratt and Mulholland; and after all operating expenses were paid therefrom, the balance was divided equally between them.

Spratt and Mulholland carried on together in this way until December, 1941. At that time they had an interview with the general manager of the company, Mr. G. F. Holland, father of the other appellant. He intimated to them that as their territory was large it would be desirable to have additional help. He then proposed that, if agreeable to them, his son, the appellant Holland, would join them and that in that case he would add to their territory that part of Eastern Ontario which had previously been covered from Montreal. The suggestion in this regard did not emanate from Spratt or Mulholland, but they agreed at once, and also to Holland's suggestion that thereafter the 10 per cent commission would be divided equally between the three appellants. This new arrangement continued in effect until 1947 and, except for the fact that the territory was increased so as to cover all of Ontario and that the commission was then divided into three equal parts, all other arrangements and duties were the same as before. In February, 1947, the appellant Holland succeeded his father as general manager of the Butterfield Division and he in turn was followed in Toronto by a younger brother, the same arrangements being then continued.

I have considered most carefully all the evidence as to the relationship between the appellants and the company, and while at first I had some doubts on the matter, I have now reached the firm conclusion that the appellants were not employees of Union Twist Drill, but were, in fact, at

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all relevant times in business as agents or manufacturer's agents, although their activities were limited to the products of one firm.

It is admitted that throughout the entire period the company made no deductions in respect of income tax from the amounts paid to the appellants as they were required to do for all employees, whether paid by salary or commission. Then it is admitted that until Harrison's death, all four of the company's sales representatives throughout Canada (including Harrison) were, in fact, manufacturers' agents and not employees, and that after Harrison's death the other three were still manufacturers' agents. It is also shown that following Harrison's death, the work performed and services rendered by the appellants to the company were precisely the same as those of Harrison, except that in 1941 the territory was increased.

The change in office from Mimico to Toronto and the division of the same commission into two equal parts, and the agreement that Spratt and Mulholland would carry no other line of goods, did not in any way change the nature of the relationship that had previously existed between the company and Harrison. The duties to be performed remained essentially the same.

Many of the other things which Spratt and Mulholland did, lead me to the same conclusion. They personally selected the new Toronto office and later on, with the appellant Holland, selected the quarters to which they moved in 1943. The lease was taken in their names and they paid the rent and bought the necessary furniture and equipment. They employed their own staff of assistants and paid all office and travelling expenses. For some years they used the name "Spratt and Mulholland Tool Sales" on their office door and in the telephone directory. Spratt said that this was done as for a time they contemplated taking on other agencies as well. This may be doubted, however, because of the evidence that from the inception of the matter it was clearly understood by all that they could represent no one except Union Twist Drill. They secured a loan from the company to assist in the purchase of office equipment, which suggests that the company was not equipping a branch store for the use of its own employees. It was said that Holland, Sr. had stipulated that

the commission would be divisible in equal shares between Spratt and Mulholland, but that he gave no reasons for that requirement. On the other hand, it is shown that the arrangements for separate cheques were made with the approval—and probably the suggestion—of the appellants' auditors, an arrangement which would be beneficial from the income tax point of view. As I have said above, the whole of the commission cheques, when received, were at once put into a bank account in the names of the appellants. The company's goods on hand in Toronto were stated to be "on consignment," a term which seems inappropriate if the appellants were employees of the company and if the Toronto office were in fact "a branch store" of the company, as is suggested.

Nor can I find on the evidence that the company had power to direct how the work of the appellants was to be done. A number of instances were cited by the appellants as to certain "directions" and "requirements" of Holland, Sr. which at first might indicate that the appellants were under his direct control; but in cross-examination it was made clear in practically every case that these were "requests" which were subject to the approval of the appellants. It is clear that the general manager was to some extent a dominating personality and that when he expressed a wish for something to be done or acquiescence on the part of the appellants in some scheme or suggestion, they would usually feel it advisable to concur. Their position was somewhat precarious in that they had no written contract with the company, the contract contained no terms as to its duration, and inasmuch, also, as they carried no other lines of goods. While, therefore, they were not obliged to concur in his suggestions, it was highly advisable for them to do so. One instance of that sort is the request for their approval to take in the appellant Holland (a matter which originated with Holland, Sr.), to which request they at once acceded. Other instances were given, such as his dislike of a particular typewriter which was their property and which he suggested they should change, and which they did change; another instance was his dislike of one of their salesmen, Ward, and his repeated intimations that he did not like him, resulting finally in

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Ward's discharge by the appellants, although they personally had no fault to find with him. In neither case were orders given by Holland, although his wishes were made quite clear.

Then, too, much is made of the contacts kept with the company through its general manager. He visited them on three or four occasions each year and would sometimes take them to call on prospective customers. They were in telephone communication with him four or five times a week and he would urge them to see certain prospects, to check on the business of rival firms and to promote the interest of the company. The appellant Holland said that they were to use their own discretion in the fulfilling and handling of the company's interests. When Spratt was asked whether any one gave him instructions as to how often he should go, or where he should go at a particular time, or whether that was left entirely and absolutely to his own judgment, he said, "Not always, no. I have been specifically requested to look after a certain complaint or check into a fall-off in business, or things of that nature (by Mr. Holland); he visited Toronto perhaps every three months and we were in frequent telephone conversation with him, perhaps three to six times a week; those conversations were to resolve problems that had arisen in connection with our business."

The appellant Holland, Jr. repeatedly spoke of the "instructions" given by the company. Referring to the period following Harrison's death in 1940, while he was still at the company office, he said that "the company would give detailed instructions to any of the four offices that we so thought; this one (referring to the Toronto office) would receive more attention." When it is recalled that this witness considered the other three agencies as manufacturers' agents, it will be seen from the statement above that generally speaking they were treated in the same way as the Toronto agent, although the latter received some more attention. He also said, "The specific carrying out of such work is given to the people in these areas on the assumption, of course, that they will be carried out to the company's advantage. So long as such operations are carried out to what the company considers their advantage, there will be no further directions from Rock Island to alter the course of the situation."

That witness also stated that when he came to Toronto and while there, he had severed his relations and engagement with Union Twist Drill Company.

My conclusion on this point, therefore, is that none of the appellants was at any relevant time an employee of the company, but on the contrary that they were in business on their own account as manufacturers' agents, but limiting their activities to the one manufacturing concern—namely, the company.

It may be convenient at this point to dispose of a number of questions as to the admissibility of certain evidence which I admitted at the trial, subject to the objection of counsel and which I reserved for further consideration.

Counsel for the appellants tendered, through the appellant Spratt, a catalogue (Ex. 12) issued by the company in 1939 and apparently circulated to its customers and used by its agents (including the appellants) in making sales. It was produced from the custody of Mr. Spratt who received it in March, 1939, while he was still a salesman in the employ of Harrison. On one of the front pages reference is made to the Montreal, Toronto and Vancouver stores, and to the Winnipeg office, in each case with its address. The sole purpose of tendering this catalogue is, as stated by counsel, that it tends to prove that the company recognized that the business in Toronto was their store and that it was a recognition by the company of the relationship that existed between the appellants and the company—a matter which is here in issue.

This document is inadmissible on several grounds. In the first place, it was issued in 1939 and could have no reference to the status of the appellants and is therefore irrelevant to this issue. Even if admitted in evidence, it would be of no effect as against the oral evidence that in 1939 all the sales were made through manufacturers' agents. But it is also inadmissible through the witness Spratt as being merely hearsay and not within any of the exceptions to the hearsay rule. The general principle is that oral or written statements made by persons who are not parties and are not called as witnesses *are inadmissible to prove the truth of the matter stated.* The question of the publication of the catalogue is not in issue; but the question of the status of the appellants to the company

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is in issue and therefore, when it is proposed to use the assertions in the catalogue that the Toronto store was the store of the company, it is inadmissible through the witness Spratt. It might be otherwise if tendered through another witness such as an officer of the company who had caused its publication and circulation, as an act corroborating his evidence as to the status of the appellants. It must, therefore, be rejected.

Counsel also tendered a postcard (Ex. 10) sent to the appellant Spratt by the general manager of the company. It is a printed card which had been sent out by the company to the trade at or about the time Spratt and Mulholland became the agents of the company in January, 1940. Over the name of the company it announces the transfer of the company's stock and offices from Mimico to the new address in Toronto, and adds—"Under the Management of Messrs. J. L. Spratt and F. H. Mulholland." This card, in my opinion, is also inadmissible through the witness Spratt as proof of the truth of the statement that Spratt and Mulholland were managers of the company office in Toronto, on the ground that it is hearsay evidence and for that reason is in exactly the same position as the catalogue above mentioned.

A further question which I reserved was the admissibility of certain questions put to Mr. Spratt in cross-examination as to his knowledge of the re-negotiation of the company's contracts. That question need not be further considered as the appellant Holland stated in direct examination to his counsel that all the costs of the four selling agents of the company, including those of the appellants, were then allowed in full as deductible expenses of the company.

The only evidence tendered on behalf of the respondent was that of George F. Holland of Worcester, Massachusetts, an official of the Union Twist Drill Company, and taken on commission at Worcester. Counsel for the appellants objected to the use of this evidence on several grounds, but at the hearing I permitted it to be read reserving my finding as to its admissibility.

I have considered the matter very carefully and have reached the conclusion that, in every respect but one, the application for the order to take the evidence on com-

mission and the conduct of the examination itself were strictly in accordance with the provisions of the Exchequer Court Act and with the General Rules and Orders and the practice of this Court. The one matter to which I have referred was that the affidavit which the commissioner was required to take before proceeding with the examination was *sworn before a Justice of the Peace.* Counsel for the appellants submits that for this reason the evidence is inadmissible inasmuch as the provisions of section 61 of the Exchequer Court Act have not been complied with.

The writ of commission was issued in the terms of Form 29 pursuant to Rule 169, and attached thereto were the instructions and Directions to the Commissioner, one of which was as follows:

4. Before you in any manner act in the execution hereof, you shall take and subscribe, before any person authorized under The Exchequer Court Act, ch. 34 of the Revised Statutes of Canada, 1927, to administer such oath, the oath hereafter mentioned, upon the Holy Evangelists or otherwise, in such manner as shall be sanctioned by the form of your religion and shall be considered by you to be binding on your conscience.

The manner in which affidavits to be used in this Court may be sworn outside of Canada is provided in section 61 of the Act as follows:

61. Any oath, affidavit, affirmation or declaration concerning any proceeding had or to be had in the Exchequer Court administered, sworn, affirmed or made out of Canada shall be as valid and of like effect to all intents as if it had been administered, sworn, affirmed or made before a commission appointed under this Act, if it is so administered, sworn, affirmed or made out of Canada before

(*a*) any commissioner authorized to take affidavits to be used in His Majesty's High Court of Justice in England;

(*b*) any notary public and certified under his hand and official seal;

(*c*) a mayor or chief magistrate of any city, borough, or town corporate in Great Britain or Ireland or in any colony or possession of His Majesty out of Canada or in any foreign country and certified under the common seal of such city, borough, or town corporate;

(*d*) a judge of any court of superior jurisdiction in any colony or possession of His Majesty or dependency of the Crown out of Canada; or

(*e*) any consul, vice-consul, acting consul, pro-consul or consular agent of His Majesty exercising his functions in any foreign place and certified under his official seal.

A Justice of the Peace does not fall within any of the classifications mentioned. It is urged by counsel for the respondent that there is no evidence that the Justice of the

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Peace who took the Commissioner's affidavit was not also a Notary Public. There is no evidence, however, that he is, in fact, a Notary Public and from the record it is patent that he acted only in the capacity of a Justice of the Peace. The attached certificate of a clerk of the Superior Court shows that he was, in fact, a Justice of the Peace, and I cannot assume that he had any other status.

Counsel for the respondent submitted that it would be highly improper to consider such an objection at the time when the evidence was tendered at the trial and that such objections should have been raised earlier. No application was made for leave to use the evidence until it was tendered at the trial. I am of the opinion that by reason of the provisions of Rule 169, such commission evidence can be given in evidence only by the direction of the Court or a Judge, unless the provisions of section 72 of the Act have been complied with.

Rule 169. The Court or a Judge may, in a cause where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before any officer of the Court, or any other person or persons duly authorized to take or administer oaths in the said Court, and at any place, of any witness or person, and may order any deposition so taken to be filed in the Court, *and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a judge may direct.*

An order for a commission to examine witnesses may be in the terms of Form 28 in the Appendix to these Rules, and the writ of commission may be in the terms of Form 29 thereof, with such variations as circumstances may require.

Section 72 of the Exchequer Court Act is as follows:

72. When any examination has been returned, any party may give notice of such return, and no objection to the examination being read shall have effect, unless taken within the time and in the manner prescribed by general order.

There is no indication that either of the parties gave notice of the return of the examination, and therefore the appellants had no opportunity of raising objections to the the examination being read until it was tendered at the trial.

For these reasons I have reached the conclusion that as the Commissioner's affidavit was taken before a Justice of the Peace and not before one of the persons authorized by section 61 of the Act to take affidavits which can be used in this Court, the whole of the commission evidence must be rejected as inadmissible. I have carefully considered

the Act and the Rules and I cannot find that the Court has any power to remedy the defect when, as here, the evidence is tendered at the trial without any notice of return of the commission having been served. Section 63 of the Act gives certain powers to the Court to receive affidavit evidence notwithstanding informalities in the heading or other formal requisites "when made or taken before any person under any provisions of this or any other Act." But that provision does not extend to such a case as this.

In this connection, reference may be made to *re Goldenberg and Glass* (1) where Middleton, J.A., in the Court of Appeal of Ontario, said at p. 416:

> This affidavit unfortunately was sworn at Toledo, Ohio, before a Justice of the Peace, and was consequently not so sworn as to be admissible in evidence.

Having determined that the appellants were not employees of the company, I turn now to the contention that their contracts with the company were not "supply contracts" which the Minister had power to re-negotiate under section 13.

One of the submissions made on behalf of the appellants is that the Minister's power of re-negotiation of supply contracts is limited to those made with the Crown or one of the departments of Government, or with a government contractor. The evidence is not quite conclusive on this point but I think on the whole I may assume (but without deciding) that all of the sales made by the company through the appellants were sales to private manufacturers or jobbers. It may be noted that the amounts directed to be paid are in all cases to be paid to the Receiver General of Canada. A careful reading of the whole Act has convinced me that this submission cannot be upheld. The general powers conferred on the Minister are very broad and in very many cases extend beyond contracts made with His Majesty. It is not necessary to set out these powers in detail, but one or two instances will suffice to indicate their extent. For example, in section 11 the Minister is given certain powers to give directions "to any person who, by virtue of any contract, whether made with the Minister or any Government department or authority or any other person." Then, by section 8, certain provisions are made

(1) (1925) 56 O.L.R. 414.

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applicable only "in respect of all contracts to be entered into by the Minister on behalf of His Majesty the King in right of Canada."

In section 13—the re-negotiation section—there is nothing which limits the power of the Minister to contracts entered into with His Majesty or with a government contractor. On the contrary, it is made applicable to all supply contracts as defined in ss. (1), and by that definition it means *a contract,* including a sub-contract (entered into as therein provided), and sub-contract includes *"any contract or arrangement" as therein defined.* Had Parliament intended to limit the power of re-negotiation to contracts with His Majesty, or with those having a government contract, that intention would have been clearly expressed in the definitions of "supply contract" and "sub-contract" in ss. (1). It seems clear to me, therefore, that the Minister's power of re-negotiation of supply contracts is not limited to those entered into with His Majesty or with those having a government contract.

The next submission of the appellants is that their arrangements or contracts with the company were not, in fact, "supply contracts." It is urged on their behalf that they were merely negotiating sales of cutting tools in precisely the same way and for the same purpose as Harrison had done prior to the war; that they had no precise knowledge as to whether the tools when sold were or were not used in the production of munitions of war, or on projects; and that in many cases their sales were made to jobbers who in turn would sell to persons unknown to them; that they did not keep records of each sale, leaving that duty to the company itself; and that they were not parties to any contract relating to munitions of war or supplies.

Now the supply contracts which the Minister has power to re-negotiate are those defined in section 13(1) (*supra*) and they include not only "supply contracts," but also "sub-contracts" as therein defined. It is apparent from the statement of defence that the respondent relies in the main on its allegation that the appellants were in the position of sub-contractors, para. 2 being as follows:

2 He denies the allegations in paragraphs 2 and 3 of the Statement of Claim and says that during the sixty month period ending December 31, 1945, the appellant, with the meaning of Section 13 of the Department of Munitions & Supply Act, being Statutes of Canada, 1945, Chapter 16

was a party to a contract or arrangement whereby he furnished articles or material for the performance of one or more supply contracts and/or received moneys, payment of which was contingent upon the entry into of one or more supply contracts or was determined with reference to one or more supply contracts and/or performed services consisting of soliciting, attempting to negotiate or negotiating one or more supply contracts.

The allegations in that paragraph are designed to bring the appellants' contracts or arrangements within one or more of the three definitions of "sub-contract" in section 13(1) (*b*). If they fall within any one of the three classifications, then as "sub-contracts" they are by section 13(1) (*a*) also "supply contracts" which by section 13(3) and (4) may be re-negotiated. I do not find it necessary, therefore, to determine whether in negotiating sales on behalf of the company they were parties to a contract whereby they furnished articles or materials for the performance of any other supply contract (s. 13(1) (*b*) (i)). The evidence of the appellants themselves clearly establishes that their contracts or arrangements with the company were of such a nature that, thereunder (1) the amount payable to them was (*a*) contingent upon the entry by the company into a sales contract in the sale of cutting tools; and (*b*) was determined with reference to the amount payable by the purchasers of such tools to the company (s. 13(1) (*b*) (ii)); (2) the services performed or to be performed consisted of soliciting, attempting to negotiate or negotiating sales of cutting tools on behalf of the company (s. 13(1) (*b*) (iii)).

To be "sub-contracts" however, such contracts as I have described must relate to "any other supply contract," and the "other supply contract" relied on by the respondent is, of course, the contract for sales of cutting tools made by the company to the purchasers thereof, as a result of which 10 per cent of the sales price was divisible between the appellants in the proportions I have mentioned. Were these contracts within the definition of supply contracts provided in section 13(1) (*a*)? The appellants have not attempted to satisfy the onus which lies on them to prove that they were not. There was evidence that the appellants had not kept complete records of the sales made but had left that duty to the company. I cannot escape the conclusion that had it been to their interest to do so, the appellants could and would have produced evidence on this point so that the nature of the sales, names of the purchasers

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and of the ultimate users of the tools would have been before the Court. The appellants were under a statutory duty to keep full records, they had their own auditors and one of the appellants—Holland—is now general manager of the company, which undoubtedly would have complete records. At one stage of the proceedings, counsel for the appellants stated that their auditors would be called, but he closed his case without any evidence from them.

On the positive side, however, there is evidence which is sufficient, in my opinion, to establish that the contracts for the sales of cutting tools by the company were, in fact, within the term "any other supply contract." The appellant Spratt stated in cross-examination that as many of the plants he called on were doing secret work, he had no idea what they were turning out; that he and the other appellants took orders for tools "which may or may not have been used for war purpose"; and that he really did not know what they were used for. But he finally agreed that the appellants were selling or supplying *"the kind of tools which war plants would require."*

I consider these statements to be of great importance, more particularly the final admission made by Spratt which I think is sufficient to bring the sales by the company within the definition of "supply contracts" contained in section 13(1) (*a*) (i), in that they were contracts to "manufacture, produce . . . or deal in or which in any way relates to munitions of war or supplies." The latter two terms are defined in the Act as follows:

> 2. In this Act, unless the context otherwise requires, the expression,
>
> (*d*) "munitions of war" means arms, ammunition, implements of war, military, naval or air stores, or any articles deemed capable of being converted thereinto, *or made useful* in the production thereof;
>
> (*e*) "supplies" includes materials, equipment, ships, aircraft, automobile vehicles, animals, goods, stores and articles or commodities of every kind including, but without restricting the generality of the foregoing, anything which, in the opinion of the Minister is, or is likely to be, necessary for or in connection with the production, storage or supply of any munitions of war or necessary for the needs of the Government or of the community in war or for reconstruction as defined in The Department of Reconstruction Act, 1944.

On the evidence of Mr. Spratt that the appellants and the company were supplying tools that war plants would require, it is apparent that "cutting tools" would be made

useful in the production of arms, ammunition and implements of war, and that therefore they fall within the definition of "munitions of war." In any event, they would fall within the very broad definition of "supplies" as being "goods and articles or commodities of every kind," or "as being necessary for or in connection with the production or supply of any munitions of war . . . or necessary for the needs of the Government or *of the community* in war."

Applying the broad meaning of "munitions of war" and "supplies" to the provisions of section 13(1) (*a*) (i), I find that the sales of cutting tools by the company were, in fact, within the term "supply contracts" and that such sales constituted "any other supply contract" referred to in section 13(1) (*b*) (ii) and (iii). The original contract of Spratt and Mulholland with the company, dated January, 1940, was entered into before April 9, 1940, but not then completed; and the second contract with all three appellants was entered into after the said date, and, therefore, both contracts are within the time limits referred to in section 13(1) (*a*).

It follows, therefore, that the contracts or arrangements existing between the appellants and the company were "supply contracts" which the Minister had power to renegotiate.

The appellants did not see fit to put in any evidence as to the commissions earned by them, as to the fair and reasonable cost of performing the contract or as to what could be considered a fair and reasonable profit thereon. There is, therefore, no evidence before me by which I could review the findings of the Minister as to what constitutes the fair and reasonable cost of performing the contract, together with a reasonable profit thereon, or as to the amount which each of the appellants was directed to pay to the Receiver General.

It is submitted for the appellant Spratt and Mulholland that they had but one contract with the company, namely, that of January, 1940, and that therefore as the Minister proceeded under section 13(4) and found that they were parties to "two or more supply contracts," the orders and directions as to them should be set aside. I find no difficulty, however, in reaching the conclusion that as to these two appellants, there were in fact two contracts with

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the company. That of January, 1940, is admitted. The arrangements made in December, 1941, with all three appellants must be considered as a second contract and not merely as a variation of the first contract. In the arrangements then made, the company made its bargain with the three appellants in place of the former bargain with Spratt and Mulholland; the former commission of 10 per cent which had previously been divided equally between Spratt and Mulholland was thereafter to be divided equally between all three appellants; and additional territory was added in which the appellants could operate. Insofar as the appellants Spratt and Mulholland are concerned, I find, therefore, that there were two supply contracts entered into by them with the company. The orders and directions as to Spratt and Mulholland are therefore affirmed.

As to the appellant Holland, there was but one contract, namely, that of December, 1941. It is urged, therefore, on his behalf that the Minister's order and direction as to him (Ex. 2) was wrong in reciting that he was a party to "two or more supply contracts" and that therefore it should be set aside.

Now there is no essential difference between the powers conferred on the Minister under section 13(3) and those conferred on him under section 13(4). Under section 13(4), where two or more supply contracts are involved, the Minister, instead of treating each supply contract separately, may either (*a*) deal with them as a unit and by making but one order and direction; or (*b*) by one order fix the amount payable to a contractor in a designated period and also make certain other adjustments where the contractor has been engaged during the period on business other than the performance of supply contracts. Under both subsections, the Minister's duties are the same, namely, to fix (1) the fair and reasonable cost of performing a contract or contracts together with the fair and reasonable profits thereon, and (2) to direct what amount shall be payable to the Receiver General. In my opinion, these two subsections must be read together, certain essential duties of the Minister being set out only in subsection (3) and being carried forward into subsection (4) only by implication.

It is not shown that the Minister in fixing the amounts which the appellant Holland could retain and the amount which he was required to pay, took into consideration any contract other than Holland's contract of December, 1941, or that in any way his computations in regard thereto were inaccurate. The mere inaccuracy of the reference in the order and direction to "two or more contracts" did not result in any finding other than that which would have followed from a recital of "one supply contract." For that reason I do not think that in the result the appellant Holland has been misled or has suffered any injustice by reason of such mis-recital. Had the order and direction referred only to section 13 and recited that Holland was a party "to a supply contract or contracts," the result would have been precisely the same. It may well be that at the time this order and direction were given, the situation as to the number of contracts entered into by Holland was not at all clear. The statement of defence states that the appellant Holland was a party "to a contract or agreement" and so he has not been in any way misled by the slight error in the Minister's order and direction. In my opinion, it would be quite improper and unjust to set aside that order and direction merely because of a slight inaccuracy in referring to "two or more contracts" where but one contract existed. I must find, therefore, that notwithstanding the error in that order and direction, the basis of the claim for repayment has not been affected and the order and direction for payment by Holland will be affirmed in his case as well.

Each of the three appeals will therefore be dismissed with costs.

I think I should add that the evidence indicated that each of the appellants had paid income tax in each year on his total income. I assume, therefore, that as their incomes in each year have been greatly reduced by reason of the Minister's orders and directions, which are hereby affirmed, that the necessary adjustments of income tax will in each case be made at the proper time.

Judgment accordingly.

1952
Jan. 22
Mar. 14

BETWEEN:

BYRON B. KENNEDY ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97 s. 3(1)—Transaction so nearly identical and closely associated with appellant's operations not to be considered as an isolated transaction—Failure by appellant to satisfy burden that the Minister's decision is erroneous—Appeal from decision of Income Tax Appeal Board dismissed.

In 1944 the appellant bought thirty lots of land located north west of the city limits of Toronto, sixteen of which were in 1948 expropriated by the Province of Ontario; the amount of compensation money resulted in a net profit to the appellant of $12,117.52. The appellant did not report that amount in his income tax return for 1948 on the ground that the purchase of said lands was for the purpose of an investment and not, in any way, related to his business of speculative builder of high class residential houses in Toronto and vicinity. The amount was added to the appellant's income by the Minister and the former appealed to the Income Tax Appeal Board which dismissed his appeal.

Held: That the purchase by the appellant of the lots of land is so nearly identical and closely associated with his business operations that it should not be considered as an isolated transaction or completely divorced from the business normally carried on by him.

2. That the appellant has not satisfied the burden on him to demonstrate that the decision of the Minister was erroneous.

APPEAL from the decision of the Income Tax Appeal Board dismissing the appellant's appeal against his 1948 assessment.

The appeal was heard before the Honourable Mr. Justice Archibald at Toronto.

O. J. D. Ross for the appellant.

Gerard Beaudoin, Q.C. and *T. Z. Boles* for the respondent.

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

ARCHIBALD J. (now March 14, 1952) delivered the following judgment:

This is an appeal by Byron B. Kennedy of Toronto, Ontario, from the Income Tax Assessment made by the Department of National Revenue for Canada, against him for the year 1946. The appellant complains that there

was added to his Income Tax the sum of $12,114.13. The said sum was added to his Income Tax by reason of the profit received by the appellant from the sale of certain lots of land owned by him, which land had been expropriated by the Ontario Department of Highways for the purpose of constructing a highway.

The appeal was heard before me in Toronto on the 22nd day of January, 1952.

The record shows that the Notice of Assessment was dated the 20th February, 1950. The Notice of Objection was duly filed by the appellant and the reply of the Minister of National Revenue was dated the 19th July, 1950. In the said reply of the said minister, a claim respecting disposal of a car was allowed, but the said assessment on the profit received from the said expropriation of the lands, amounting to $12,117.53, was confirmed. This decision of the said minister was appealed to the Income Tax Appeal Board and by that board was heard on the 24th day of January, 1951. The appeal was dismissed by the Income Tax Appeal Board on the 28th day of February, 1951, and the decision of the Income Tax Appeal Board was duly appealed to this Court.

The facts as I find them are as follows:

(i) That according to appellant he became interested in acquiring the lands hereinafter referred to as the "Challenor Estate," in 1943, and that on the 20th day of January, 1944, the appellant offered to purchase from the Challenor Estate, thirty lots of land and paid for the same the sum of $7,000 on the 13th day of April, 1944.

(ii) That the said lands are located north west of the city limits of the city of Toronto in North York township, and are between Avenue road and Bathurst street, and that said lands had been in possession of the Challenor Estate for a period of more than twenty years prior to the sale to the appellant.

(iii) That some time (the dates are not certain) during the years 1946 and 1947, the appellant had discussions with the representatives of the Province of Ontario, and learned from them that said province had under consideration the construction of additions

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to the Toronto to Barrie highway and, that a portion of said lands would be required by said province for the construction of said highway, and negotiations followed as to the compensation which should be paid by the said province to the appellant.

(iv) That on the 16th day of February, 1948, the appellant was paid by the said Province of Ontario, the sum of $16,802.05, as compensation for the portion of the land later conveyed by the appellant to said Province of Ontario, and amounting, in all, to sixteen lots, and that there then remained unsold by the appellant, fourteen lots out of the lands purchased by him from the said Challenor Estate.

In his Income Tax return submitted for the year 1948, the appellant did not report the said sum of $12,117.53 as part of his taxable income. The reason given by him for not doing so, and which was urged with great force by his counsel before me, is that he had for upwards of twenty-two years been engaged in the business of "speculative builder" in the city of Toronto and that the purchase of the said lands by him from the Challenor Estate was for the purpose of an investment and not, in any way, related to his business.

In the course of the representations made by the appellant's counsel to me, it was represented that the Income Tax Appeal Board was in a large measure influenced by reason of the failure of the appellant to appear in person before that Board and clarify his intentions as to the purpose for which said lands had been purchased by him. The appellant did, however, appear before me, and after having given careful consideration to his evidence, I am of opinion that he failed completely to clarify his intentions respecting the purchase of these lands.

His evidence as to the purpose for which the lands were acquired is far from satisfactory. He endeavoured to show that he paid the sum of $7,000 for these lands to assist a friend, whose friends in England were unable to bring to Canada sufficient money to pay the taxes and, that his action in purchasing the property, prevented a tax sale of said lands. He repeatedly refers in his evidence to this as his purpose in buying said lands. However, later in his evidence, and particularly on cross-examination, he states

that the purchase of the Challenor Estate lands for $7,000 was a "good buy"; that he felt it could be later disposed of at a "profit," and again indicated his intention of building at some later date apartment houses on the said lands. Indicating that his business comprised *inter alia*, that of buying lands to be re-sold for homes or other buildings. In short, the purchase by him of the Challenor Estate lands is so nearly identical and closely associated with his business operations, that it should not be considered as an isolated transaction or completely divorced from the business normally carried on by the appellant.

Furthermore, it should be borne in mind that there was filed with me an exhibit to his evidence indicating the operations as builder carried on by him for the years 1927 to 1946 inclusive. This exhibit, filed before me and marked "1", clearly indicates that during the years 1940, 1941, 1942, 1943, 1944 and 1945, the buildings constructed by the appellant and sold by him showed a striking decrease in cost of the houses so constructed. It is apparent that the costs of buildings constructed during those years, bear little resemblance to the costs of the buildings previously constructed by him. The appellant endeavoured to explain this by indicating that the difficulty in obtaining materials and government restrictions as to the size and costs of the buildings, made it necessary for him to adopt a building of much lower cost. The lowest point in his building costs and operations apparently was reached by the appellant about the year 1943, and that is the year in which discussions were had by him with respect to the purchase of the Challenor Estate lots.

It should be noted also, that during the years 1943 and 1944, the appellant became interested with three other gentlemen in acquiring and developing for sale as building lots, thirty other lots on the outskirts of Toronto, in the Hunt Club Golf Course property, so called; that he participated with his colleagues in the various meetings held from time to time with respect to this property, and that after having contributed large sums of money towards the purchase of this property, he participated in the development and sale of the lands at a profit. It is also in evidence, that he subsequently purchased six lots of land in the Summit property, so called, and when it was later discovered

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that the municipality had made changes in the building restrictions, he sold these lands, again at a profit, and without having built houses thereon.

His counsel, in the course of his skilful argument, urged that the transaction with respect to the Challenor Estate lands, was an investment, pure and simple, and that it was quite apart from the business which he normally conducted. As I have already indicated, I am satisfied such was not the case, and I am confirmed by the appellant's own evidence, both in the manner in which it was given, and in the actual testimony itself.

Having regard also to the trend in the quality and type of houses he had under construction, and having regard to his interests at or about the same time, in transactions affecting lands of similar type, it is clear to me that he has not satisfied the burden on him to demonstrate that the decision of the Minister of National Revenue was in error.

My decision is that this appeal should be dismissed with costs.

Judgment accordingly.

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Oct. 4 & 5

Dec. 12

BETWEEN:

FREDERICK JAMES WALSH .....SUPPLIANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

Crown—Petition of Right—Damages—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c)—Onus of proof on suppliant—Crown not responsible until statutory conditions of liability proved to have been present—Action dismissed.

Suppliant seeks to recover from respondent damages for injuries caused through the negligent operation of an army vehicle by one Sonmor who was employed in a civilian capacity in an army camp at Dawson Creek, British Columbia. Sonmor was employed on a 48 hour per week basis, his day's work ending at 5 p.m. He was supplied with a house, heat and light by the army but not provided with kitchen fuel, wood being used, and for the supply of which he was solely responsible. It was on a trip in search of fuel after working hours, in an army vehicle, lawfully borrowed for the purpose, that the accident occurred causing the suppliant's injuries. The Court found that Sonmor was engaged solely on his own business and the expedition was not in any way incidental to his employment.

Held: That the action must be dismissed since there is no evidence of any negligence of an officer or servant of the Crown while acting within the scope of his duties or employment as provided in s. 19(*c*) of the Exchequer Court Act.

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PETITION OF RIGHT by suppliant seeking damages from the Crown for injuries allegedly caused by negligence of a servant of the Crown.

The action was tried before the Honourable Mr. Justice Hyndman, Deputy Judge of the Court, at Edmonton.

W. Arthur McClellan for suppliant.

Herbert King and *K. E. Eaton* for respondent.

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

HYNDMAN D.J. now (December 12, 1951) delivered the following judgment:

By petition of right, Frederick James Walsh of Dawson Creek in the province of British Columbia, clerk, claims against His Majesty the King, in right of Canada, damages, general and special, caused by the negligence of Arnold Sonmor, alleged to be a civilian employee of His Majesty the King, in the Department of National Defence.

On the first day of September, 1950, the suppliant was the owner and driver of a Ford one ton truck, licence number C 17583, proceeding north on the Alaska highway, in said province of British Columbia. At about mile 23 on said highway, some 20 miles north of the village of Dawson Creek, at about 7.30 p.m. Pacific daylight saving time, the suppliant stopped and pulled to the right hand side of the said highway for the purpose of changing a deflated tire. A few minutes after so stopping, a National Defence vehicle, licence number M 988, driven by the said Arnold Sonmor, a civilian employee of His Majesty, aforesaid, who was also proceeding north on the said highway, ran into the rear of the suppliant's vehicle, damaging the truck and severely injuring the suppliant. Visibility at the time was good and it is claimed that it was solely through Sonmor's negligence in not keeping a proper lookout that the said accident occurred.

The suppliant claims that he sustained the following personal injuries:

1. Shock and concussion;
2. Deep lacerations of the scalp;
3. Right ear almost totally severed;
4. Multiple bruises and contusions to the body, from head to feet, and
5. Injuries to cartilages of both knees.

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It is claimed that the above injuries have left some permanent disability and have disfigured the suppliant. The suppliant's truck was also badly damaged. The special damages claimed are:

1. Physician's fee	$ 100.00
2. Damage to truck and box	281.29
3. Dental work	26.00
4. Hospital expenses	176.00
5. Loss of earning for four months at $189 per month	756.00
	$1,339.29

The above item 2 of $281.29 was, by amendment at trial, increased to $318.18, thus increasing the total to $1,376.18.

In answer to the claim, all the material allegations in the petition are denied, and, in the alternative, it is claimed that if the driver of His Majesty's car was negligent, the damage suffered by the suppliant was caused by the fault of the suppliant as well as by the said Sonmor, and the Contributory Negligence Act of British Columbia is pleaded.

The Crown further pleads that the said Arnold Sonmor was not, at the time of the collision, acting within the scope of his duties or employment as an officer or in the service of His Majesty, referred to in the petition of right.

The evidence discloses that the suppliant parked his car on the right hand side of the road, the left hind wheel being about 9 feet from the edge of the gravel portion of the road, leaving 26 feet to the other side. In the centre gravel had been accumulated and there were well marked tracks on either side of such gravel, used by cars coming and going. I find that there was plenty of room for cars to pass each other, either coming or going, if properly and carefully driven. About 530 feet south of the parked car there was a curve at the crown of an up-hill grade, and a straight road from the top of the curve to the suppliant's car. Sonmor was driving at the rate of about 30 miles per hour, and just as he rounded the curve the sun caught him in the eyes and he was unable to see just where he was, but kept on going, all the time blinded by the sun, until he collided with the suppliant's car. The left side of the suppliant's car was smashed, suppliant thrown to the ground, knocked unconscious, and was cut, bruised and bleeding.

In my opinion, there was clearly negligence on the part of Sonmor in proceeding 500 feet or more, unable to see just where he was on the road, and when he realized this situation, it was his duty to stop as soon as possible, and he had plenty of time in which to realize this, as a prudent and reasonable man should. His proceeding on as he did, in my opinion, was pure negligence. That he was going at an unreasonable rate under the circumstances at the time of the collision, is evidenced by the fact that his car was 187 feet further on from the point of the accident, and if the driver, Sonmor, was acting in the course of his duties and employment, I would not hesitate to give judgment for the suppliant against the Crown. I do not consider that there was any contributory negligence on the part of the suppliant, as he was reasonably close to the shoulder of the road, with plenty of space left for cars to pass going in the same direction.

However, the difficulty in the claim is that on the evidence, Sonmor, was not acting within the course of his duties or employment, but was on a purely personal journey.

The facts are that Sonmor was employed in a civilian capacity in the army camp at Dawson Creek, on a forty-eight hour per week basis, his hours of work ending about 5.00 p.m. He testified that on the day in question, he locked his shop at 5.45 p.m.

Under the arrangements with him, as apparently with other civilian employees, a house, heat, and light were found for him by the army, but no provision made for kitchen fuel, for which wood was used, and for the supply of which he himself was solely responsible.

It was on a trip with his three sons to secure this kitchen wood that he was engaged at the time—clearly after his working hours—and had borrowed the army car for the purpose, in a lawful way. His employer was in no way responsible for providing, or securing this fuel for him. The evidence is undoubted that he was engaged solely on his own business and not on duty when the accident occurred. Nor can I see that under the terms of his contract it was in any way incidental to his employment: instead of going for this wood himself he might well have purchased it from some one else.

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This being the position of affairs, on the authorities, his claim against the Crown must fail, and the action be dismissed.

The claim is made under section 19(*c*) of the Exchequer Court Act, R.S.C. 1927, c. 34, as amended, and reads:

> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:
>
> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

There are many decisions on this point, a recent one being that of the president of this Court, *Ginn et al.* v. *The King*, (1) in which he said:

> To succeed in their claims the suppliants must prove not only that the injuries suffered by the suppliant Robert John Ginn resulted from the negligence of an officer or servant of the Crown but also that such negligence occurred while the officer or servant was acting within the scope of his duties or employment. The onus of proof of these matters lies on the suppliants. The onus is not a light one.

The president cites the case of *The King* v. *Moreau*, (2), in which Rinfret, C.J., said:

> Deuxièmement, toujours en vertu de l'article 19(*c*), il ne suffisait pas à l'intimé de prouver la négligence d'un officier ou d'un serviteur de la Couronne, mais il fallait, en plus, qu'il prouvât que cet officier ou ce serviteur négligent, agissait dans les limites de ses devoirs ou de ses fonctions.

Other decisions I might mention are, *Hewitt* v. *Bonvin* (3); *Gibson* v. *British Columbia District Telegraph and Delivery Company Limited*, (4); *McKay* v. *Drysdale*, (5); *Rawn and Strath* v. *The King*, (6).

There will therefore be judgment dismissing the suppliant's claim with costs.

Judgment accordingly.

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(1) (1950) Ex. C.R. 208 at 211.
(2) (1950) S.C.R. 18.
(3) (1940) 1 K.B. 188.
(4) (1936) 3 W.W.R. 241.
(5) (1921) 2 W.W.R. 592.
(6) (1948) 4 D.L.R. 412.

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Jan. 24, 28, 29, 30

May 14

BETWEEN:

JOHN D. FORBES ..... APPELLANT;

AND

MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

Revenue—Income tax—Income War Tax Act R.S.C. 1927, c. 97, s. 47—Onus is on appellant to show assessment is invalid—Failure to discharge onus—Appeal dismissed.

Held: That the onus is on the appellant to prove that the arbitrary assessment for income tax made against him and affirmed by the Minister of National Revenue is erroneous and when that onus is not discharged either by the appellant or by any evidence adduced at the hearing the appeal must be dismissed.

APPEAL under the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Archibald at Toronto.

Joseph Sedgewick, Q.C. and *Stuart Thom* for appellant.

G. B. Bagwell, Q.C. and *D. K. Petapiece* for respondent.

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

ARCHIBALD J. now (May 14, 1952) delivered the following judgment:

This is an appeal against the arbitrary assessment made against the appellant, which assessment was affirmed by the Minister of National Revenue, on the 15th day of May, 1950. The assessment is for the years 1941 to 1948 inclusive. The appellant had filed his income tax return for each of the years in question, and no exception was taken by the income tax inspector until receipt by him prior to December 15, 1949, of a book containing daily records of receipts for the appellant respecting his hotel during the period August 1, 1946 to December 26, 1948. This book is Exhibit "A" in the evidence, and is referred to in the minutes of evidence as the "Black book." It will be so referred to by me throughout this decision. The entries in the Black book corresponded in many details with those in the Day books and Cash books kept by the appellant, but there were many discrepancies as well, and the sum total of the entries in the Black book greatly exceeded those of

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the sum total of the entries shown for a comparable period and corresponding dates in the Day books and Cash books, as shown to the appellant's auditor from time to time and which were employed by the appellant in preparing his income tax returns from year to year.

The appeal was heard before me at Toronto on the 28th, 29th and 30th days of January, 1952.

Owing to the unusual circumstances detailed in the evidence given on the hearing of this appeal, I will refer briefly to the facts involved and comment on the evidence.

The appellant's hotel, hereinafter referred to as the "Forbes' hotel," is located at Shuter and Mutual streets in the city of Toronto. It consisted, at all times relevant to the dates covered in the assessment, of about twenty rooms available for permanent and transient guests, in addition to dining rooms, kitchens, beverage rooms and other rooms required in the operation of the hotel. The property, or at least the major portion of it, was acquired by the appellant, according to his auditor, about fifteen years ago. The appellant was residing in the Forbes' hotel at the time of his marriage to Mrs. Linton Forbes, in May, 1939. For some time after their said marriage, the books of account (Day book, Cash book, etc.), were kept by the appellant, his son "Mickey" Forbes (a son by appellant's first marriage), and others, up to February, 1943, when Mrs. Linton Forbes took charge of the bookkeeping, and the entries are in her handwriting to June 27, 1945. Subsequent to that date, and up to approximately November, 1948, the entries in the books appear in the handwriting of "Mickey" Forbes, who acted as manager for the appellant of the Forbes' hotel operations, the bookkeeping, the returns and other matters affecting the business of Forbes' hotel. Subsequent to that date, according to Mrs. Forbes, the handwriting in the books is that of one, Norman Vale.

The appellant's auditor, Walter Smith, set up a set of books—Day book, Cash book and other records—which he considered adequate for the purpose of the manager of a small hotel and beverage rooms. Each month the books were taken to Smith's office and audited by him and, based on this audit, income tax returns were prepared from year to year. The check of the books made by Mr. Smith from

month to month, seems to have been careful and conscientious, subject to the observation that he depended entirely on the entries and records made by the appellant or some one or other of his managers, bookkeepers or servants, and he, Smith, did not make any adequate independent check of the records so handed him. I should add that I was not impressed by his evidence when, in his evidence, he attempted to estimate the revenue which should have been produced by the sale of the quantities of beer and wine sold by the appellant at his hotel and in the beverage rooms operated by him, as well as the revenue which should have been received from room rentals and other receipts. I should add that Mr. Smith was not convincing as an expert.

Due to the condition of his health, the appellant himself, afforded little or no assistance to the Court in considering his appeal. He was examined for discovery on November 14, 1951, and while the evidence given by him at that time does not, in the written transcript then made, disclose any serious mental disability or impairment, however, prior to being called to the witness box, his doctor, a specialist in neurology and psychiatry, testified that the appellant had been under his care and later in hospital under his observation, in March and April, 1951. He diagnosed appellant as "suffering from a degenerative disease of the brain to such an extent that he had a very serious memory disease" and that in his opinion, "appellant was entirely incapable, as far as being able to look after his affairs, is concerned." In his opinion, reliance could not be placed on appellant's recollection of what happened since 1940 or 1941. Counsel for appellant then called appellant to the witness stand—I assume either to demonstrate to me the force of the doctor's diagnosis, or to discredit and nullify the effect his evidence given on discovery might have on me. In any event, as he appeared before me, his is a sad case, and I do not feel justified in accepting the evidence given by him on discovery, particularly, as his counsel before the examiner called attention to the mental condition of his client.

Comment should also be made respecting the evidence given by Mrs. Linton Forbes, the appellant's present wife. Much of her married life to appellant has been spent in residence at the Forbes' hotel. In fact, she lived there all the time, with the exception of the period beginning 1946

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and continuing to November, 1948, when she, with her husband and her two infant children, lived at Port Credit. Her evidence satisfies me that while she was living at the Forbes' hotel, and particularly during the time she kept the books, the entries made by her, were, in the main, those supplied to her by other members of the staff or hotel organization, and that she did nothing to verify the correctness or accuracy of the information given her. For example, the records she furnished the auditor as to beverage room receipts were based on slips and verbal reports from tap men and other servants. She did not check in the cash register receipts or otherwise. So also her information respecting room rentals was vague and uncertain—and the charts and slips respecting them and allegedly kept by her, were not produced to the Court. If the appellant relied on her evidence to show that during any portion of the time the records were so kept and to disprove the Minister's assessment in any particular, then I must say her evidence is woefully inadequate and does not convince me that the records so kept by her tell the whole story of the operations of the Forbes' hotel.

I find that in all the circumstances of this appeal, there is no evidence taken by itself to indicate that the Minister's assessment is erroneous. This brings me to consider whether or not the burden on the appellant is discharged by an examination of the evidence adduced on behalf of the Minister of National Revenue. Counsel for the appellant stresses the importance of the effect of the evidence given by "Mickey" Forbes. I do not see that the evidence given by "Mickey" Forbes can be said to be of assistance to the appellant. "Mickey" Forbes did, if further proof was needed, establish that the Black book was written in his handwriting; that it was a book kept by him and in his custody during the time when he was managing the Forbes' hotel for the appellant, but when he ("Mickey" Forbes) attempted to explain the purpose for which the book was kept, when I had given counsel who called him, leave to cross-examine his own witness, he told a story so fantastic and so inconsistent and utterly improbable, that I cannot accept it as the proper explanation. I reject it and all evidence relied on by counsel for the appellant in support of the contention that "Mickey" Forbes' evidence, or any

part thereof, supports the argument that appellant had discharged the burden required of him to show the Minister's assessment was erroneous.

There remains for comment the evidence given by E. G. Gowen, an assessor for the Income Tax Department. This witness was called by the respondent. He examined the Black book and compared the entries in it with those in the Day books and Cash books kept by the appellant for the corresponding dates and periods. His investigations were followed by the amended assessment. His examination of the relevant documents and his research were thorough, painstaking and exhaustive. He did not leave his assessment to guess or speculation. His examination of the documents was made with meticulous care and his investigation into returns to the Liquor Control Board of Ontario confirmed in my mind the inescapable conclusion that the entries in the right hand column of the relevant pages in the Black book, referred to as the "Snaff" or "Snuff" column, properly and correctly represented the additional amounts of revenue received by the appellant. This witness was submitted to a searching and exhaustive cross-examination by counsel for the appellant and his evidence was not shaken. One could not fail to be impressed by the accuracy of his evidence and by his fairness to the taxpayer, both in the method followed by him in making his investigations, and also in the manner in which he gave his evidence. His reconstructions and projections of the information and records contained in the Black book to other periods and years not covered by the Black book, were carefully explained by him and conclusively demonstrated to me the accuracy of the arbitrary assessment. I accept his evidence as immeasurably superior to that given by the appellant's auditor, and in all instances, where there is conflict between the two, I accept Mr. Gowen's evidence in preference to that of the auditor.

It is clear that the appellant has not discharged the burden on him to show that the arbitrary assessment affirmed by the Minister of National Revenue, pursuant to the provisions of section 47 of the Income War Tax Act of Canada, is invalid or in error. That the burden is one which the taxpayer must discharge has been clearly set forth in several leading cases. I will refer only to the decision of

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Thorson, P. in *Dezura* v. *Minister of National Revenue* (1); to the decisions of Rand J. and Kellock J. in *R. W. S. Johnston* v. *Minister of National Revenue* (2); see also Cameron, J. in *Chernenkoff* v. *Minister of National Revenue* (3). Counsel for the appellant stressed the effect of the decision of Thorson P. in *Goldman* v. *Minister of National Revenue* (4). I am of opinion that the language of the learned President in his decision does not assist counsel in this case. The learned President did not vary in any respect the statements of the law already referred to in *Johnston* v. *Minister of National Revenue* (*supra*).

This appeal will be dismissed with costs.

Judgment accordingly.

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Jan. 21

Mar. 14

BETWEEN:

ALLOY METAL SALES LTD. .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

Revenue—Excess Profits Tax Act 1940, s. 15A—Standard profit—Controlled company—No ambiguity in the wording of Section 15A—Meaning of the wording of Section 15A—Appeal dismissed.

The appellant company was incorporated in 1940, and has been since its inception a wholly owned subsidiary of the International Nickel Company of Canada Limited for the purpose of distributing the latter company's products. Appellant company's standard profit was fixed by the Board of Referees under the Excess Profits Tax Act, prior to the enactment of Section 15A of that statute, at the sum of $60,000. Subsequent to the enactment of that section, in May 1943, and in accordance with its provisions the appellant's standard profit in respect of the taxation years of 1942, 1943, 1944 and 1945 was fixed by the Minister at the sum of $5,000. Hence the appeal.

Held: That there is no ambiguity in the wording of Section 15A of the Excess Profits Tax Act, 1940.

2. That the wording of the section simply means that the standard profit of a controlled company cannot exceed $5,000 a year, notwithstanding any provision in the Act. *The Royal City Sawmills Limited* v. *The Minister of National Revenue,* (1950) Ex. C.R. 276 followed.

(1) (1948) Ex. C.R. 10.
(2) (1948) S.C.R. 486 at 490 and 492.
(3) (1950) Ex. C.R. 15 at 23.
(4) (1951) Ex. C.R. 274.

APPEAL under the Excess Profits Tax Act, 1940.

The appeal was heard before the Honourable Mr. Justice Archibald at Toronto.

H. C. F. Mockridge, Q.C. for appellant.

J. W. Pickup, Q.C. and *T. Z. Boles* for respondent.

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

ARCHIBALD J. now (March 14, 1952) delivered the following judgment:

The appellant, Alloy Metal Sales Limited, was incorporated on December 27, 1940, to become the organization for the distribution of certain products of the International Nickel Company of Canada, Limited. Prior to that date, the International Nickel Company of Canada, Limited, had attended to the distribution of its own products.

Paragraph 6 of the appeal contains the following words:

6. The appellant has accordingly since the first of January, 1941, carried on the business of distributing and selling the products of The International Nickel Company of Canada, Limited and its subsidiaries such as nickel alloys and rolled nickel and nickel alloy shapes and in addition has distributed certain metals such as stainless steel produced by others and its standard profit was fixed by the Board of Referees under The Excess Profits Tax Act, prior to the enactment of Section 15A of that Statute at the sum of $60,000.

Section 15A of the Excess Profits Tax Act reads as follows:

15A. Notwithstanding anything in this Act contained in any case where a company has a controlling interest in any other company or companies (hereinafter called controlled company or companies) incorporated in 1940 or thereafter . . . and the sum of the capital employed by such company and such controlled company or companies at the time of incorporation is not in the opinion of the Minister of National Revenue substantially greater than the capital employed by such first-mentioned company prior to the incorporation of such controlled company or companies, the standard profits of all such controlled companies taken together shall not exceed $5,000 in the aggregate, and shall be allocated to each of such controlled companies in such amounts as the Minister of National Revenue may direct.

In any such case a reference to the Board of Referees shall not be made notwithstanding the provisions of section five of this Act.

The contention on behalf of the appellant is that inasmuch as this legislation is retroactive and has retrospective effect, this section must be strictly construed and that

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ambiguity being evident by reason of the second paragraph of the section the Court should, in construing the whole of section 15A resort to discussions in Parliament to assist it in determining the reason for the legislation.

After giving careful thought to the wording of the subsection, I am unable to see that there is any such ambiguity in the wording of the section as to justify resort to the discussions in Parliament at the time when consideration was being given to the legislation.

The argument on behalf of the appellant is that if resort is had to the Hansard debates at the time of the enactment of this legislation, it will be apparent that the purpose of the Act was to prevent an abuse from creeping in which would permit companies to incorporate wholly owned subsidiaries for the purpose of limiting income tax assessments. There is certainly nothing in the section itself containing any reference to such an abuse. There is no recital nor any preamble to indicate anything of the kind. If the wording of the section means anything at all, it means that the standard profits of the Alloy Metal Sales Limited cannot exceed $5,000 a year, notwithstanding any provision in the Act.

The point was squarely before this Court in the appeal of *The Royal City Sawmills Limited* v. *The Minister of National Revenue* (1). That case was tried before Sidney Smith, D.J., and at p. 278, the learned judge states:

> In my opinion there can be no doubt that, from first to last, this was a controlled company in the sense of this section (indeed the point was not contested); that in the opinion of the Minister of National Revenue (and, I may add, in my own as well) the sum of the capital of parent and offspring was not substantially greater than the capital of the parent company at the relevant time; and that its date of incorporation and chargeable accounting periods come within the statutory time. How, then, can it be said that the company falls outside the wide net of this section?
>
> The main argument was that having had its standard profits fixed at $28,500 in 1941, the section could not now operate to reduce them to $5,000; that this would be tantamount to retrospective legislation; and that the section left much room for doubt as to whether this was the intention.
>
> But the section introduced a new standard profit for certain companies of which this was one. It contains no hint that Parliament intended that the section should not apply to companies within its ambit whose standard profits had previously been fixed by some other measure. If such had

(1) (1950) Ex. C.R. 276.

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been the intention nothing would have been easier than to say so. In the absence of such language the qualification of its terms by any such implication is not legitimate. The provision may seem harsh to the appellant company, but if the provision is clear the Court has no jurisdiction to mitigate such harshness, if any there be.

In my opinion this statutory provision interpreted according to income tax principles and to the actual terms of the language used amounts to saying: "If you are a controlled company your standard profits shall not exceed $5,000 notwithstanding any machinery in the Act which may hitherto have given you a greater standard profit."

The appeal must be dismissed with costs.

In this appeal, it is complained that the result has worked hardship on the appellant because the income tax as assessed is greatly in excess of any assessment that would have been made had no wholly owned subsidiary been established for the purpose of attending to the sales of the various products referred to in its Letters Patent, and, while it may be regretable that this condition has resulted, nevertheless, in my view, proper construction of the statute does not permit the interpretation sought by the appellant.

The appeal will be dismissed with costs.

Judgment accordingly.

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Feb. 28

Mar. 18

BETWEEN:

HYMAN RUBENSTEIN *et al* .....APPELLANTS;

AND

THE REGISTRAR OF TRADE MARKS. RESPONDENT,

AND

BULOVA WATCH COMPANY INC. ..... } OBJECTING PARTY.

Trade Mark—"Bulla"—"Bulova"—The Unfair Competition Act, 1932, S. of C. 1932, c. 38, ss. 2(k) (m) (o), 26(1) (f), 51—Whether "Bulla" similar to "Bulova"—Whether two trade marks are similar within meaning of s. 2(k) of the Act a question of fact to be determined upon facts and particulars of each case—Test to be applied that of sound —Sound of words "Bulova" and "Bulla" likely to confuse users of wares—Evidence of actual confusion not necessary—Appeal dismissed.

The Registrar refused the appellant's application to register the word mark "Bulla" for use in association with watches on the ground that the proposed word mark is confusingly similar to the objecting party's registered trade mark "Bulova" for use in association with watches,

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watch movements, watch cases and watch parts. The appeal is from the Registrar's refusal and the objecting party was added as a party to the proceedings in appeal.

Held: That whether two trade marks are similar within the meaning of s. 2(*k*) of the Unfair Competition Act, S. of C. 1932, c. 38, is a question of fact to be determined upon the particular facts and circumstances of each case.

2. That the only test that need be applied herein is that of sound. In each case, the word mark is comprised of one word only; in each case, when spoken in English, the accent is on the first syllable, which is identical for both words; and in each case the first and last syllables are exactly alike both in spelling and pronunciation.

3. That the sound of the two words "Bulova" and "Bulla" is such that users of the wares would likely confuse them and be led "to infer that the same person assumed responsibility for their character or quality".

4. That when there has been no substantial contemporaneous use of the two marks, the fact that there is no evidence of actual confusion through such use as there has been, is not of much importance. *Freed and Freed Ltd.* v. *Registrar of Trade Marks et al* (1950) Ex. C.R. 431 followed.

APPEAL from the Registrar's refusal to register the appellant's proposed word mark "BULLA".

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

Henri Gerin-Lajoie, Q.C. for appellant.

W. P. J. O'Meara, Q.C. for Registrar.

J. C. Osborne for objecting party.

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

CAMERON J. now (March 18, 1952) delivered the following judgment:

This is an appeal under section 51 of the Unfair Competition Act, 1932, from the refusal of the Registrar of Trade Marks to register the word mark "BULLA." On November 21, 1949, the appellants filed an application to register that mark, alleging that they had used it on wares described as "watches" to indicate that such wares were *sold* by them.

At that time, Bulova Watch Company, Inc., was the registered owner of two specific trade marks as follows: (1) Registration No. 235/50875, consisting of the word mark "BULOVA" for use with watches and watch movements,

which was registered on November 5, 1930; (2) Registration No. 194/42775, consisting of the word mark "BULOVA," together with certain design matter for use with watches, watch-cases and watch parts, which was registered on November 2, 1927.

Bulova Watch Company opposed the appellants' application and after some correspondence the Registrar, on December 22, 1950, refused the application, his grounds being stated as follows:

> It is my opinion that the word "BULLA" and the registered Trade Marks "BULOVA" are confusingly similar within the meaning of Section 2(*k*) of the Unfair Competition Act, 1932, and that in the mind of the public, the marks so resemble each other or so clearly suggest the idea conveyed by each other that the contemporaneous use of both in the same area in association with wares of the same kind would be likely to cause dealers in and/or users of such wares to infer that the same person assumed responsibility for their character or quality.
>
> Accordingly, the application of your client is refused. This is a final action.

Upon the application of Bulova Watch Company, it was added as an objecting party in the appeal and in its Statement of Objections it relied substantially on the reasons assigned by the Registrar for refusing the application.

The Registrar's decision was based on the provisions of section 26(1) (*f*) of the Unfair Competition Act, as follows:

> 26. (1) Subject as otherwise provided in this Act, a word mark shall be registrable if it
>
> (*f*) is not similar to, or to a possible translation into English or French of, some other word mark already registered for use in connection with similar wares;

It is admitted that the wares sold by the appellants and the wares manufactured and sold by the objecting party are "similar" as that term is defined in the Unfair Competition Act, s. 2(1). The sole question for determination, therefore, is whether "BULLA," the proposed word mark of the appellants, is similar to "BULOVA," the word mark of the objecting party, already registered.

Section 2 of the Act defines "similar" in relation to trade marks, "trade mark" and "word mark," as follows:

> 2. In this Act, unless the context otherwise requires:
>
> (*k*) "Similar," in relation to trade marks, trade names or distinguishing guises, describes marks, names or guises so resembling each other or so clearly suggesting the idea conveyed by each other that the contemporaneous use of both in the same area in association with wares of the same kind would be likely to cause

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dealers in and/or users of such wares to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced, or for their place of origin;

(*m*) "Trade mark" means a symbol which has become adapted to distinguish particular wares falling within a general category from other wares falling within the same category, and is used by any person in association with wares entering into trade or commerce for the purpose of indicating to dealers in, and/or users of such wares that they have been manufactured, sold, leased or hired by him, or that they are of a defined standard or have been produced under defined working conditions, by a defined class of persons, or in a defined territorial area, and includes any distinguishing guise capable of constituting a trade mark;

(*o*) "Word mark" means a trade mark consisting only of a series of letters and/or numerals and depending for its distinctiveness upon the idea or sound suggested by the sequence of the letters and/or numerals and their separation into groups, independently of the form of the letters or numerals severally or as a series.

The appellants have been carrying on business as wholesale jewellers and importers in Montreal since August, 1949, selling watches wholesale in Canada, but mostly in the province of Quebec. Since October, 1949, they have been selling watches exclusively under the trade mark "BULLA," as imported from Switzerland from the firm "Manufacture de Montres Bulla, Emile Juillard, S.A." It is shown that the latter firm has been in existence since 1872 and has continuously carried on the business of the manufacture, sale and export of watches, using the trade mark "BULLA" in connection therewith. There is no evidence that any of its watches were sold at any time in the United States or that any of such wares with the word mark "BULLA" were ever sold in Canada until October, 1949, when the appellants first commenced to import and sell them. The appellants are not shown to have acquired any rights in the word mark from the Swiss manufacturer of the watches. Their good faith in attempting to register as their word mark the actual mark appearing on watches imported by them is not challenged.

The objecting party is a New York corporation. Its business was originally founded about 1875 by Joseph Bulova and was incorporated in 1911 as "J. Bulova Company," but its present name was adopted in 1923. As early at least as 1907, the word "BULOVA" was adopted as its trade mark and has been used continuously since that time in association with watches, watch movements, parts

thereof and watch cases. It was first used in Canada as a trade mark with respect to watches and watch movements at least as early as 1927, and such use has been continuous since that date. It is the principal trade mark of the objecting party and that it is a very valuable asset is established beyond question. From 1941 to 1951, it sold wares bearing that mark throughout every state in the United States and every province in Canada, sales in the United States aggregating over 389 million dollars and in Canada over 21 million dollars. For the same period, its direct advertising costs in connection therewith totalled over 39 million dollars in the United States and over 3 million dollars in Canada. In the United States and Canada there are respectively over twelve thousand and two thousand active outlets for its sales. Its advertising has been conducted in all media, including magazines, trade papers, newspapers, radio, television, window displays, etc., the details of which are supplied in the affidavits of H. E. Henshal and R. F. Warren, two of its vice-presidents.

Whether two trade marks are similar within the meaning of section 2(*k*) is a question of fact to be determined upon the particular facts and circumstances of each case. The matter has been frequently before the courts, but it is well established that except where some general principle is laid down, cases on the similarity of other marks under other circumstances are of little assistance (vide *Coca-Cola Company of Canada, Ltd.* v. *Pepsi-Cola Company of Canada, Ltd.* (1)).

The general approach to this problem was stated by Parker, J. in the *Pianotist Co. Ld's. Application* (2), as follows:

> You must take the two words. You must judge of them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact, you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks. If, considering all those circumstances, you come to the conclusion that there will be a confusion—that is to say, not necessarily that one man will be injured and the other will gain illicit benefit, but that there will be a confusion in the mind of the public which will lead to confusion in the goods—then you may refuse the registration, or rather you must refuse the registration in that case.

(1) (1942) 2 D.L.R. 657 at 661. (2) (1906) 23 R.P.C. 774 at 777.

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This statement was quoted with approval by Davis J. in the *Pepsi-Cola* v. *Coca-Cola case* (1).

In the case of *British Drug Houses Limited* v. *Battle Pharmaceuticals Limited* (2), certain general principles were laid down both in this Court and on the appeal. In the Supreme Court of Canada, Kerwin, J. followed the judgment of the House of Lords in *Aristoc Ld.* v. *Rysta Ld.* (3), which adopted a passage in the dissenting judgment of Luxmoore, L.J., in the Court of Appeal as a fair statement of how the Court should approach the question of the similarity of trade marks. The passage appears in the speech of Viscount Maugham at p. 86:

> The answer to the question whether the sound of one word resembles too nearly the sound of another so as to bring the former within the limits of s. 12 of the Trade Marks Act, 1938, must nearly always depend on first impression, for obviously a person who is familiar with both words will neither be deceived nor confused. It is the person who only knows the one word, and has perhaps an imperfect recollection of it, who is likely to be deceived or confused. Little assistance, therefore, is to be obtained from a meticulous comparison of the two words, letter by letter and syllable by syllable, pronounced with the clarity to be expected from a teacher of elocution. The court must be careful to make allowance for imperfect recollection and the effect of careless pronunciation and speech on the part not only of the person seeking to buy under the trade description, but also of the shop assistant ministering to that person's wants.

In this connection, reference may also be made to *S. Cohen* v. *Registrar of Trade Marks* (4) and to *Union Oil Co. of California* v. *The Registrar of Trade Marks* (5).

The evidence given on the appeal (with one exception to be later noted) was entirely by affidavit and it related almost entirely to the manner in which "BULLA" and "BULOVA" were pronounced. There is no disagreement as to the manner in which the proposed mark "BULLA" is pronounced. The affidavits filed by the appellants state that when used by an English-speaking person, it is pronounced with the accent on the first syllable, thus, "Bull'-a," and when used by a French-speaking person, it is pronounced without accent, thus: "Bul-a." The objecting party's affidavits do not deal with the matter at all and I therefore accept the applicant's evidence on that point.

(1) (1940) S.C.R. 17 at 32.
(2) (1944) Ex. C.R. 239, (1946) S.C.R. 50.
(3) (1945) A.C. 68.
(4) (1948) Ex. C.R. 513.
(5) (1949) Ex. C.R. 397.

The evidence as to the manner in which "BULOVA" is pronounced is contradictory. For the appellants there are sixteen affidavits from jewellers carrying on business in the cities of Montreal and Quebec and other cities in the province of Quebec. In each case, after stating the experience which the deponent had in the sale of watches and the length of time which he had known the marks "BULOVA" and "BULLA," he stated:

> When I first learned of the existence of the trade mark "BULLA" in connection with the sale of watches, I already knew the trade mark "BULOVA" and no confusion arose in my mind between the two trade marks which I have always distinguished without difficulty.
>
> As to the word "BULOVA", I have always pronounced and have heard it pronounced in trade and by the general public, *in English* with the letter "o" pronounced as in "low" and with the accent on the second syllable, as follows: "Boo-low'-va."
>
> In French I pronounce the word "BULOVA" without accent on any syllable, and with the first syllable pronounced "Bu," following its French pronunciation, in place of "Bou."

In each case, also, there is a statement that the deponent knows of no instance of confusion ever having arisen in the trade or among the purchasing public, or otherwise, between the two marks "BULLA" and "BULOVA."

In addition, there is an affidavit of Sol Mayoff, a jewellery salesman from Montreal, in English, in which he states that no confusion arose in his mind between the two marks which he has always distinguished without difficulty; and that he has always pronounced "BULOVA" and heard it pronounced as above set forth, namely, "Boo-low'-va." The affidavit of S. Bigner, Quebec City, in English, is to the same effect. In addition, there are four further affidavits in English, three by jewellers carrying on business in Vancouver and one by a bookkeeper-accountant of the city of Toronto, in which the same statements are made. There are also four affidavits taken by residents of Montreal, a teacher, two engravers, and a furrier, all in English, and all to the same effect.

The remaining evidence of the appellants consists of the affidavit of Hyman Rubenstein, one of the appellants, and C. E. Demers, a representative and sales agent of Elite Jewellery Company, each stating that no confusion has arisen in his mind between the marks "BULLA" and "BULOVA," and each stating that when "BULOVA" is pronounced in English, it is pronounced with the accent

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on the second syllable, as "Boo-low'-va." In addition, Mr. Demers states that when pronounced in French "BULOVA" is pronounced without accent on any syllable and that the first syllable is pronounced "Bu" instead of "Bou."

The evidence for the objecting party as to the pronunciation of its mark "BULOVA" is most cogent and convincing, so much so that I accept it without question as establishing affirmatively that throughout the greater part, if not all, of Canada, and throughout all of the United States, it is pronounced as stated in their affidavits, namely, with the accent on the first syllable as in "Bull," and with the "o" pronounced as in "love," thus, "Bull'-love-a." As is well known, much of the objecting party's advertising is done by spot advertising over radio and television networks, a large part of it being in connection with time signals—given many times daily—and on each occasion the word "BULOVA" is repeated several times and usually spelled. It is shown that instructions are given to announcers of the radio and television programs advertising "BULOVA" watches that the word should be pronounced as above. Their broadcasts, whether originating in Canada or originating in the United States and heard in Canada, are heard almost daily throughout the whole of Canada. The affidavits of H. D. Henshel, a vice-president, and of R. F. Warren, a vice-president in charge of advertising and sales promotion of the objecting party, state that they have never heard the word pronounced at any time other than as above, and have never heard it pronounced as stated in the affidavits filed on behalf of the appellants. Because of their positions, both these witnesses would have a special interest in noting the manner in which the word was pronounced and I accept their statements without question.

There are also seven affidavits filed by radio announcers employed in radio stations located in St. John's (Newfoundland), Vancouver, Montreal, Winnipeg, Hamilton and Toronto, all of whom have been broadcasting from eleven to seventeen years. In each case, they state:

> 2. In the course of my duties as a radio announcer, I have frequently broadcast the BULOVA time announcements which are issued over stations located throughout the Dominion of Canada and in each case, I have pronounced the word BULOVA with the accent on the first syllable and with the letter "o" pronounced as in "love," thus "Bull'-love-a".

Hugh Horler, who is in charge of the radio advertising division of the MacLaren Advertising Co. Ltd. of Toronto, and is familiar with the advertising of watches (including Bulova watches) throughout Canada, gave instructions to the various broadcasting stations for the diffusion of Bulova watch advertising throughout Canada, and he states as follows:

4. I have never heard the name "Bulova" pronounced in the manner set forth in the affidavit filed on behalf of the appellants herein, but have always heard it pronounced with the accent definitely upon the first syllable. If I had heard any radio announcer making an announcement of "Bulla" watches, I would have been certain that he had made a slip and was in fact broadcasting in connection with Bulova watches.

5. I am the person who gave instructions to the various radio broadcasting stations for the diffusion of Bulova watches throughout Canada. I have not at any time authorized the use of any other pronunciation of the name of the said company or of its registered trade mark, except with the accent very clearly upon the first syllable.

6. If at any time I had been in the province of Quebec and had heard any announcer on the French network pronouncing the word "Bulova" accentuated as referred to in the affidavits filed on behalf of the appellants, I would have communicated at once with the said station and have directed that the announcer should thereafter pronounce the word "Bulova" in the accepted manner and in the only way known to me, namely, with the accent on the first syllable.

The affidavit of Mr. E. V. Rechnitzer, a vice-president of the said MacLaren Advertising Company, is to the same effect.

The objecting party also put in evidence twenty affidavits by retail jewellers resident in every province of Canada, and each of whom has been familiar with Bulova watches for many years. Each states as follows:

2. In the course of such business, I have sold a very large number of time pieces including watches of many varieties and I have become thoroughly familiar with the trade and the majority of the well-known trade marks used in it.

3. In particular, I have been familiar with the internationally known trade mark BULOVA for—years and I recognize it as a symbol identifying watches of high quality which are in constant and extensive demand by Canadian purchasers not only in my own establishment but in many other outlets of which I have personal knowledge.

4. I have never seen the word BULLA used in Canada as a trade mark or otherwise in association with watches or other time pieces nor have I seen it used in advertising in connection with such wares.

5. I have always pronounced the word BULOVA, and heard it pronounced, with the accent on the first syllable and with the letter "o" pronounced as in "love", thus "Bull'-love-a".

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6. The words BULLA and BULOVA so resemble each other that the contemporaneous use of both in the same area in association with watches would cause me to infer that the same person assumes responsibility for their character or quality.

There are also five affidavits from the general public, namely, an appliance salesman from Toronto, a stenographer from St. John's, Newfoundland, a clerk from Montreal, a bank clerk from Vancouver, and an assistant manager from Winnipeg, each of whom has had occasion to interest himself in the sale of watches and has been familiar with a number of different trade marks used in association with the watches. Each has been familiar with the trade mark "BULOVA" for many years and each gives evidence to the same effect as in paragraphs 4, 5 and 6 of the affidavits of the retail jewellers just quoted.

As I have said, the evidence as to the manner in which "BULOVA" is pronounced in Canada is somewhat conflicting. However, I prefer that of the objecting party, supported as it is by the evidence of those having a particular interest in and knowledge of the manner in which it is pronounced, namely, the officials of the company, the advertising agents, broadcasters throughout all of Canada, and jewellers from every province of Canada who have sold Bulova watches for many years, and also from the general public. I am satisfied that its normal and generally used pronunciation is with the accent on the first syllable and with the "o" pronounced as in "love," thus, "Bul'-love-a"; and that it is only in a comparatively few and exceptional cases, if at all, that it is pronounced with the accent on the second syllable as in "low."

At the hearing, counsel for the objecting party asked leave to submit to the court the phonograph recordings of certain radio broadcasts advertising Bulova watches and in which the announcer repeatedly used the word "BULOVA". Rubenstein, one of the appellants, had stated in his affidavit that to his personal knowledge the word when used by radio broadcasters was pronounced as "Boo-low-va." To meet this allegation, the objecting party secured the affidavits of the seven radio announcers above referred to, and each, after stating that he had always

pronounced the word as contended for by the objecting party, added:

> 3. Submitted herewith and marked as Exhibit A is a recording of such a time announcement broadcast by me in the ordinary course of my duties over station on the day of December, 1951, which said recording was taken on my instructions, and having listened to the same, I verify that it is a reproduction of my voice.

In each case the date of the recording was in December, 1951, after this appeal was taken. The application also extended to two other records referred to as Exhibits A and B in the affidavit of R. F. Warren, and while the details of these recordings are not specifically stated, it is probable that they also were taken after the present appeal was launched.

Counsel for the appellants objected to the use of these recordings both on principle and because they were taken after the commencement of the appeal, and might, therefore, have been especially prepared so as to assist the objecting party's contention. Had they been taken prior to the dispute between the parties hereto, I would have admitted them without question, as perhaps the best evidence of the manner in which broadcasters actually pronounce the word, and as that matter had been brought in issue by the affidavit of one of the appellants. I have given consideration to the objections and have decided that the playing of these records is admissible evidence. The affidavits show that the recordings as submitted were of broadcasts "in the ordinary course of my duties" and are in confirmation of a statement in the previous paragraph that the deponent had always pronounced the word "BULOVA" as "Bull'-love-a." At the hearing, I admitted the recordings subject to counsel's objections, which I now over-rule. When actually played, these records confirmed the other evidence contained in the affidavits filed for the objecting party, the announcer in each case pronouncing the word as I have just stated, with the accent on the first syllable, and the "o" as in "love."

In view of these conclusions, considering all the surrounding circumstances, and applying the principles laid down in the cases which I have cited, I have no hesitation in reaching the conclusion that the first impression of users of or dealers in watches in association with which the words "BULOVA" and "BULLA" are used, would likely be that

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they are confusingly similar. In this case, the only test that need be applied is that of sound. In each case, the word mark is comprised of one word only; in each case, when spoken in English, the accent is on the first syllable, which is identical for both words; and in each case the first and last syllables are exactly alike both in spelling and pronunciation. The importance of the first syllable of a word mark was referred to in the case of *In the Matter of London Lubricants,* (1920) *Limited's Application to Register a Trade Mark* (1), where in the Court of Appeal Sargant, L.J. said at p. 279:

> The termination of the new word is different. Though I agree that, if it were the only difference, having regard to the way in which the English language is often slurred at the termination of words, that might not alone be sufficient distinction. But the tendency of persons using the English language to slur the termination of words also has the effect necessarily that the beginning of words is accentuated in comparison, and, in my judgment, the first syllable of a word is, as a rule, far the most important for the purpose of distinction.

It seems to me that a person who had some knowledge of the mark "BULOVA," but remembered the name somewhat imperfectly (and possibly only the first syllable thereof) would be easily confused when buying a watch which was described by the seller as one made by "BULLA," or as a "BULLA" watch, and thus there would be confusion in the goods themselves. It is to be kept in mind, also, that when the watches of the appellants and the objecting party are sold by the same dealer, it is highly probable that they would be displayed and sold over the same watch counter. The sound of the two words is such that in my opinion users of the wares would likely confuse them and be led "to infer that the same person assumed responsibility for their character or quality."

As I have said, there has been no proof that confusion has arisen because of the actual use of the two marks in question. That would be an element to be taken into consideration if there had been a long contemporaneous user of the two marks in the same area, but that is not the case here. The appellant first used their mark in October, 1949, but they have not seen fit to state the extent of its sales or

(1) (1925) 42 R.P.C. 264.

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of any advertising used in connection therewith. None of the persons who supplied affidavits for the objecting party had ever heard of the word "BULLA" in connection with watches until these proceedings were commenced. I think I can infer that such use as the appellants have made of their mark has been extremely limited. When there has been no substantial contemporaneous use of the two marks, the fact that there is no evidence of actual confusion through such use as there has been, is not of much importance, and in this case I attach no great weight to it. (*Freed and Freed Ltd.* v. *Registrar of Trade Marks et al* (1)).

It is admitted that the onus is on the appellants to show that the decision of the Registrar was wrong. In my opinion, the appellants have failed to establish that the proposed mark is not calculated to deceive and to cause confusion. I think that the decision of the Registrar was right and should be affirmed.

The appeal will therefore be dismissed. The objecting party will be entitled to its costs after taxation. While the Registrar of Trade Marks was represented by counsel at the hearing, the latter took no part in the proceedings and in accordance with the usual practice, no order will be made as to his costs.

Judgment accordingly.

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(1) (1950) Ex. C.R. 431.

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BETWEEN:

SEVEN UP OF MONTREAL LIMITED ..... } APPELLANT;

AND

MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

Revenue—Income War Tax Act 1927, c. 97, s. 6(1) (a) (b)—Expenditure on account of capital or revenue—Outlay on account of capital not deductible from income as a "disbursement or expense wholly, exclusively and necessarily laid out for earning the income"—Appeal dismissed.

Held: That the purchase by appellant of the goodwill of another's business, and the covenant by the vendor to go out of business together with the property and assets of the vendor's business as a going concern, is an outlay of money on account of capital and not on revenue account, and as such is not deductible from income by virtue of s. 6(1) (*b*) of the Income War Tax Act R.S.C. 1927, c. 97, and is not a disbursement or expense wholly, exclusively and necessarily laid out for the purpose of earning the income as provided for in s. 6(1) (*a*) of the Act.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Cameron at Montreal.

H. H. Stikeman, Q.C. and *E. A. L. Bissonnette* for appellant.

C. Provost, Q.C. and *R. G. Decary* for respondent.

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

CAMERON J. now (April 28, 1952) delivered the following judgment:

This is an appeal by the taxpayer from a decision of the Income Tax Appeal Board dated September 28, 1950, affirming the income tax assessment made upon the appellant for the taxation year 1947. In assessing the appellant, the respondent had disallowed as a deduction the sum of $28,725 (including $225 legal expenses) which the appellant claimed was a disbursement or expense wholly, exclusively

and necessarily laid out for the purpose of earning its income, and therefore deductible under the provisions of s. 6(1) (*a*) of the Income War Tax Act, R.S.C. 1927, c. 97, as amended.

The appellant company manufactures and distributes a carbonated beverage known as "Seven Up," of which sugar is a very important ingredient. During the war years and for some time thereafter, sugar was rationed by the Government of Canada and was under the control of the Sugar Administrator of the Wartime Prices and Trade Board. For industrial purposes—such as that of the appellant—sugar was rationed on a basis of declaration of user in the year 1941; then from time to time and consistent with the available supplies, a percentage of that quota basis was given as a quarterly quota. If at the end of the year it was found that an industrial consumer had been receiving a quota substantially in excess of his normal requirements, his subsequent quotas could be reduced to a lesser percentage of the quota basis.

The appellant had been in business in 1941 and therefore was in receipt of quarterly quotas of sugar ration permits, and its output of "Seven Up" was limited by the amount of sugar which it could purchase with those permits. Lack of sugar alone prevented it from meeting the increased demands for its product, its plant facilities being capable of greatly increased output. Under the regulations established by the Sugar Administrator, the only way in which an industrial user of sugar could increase its quota basis was by purchasing as a going concern the business of another industrial user of sugar and thereafter by applying to the Sugar Administrator to add to its quota basis that formerly held by the vendor.

Having in mind the desirability of placing itself in a position to secure more sugar, the appellant entered into negotiations with another beverage manufacturer in the Montreal area, Rocket Cola Co. Ltd. (hereinafter to be called "Rocket"), which also had an industrial quota for sugar, but which desired to discontinue its business. In the result, the appellant and Rocket, on February 6, 1947,

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entered into a bulk sales agreement (Ex. 1) by which for the expressed consideration of $30,699.61, Rocket sold, conveyed and transferred to the appellant:

The ownership of and all its rights and title to the assets presently used by the vendor as a going concern under the name of Rocket Cola Co. Ltd., carrying on the business of manufacturing and bottling soft beverages at 3870 Cote St. Michel, Ville St. Michel, Quebec, including goodwill, sugar supplies and rights to sugar quota and contracts, the whole as more fully described on the sheet attached hereto, marked "A" and signed by the parties.

Ex. A to that agreement, which was signed by both parties, was as follows:

ASSETS OF ROCKET COLA CO. LTD.

Right to purchase sugar under sugar quota SA 013119 Q of the Wartime Prices and Trade Board.

A. *STOCK*		
Sugar on hand	2,500 lbs.	172.50
Sugar purchased from and on order for delivery from Canada & Dominion Sugar Co. Ltd. under sugar quota SA 013119 Q being balance of last quarter of 1946 and first quarter of 1947	29,450 lbs.	2,027.11
B. *Sundry Inventories*		
Supplies	358.69	
Fuel	50.00	
Finished Goods	398.40	
Bottles & Cases	3,031.80	3,838.89
C. *Bottling Equipment*	19,721.97	
Less allowance for depreciation	10,144.35	9,577.62
D. *Trucks & Equipment*	1,486.00	
Less allowance for depreciation	1,485.00	1.00
E. *Furniture & Fixtures*	1,436.85	
Less allowance for depreciation	517.16	919.69
F. *Shop Equipment*		1,508.48

Lease on manufacturing premises at 3870 Cote St. Michel, Montreal, Quebec.

Finally, by para. 6 it was provided:

6. The vendor undertakes to cease carrying on its business described above and to take immediate steps to wind up its affairs.

On the same date the appellant and Rocket executed Form 445 supplied by the Sugar Administrator of the Wartime Prices and Trade Board, entitled: "Industrial Sugar Quota Transfer Declaration" (Ex. 5). Therein, Rocket stated by the oath of its president:

Effective on the 6th day of February, 1947, I/we Rocket Cola Co. Ltd. hereby transfer and assign all present, past and future sugar and preserve rights as applied to my/our authorized respective quotas, to Seven Up of Montreal, Ltd.

I/we also advise that my/our business was transferred as a going concern.

This declaration was duly forwarded to the Sugar Administrator who, on February 8, 1947, wrote the appellant as follows:

We have received from your solicitors, Messrs. Bumbray & Carroll, the Industrial Sugar Quota Transfer Declaration confirming to us that you purchased on February 6th, 1947 the soft drink business of Rocket Cola Co. Ltd. 3870 Cote St. Michel, Montreal.

We are transferring to you the sugar quotas of Rocket Cola Co. Ltd.

At the time of the sale, a balance of 29,450 coupons remained at the credit of Rocket Cola Co. Ltd. at their bank for which a ration cheque of same amount has been handed to us. In order to replace this cheque, we enclose a Supplementary Industrial Sugar Quota Authorization for 29,450 coupons, which kindly deposit at once at your bank, entitling you to use this quantity of sugar during the present quarter.

That, however, did not conclude the matter. The appellant, having received the administrator's letter of February 10, 1947, wrote Rocket on the same date as follows (Ex. 2):

In respect to the Bulk Sale Agreement entered into on February 6th, 1947 between yourselves as vendors and ourselves as purchasers, it is agreed that in consideration of the sum of $1.00, we hereby waive all claim and title to items (*b*), (*c*), (*d*), (*e*) and (*f*) of the assets mentioned in the said agreement, all said items to remain your property for all legal purposes.

We are also waiving all rights for the lease for the premises presently occupied by your company at 3870 Cote St. Michel Road, Ville St. Michel.

It will be seen, therefore, that as a result of all the transactions with Rocket, the appellant retained as tangible assets only sugar on hand and sugar in transit, of an aggregate agreed value of $2,199.61. In addition, the appellant's sugar quota basis was increased to the extent of Rocket's former quota basis and it was therefore in a position, while rationing remained in effect, to purchase larger amounts of sugar than it could otherwise have done. Sugar was decon-

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trolled in November, 1947. The appellant says that this right to acquire additional sugar was obtained at a cost of $28,500, that is, the difference between the total consideration of $30,699.61 and the value of the sugar on hand and in transit; that it represented the actual additional cost of acquiring additional sugar and is just as much a deductible expense as the cost of the sugar itself. It says that in substance it purchased a rating to acquire further sugar, which rating, by reason of the regulations of the Wartime Prices and Trade Board, was an absolute prerequisite to the purchase of sugar.

What, then, is the true nature of this outlay of $28,500? The respondent submits that it is a disbursement or expense which is not deductible by reason of the provisions of s. 6(1) (*a*) and (*b*) of the Income War Tax Act, while the appellant contends that it was a disbursement wholly, exclusively and necessarily laid out for the purpose of earning the income and was not a capital outlay. Those sections are as follows:

> 6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> (*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;
>
> (*b*) any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence, except as otherwise provided in this Act.

There are two main reasons why the appellant's outlay of $28,500 cannot be said to have been for the purchase from Rocket of a rating or right to acquire sugar. The first is that such a purchase would have been illegal and the second is that there is no admissible evidence to establish that such was the case.

It is abundantly clear from the evidence that "the rights to purchase sugar under Sugar Quota SA013119Q" (the first item in Schedule A) was not something which could be sold by Rocket to the appellant. It was a right, issued by the Sugar Administrator, to a particular industrial user and for his own use only. At the trial I asked for the production of the applicable regulations and orders, but they were not produced. Since then, however, I have found certain orders

of the Wartime Prices and Trade Board which appear to be applicable. For example, Order No. 242 of the Wartime Prices and Trade Board respecting sugar rationing, dated February 27, 1943, provided as follows:

> 41. No person, except as provided by this order, shall
>
> (a) forge, counterfeit, utter, *endorse, transfer, traffic in,* alter, deface, mutilate, obliterate or destroy any sugar coupon, canning sugar coupon, ration book, ration card, requisition, certificate, permit, ration cheque, transfer voucher, or any other document relating to a purchase or use of sugar, or anything printed or written thereon;"

From the evidence as a whole, I am satisfied that that order or a similar order or regulation remained in effect throughout. It would have been illegal to sell such a quota or for the purchaser thereof to make any use of it. Rocket therefore could not sell and the appellant could not purchase any right to purchase sugar. All that the appellant could do to increase its sugar quota basis was to buy the assets of Rocket as a going concern, satisfy the Sugar Administrator that that had been done, and then make application to the administrator—not to transfer Rocket's sugar quota authorization to it, but—to increase its own to the extent formerly enjoyed by Rocket. These were the actual steps taken by the appellant. In the result, its application was approved. Rocket's former quota SA013119Q was surrendered for cancellation and the appellant's quota basis was increased. What the appellant had to purchase and did, in fact, purchase, were the assets and property of Rocket. It was upon the appellant as purchaser of such assets that the Sugar Administrator conferred the additional rights to purchase sugar.

On the second point, the evidence clearly establishes that for a consideration of $30,699.61, the appellant bought out all the assets of Rocket Cola Co. Ltd. as a going concern. Their contract was embodied in the Bulk Sales Agreement (Ex. 1) which was not an agreement to sell but an actual sale, transfer and conveyance of all Rocket's right and title to the assets mentioned in Schedule A thereto, the details of which have been set out above. In argument, counsel for the appellant admitted that the Bulk Sales Agreement

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did, in fact, constitute a sale to the appellant of the assets set out therein; and also that the letter of February 10, 1947 (Ex. 2) constituted a resale by the appellant to Rocket of the assets therein mentioned for a consideration of one dollar. He submitted, however, that the results of the sale and resale made it apparent that the true intent of the parties was the sale and purchase of sugar and rights to purchase sugar, and that it was never the intention that the appellant should ever acquire the ownership of anything else. At his request, but under reserve of objections raised by counsel for the respondent as to its admissibility, I heard evidence by officials of the appellant who took part in the negotiations with Rocket.

By s. 35 of the Canada Evidence Act, the Laws of Evidence in force in the province of Quebec are made applicable to these proceedings. By Articles 1206 and 1234 of the Civil Code of that province, it is provided:

1206. The rules declared in this chapter, unless expressly or by their nature limited, apply in commercial as well as in other matters.

When no provision is found in this code for the proof of facts concerning commercial matters, recourse must be had to the Rules of Evidence laid down by the laws of England.

1234. Testimony cannot in any case, be received to contradict or vary the terms of a valid written instrument.

I think there can be no doubt that the evidence of these witnesses, insofar as it tends to show that at the time of the execution of the main contract embodied in the Bulk Sales Agreement there was also an oral contract that after the happening of certain events the appellant would resell to Rocket a portion of the goods comprised in the original sale for the sum of one dollar, would be admissible. Such an agreement would not be inconsistent with or tend to vary or contradict the terms of Ex. 1 (*Phipson on Evidence,* 8th Ed., p. 568). But insofar as that evidence would tend to show that Rocket did not sell the whole of its business and assets as a going concern, or that the whole of the consideration of $30,699.61 was referable to sugar and the right to purchase sugar, and not to all the assets mentioned in the agreement and its schedule, or that the appellant did not, in fact, become the owner of all such assets upon executing the Bulk Sales Agreement, it is in my view

inadmissible as tending to contradict or vary the terms of that written agreement (Art. 1234 of the Civil Code), and I therefore reject it as inadmissible.

For the reasons which I have stated, therefore, I find that the appellant could not legally have purchased from Rocket the right to purchase sugar, and that there is no admissible evidence to establish that in attempting to acquire it, the appellant paid $28,500 or any other specific amount therefor. I think that it cannot now be disputed that for the outlay of $30,699.61, the appellant acquired not only the goodwill of Rocket's business and a covenant that Rocket would go out of business, but also the property mentioned in Schedule A to the agreement, including the lease, bottling equipment, trucks and equipment, furniture and fixtures, and shop equipment. (Nothing need be said about the value of the stock of sugar on hand and in transit totalling $2,199.61, the acquisition of which by the appellant was approved by the Sugar Administrator and which amount the respondent herein has quite properly treated as an expense attributable to the acquisition of stock). These physical assets were doubtless of considerable value as indicated by the amounts placed opposite them in Schedule A. The agreement and the schedule were both prepared by the appellant's solicitors, and signed by the appellant. There is no evidence that the values therein given were not, in fact the real market values of the various items. The value of the lease is not stated and there is no evidence whatever to indicate whether or not it had any real market value.

There can be no doubt, therefore, that on the admissible evidence the appellant's outlay was for the purpose of acquiring the assets of Rocket as a going concern. Its officers were told by their legal advisors that under the existing controls such a bona fide purchase would have to be made and that in no other way could it hope to increase its sugar quota basis, and that is what the appellant did.

The appellant's business was that of manufacturing and distributing beverages. The purchase of another business as a going concern with the assets I have mentioned, was made by it as owner and not as a trader and undoubtedly resulted in the acquisition of enduring assets. In my opinion, the outlay in respect thereof was just as much an

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outlay on account of capital as it would have been had the appellant been a new corporation formed for the purpose of acquiring Rocket's business as a going concern. As an outlay on account of capital, its deduction is barred by the provisions of s. 6(1) (*b*) of the Income War Tax Act (*supra*). In my opinion, the mere fact that within a few days the appellant made a resale of most of the assets for the price of one dollar cannot change the nature of the original outlay from one on capital account to one on revenue account. In so re-selling at a loss, the appellant incurred a capital loss.

In view of these findings, it is not necessary to consider the evidence of certain accountants as to what would have been proper accounting practice had the appellant, in fact, paid $28,500 for the right to purchase sugar. The outlay on account of capital being specifically debarred from deduction by the provisions of the Act, the question of proper accounting practice does not here arise.

For these reasons, I must affirm the conclusions of the Income Tax Appeal Board and dismiss the appeal therefrom. The respondent is entitled to be paid his costs after taxation.

Judgment accordingly.

BETWEEN:

ANACONDA AMERICAN BRASS LIMITED ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

1950
June 19-23, 26, 27
1952
June 7

Revenue—Excess profits tax—Excess Profits Tax Act, 1940, S.C. 1940, c. 32 ss. 2(1) (c), 2(1) (i), 2(1) (f), 3—Net taxable income—Income War Tax Act, R.S.C. 1927, c. 97—Determination of income through matching appropriate costs against revenues—Cost of sales—Value of closing inventory—Last-in first-out or Lifo method of inventory accounting.

The appellant operated a primary mill and produced copper and copper alloys in the form of sheets, rods and tubes. It sought to make its profits by processing its metals into its finished products and did not trade or speculate in its raw materials. It maintained a policy of having the sales price of its finished products closely reflect the replacement cost of their metal content and it matched its metal purchases to its sales so that the inward flow of metals matched the outward flow of the metal content of its finished products. Its business required a large inventory and the rate of turnover of its inventory was slow. It made no attempt to use its raw materials in the order of their purchase or in any particular order. The appellant had used the last-in first-out or Lifo method of inventory accounting for its own corporate purposes ever since 1936 but first used it in computing its income tax and excess profits tax in its returns for 1946 and extended its use in its returns for 1947. The Minister refused to recognize the method and on his assessment for 1947 added a large amount to the amount of taxable income reported by it. From this assessment the appellant appealed.

Held: That the proper determination of income through matching appropriate costs against revenues is a major objective of accounting.

2. That there is no single inventory method that is applicable in all circumstances and the method that ought to be selected for any company is the one that is in accord with its genius of profit making and most nearly accurately reflects its income position according to the manner in which it carries on its business.

3. That the Lifo method of inventory accounting and ascertaining the materials cost of sales is a recognized and acceptable method in the circumstances that are appropriate to it.

4. That where a manufacturing company avoids speculation or trading in its materials and makes the sales price of its finished products closely reflect the current replacement cost of their materials content and matches its purchases of materials to its sales of finished products so that the inflow of the materials equals the outflow of the materials content of the finished products and it must continuously maintain a large inventory and the rate of its turnover is slow the Lifo method of inventory accounting and ascertaining the materials cost of its sales for the year is the method that most nearly accurately reflects its

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income position according to the manner in which it carries on its business and is the method that ought to be applied in ascertaining the materials cost of its sales and determining its net taxable income.

5. That the Lifo method of inventory accounting was appropriate in the circumstances of the appellant's business.

APPEALS under the Excess Profits Tax Act, 1940.

The appeals were heard before the President at Toronto.

A. S. Pattillo Q.C., W. C. De Roche and *A. J. MacIntosh* for appellant.

J. W. Pickup Q.C. and *F. J. Cross* for respondent.

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

THE PRESIDENT now (June 7, 1952) delivered the following judgment:

The appeals herein were brought against the Appellant's assessments under The Excess Profits Tax Act, 1940, Statutes of Canada, 1940, chap. 32, for the years 1946 and 1947 but at the hearing it developed that the dispute over the assessment for 1946 turned on a question of scrap allowance and it was agreed that the appeal against it should be dismissed without costs. The Court is thus concerned only with the appeal against the assessment for 1947.

The tax in question was imposed by section 3 of The Excess Profits Tax Act, 1940, which read:

3. In addition to any other tax or duty payable under any Act, there shall be assessed, levied and paid a tax in accordance with the rate set out in the Second Schedule to this Act upon the excess profits of every corporation or joint stock company residing or ordinarily resident in Canada or carrying on business in Canada:

And "excess profits" was defined by section 2(*c*) as:

2. (1) (*c*) "Excess profits" means

(ii) in the case of a corporation or joint stock company that has not filed a consolidated return for the taxation period, the amount by which the profits of the taxpayer exceed one hundred and sixteen and six hundred and sixty-six one thousandths per centum of the standard profits of the taxpayer;

And "standard profits" was defined by section 2(*i*) as:

2. (1) (*i*) "Standard profits" means the average yearly profits of a taxpayer in the standard period in carrying on what was in the opinion of the Minister the same class of business as the business of the taxpayer in the year of taxation or the standard profits ascertained in accordance with section five of this Act:

And finally "profits" was defined by section 2(*f*) as:

> 2. (1) (*f*). "Profits" in the case of a corporation or joint stock company for any taxation period means the amount of net taxable income of the said corporation or joint stock company as determined under the provisions of the *Income War Tax Act* in respect of the same taxation period,

Thus what falls to be determined is the amount of the appellant's net taxable income in 1947 as determined under the Income War Tax Act, R.S.C. 1927, chapter 97.

The issue in the appeal is whether the appellant in computing its net taxable income for 1947 was entitled to deduct from its gross revenue from the sale of its finished products the cost of their metal content as ascertained by the last-in first-out method of accounting, commonly called the Lifo method. The appellant contends that it was entitled to use this method in ascertaining such cost. The Minister, on the other hand, asserts that the appellant's cost of sales for the year must be determined according to the first-in first-out method, commonly called the Fifo method. This would result in a much higher valuation of the appellant's closing inventory for 1947 than under the Lifo method. The Minister asserts that the increase in value of this closing inventory calculated on the basis of cost or market whichever is lower over the value of the opening inventory for 1947 calculated on the same basis must be regarded as inventory profit in 1947 and included as an item of the appellant's taxable income. Under the Lifo method there would be no such addition. The question whether a company such as the appellant may ascertain the materials cost of its sales by the Lifo method is a novel and important one that is not free from difficulty. This is the first case in which the question has arisen for decision in Canada.

Proper understanding of the issue requires knowledge of the nature of the appellant's business and its policy and practice in selling its finished products and purchasing its raw materials, an analysis of the accounting methods in dispute and an examination of the conditions of their respective applicability.

Evidence of the nature of the appellant's business and its business policy and practice was given by Mr. A. H. Quigley, its president, Mr. J. S. Vanderploeg, its general manager, and Mr. U. M. Evans, its works manager.

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The appellant was incorporated under the laws of Canada in 1922 and has carried on its business at New Toronto since that date. It operates what is called a primary mill and produces copper and copper alloys in the form of sheets, rods and tubes, which it sells to its customers for further manufacture by them. Its products, although referred to as its finished products, are, strictly, speaking, only semi-finished. It is a wholly owned subsidiary of its United States parent, the American Brass Company. The parent company operates in the United States through six primary mills similar to the appellant's and considers the appellant as one of its branches in the same way as it does its United States mills. They all operate in the same manner and follow the same business policy and practice.

Over 80 per cent of the metal content of the appellant's finished products consists of copper and zinc is its main metal for its alloys. Copper and zinc between them account for about 98 per cent of the metals used by it. Lead, nickel, tin and a little silicum and magnesium make up the remaining 2 per cent. With the exception of tin, which it imports, the appellant purchases all its supplies of metals from Canadian refineries which are independent of it. Indeed, the appellant is dependent on them for its supplies.

It was asserted by the appellant's witnesses that its business is that of a primary producer of copper and copper alloy products, that it does not trade in its raw metals and deliberately avoids speculation in them and that it makes its profit, if any, solely by processing its metals into its finished products. The appellant's objective was said to be achieved by its policies of selling its finished products at sales prices based on the replacement cost of their metal content together with a processing charge covering all the expenses of manufacture, other than such replacement cost, and an allowance for profit, changing the sales price of its products whenever necessary in order to reflect any change in the purchase price of their metal content and matching its purchases of metals as closely as possible to its sales of finished products so that the inflow of metals should equal the outflow of the metal content of the products. By following these policies the appellant was not concerned with the rise or fall in the price of its raw metals since

that would be reflected either up or down in the sales price of its finished products, and its profit from processing would remain unaffected thereby, and it incurred no risk through being left with an excessive closing inventory.

Prior to the war the appellant sold its products for delivery within 90 days at a firm price based on the price of copper at the date of acceptance of the order because it could purchase its requirements of copper from the refineries for delivery within 90 days at the price prevailing at the date of the order. Later, however, this became impossible and the appellant followed the practice of making the sales price of its products reflect the purchase price of their metal content and determining its sales price at the date of shipment of the products according to the purchase price of the metals at the date of such shipment. For example while the price of copper was controlled at 11·5 cents per pound and that of zinc at 5.75 cents the appellant's Base Price List No. 1, dated July 16, 1945, was in effect showing the sales price of its various products. But when the price of copper was permitted to be increased to 16·625 cents per pound on January 22, 1947, and that of zinc to 10·25 cents the appellant immediately issued its Base Price List No. 2, dated January 22, 1947, with its new sales prices. And when the controls on metal prices were lifted on June 10, 1947, and copper rose to 21·5 cents per pound and zinc to 11 cents the appellant immediately issued its Base Price List No. 3, dated June 10, 1947, reflecting the increases in these prices. There was a further Base Price List No. 4, dated September 1, 1947, but this was not related to any change in the prices of metals. There were two exceptions to this general practice. The appellant did a small amount of Government and export business on a firm price basis using the price list in force at the date of acceptance of the order. The appellant also had some customers who purchased its products on what was called a commodity price based on a special processing charge and the replacement cost of their metal content at the date of shipment. Subject to these exceptions, the appellant's sales price for its products was based on the replacement cost of their metal content and a processing charge to cover all its other expenses of production and provide an allowance for profit. While the factor in the sales price

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dependent upon the replacement cost of the metals was subject to fluctuation as such cost went up or down there was much less variation in the factor of the processing charge. A change in the replacement cost of the metals would, therefore, not affect its processing charge or the profit from its business.

The close relationship between the terms on which the appellant purchased its supplies of raw copper and those on which it sold its finished products appears from Exhibit 4. During the war years and until April 30, 1946, the appellant purchased its copper at firm prices which were controlled. From May 1, 1946, to November 30, 1946, it purchased at the prices which were in effect on the first day of the month in which the copper was shipped. From December 1, 1946, to June 30, 1947, the prices paid were those that prevailed on the date of shipment. Then from July 1, 1947, the appellant purchased at prices for delivery in the following month. The terms of sale corresponded closely. During the war years and until May 31, 1946, the appellant sold its products at prices from the price list in effect on the date of acceptance of the order if accepted for delivery within 90 days. From June 1, 1946, to February 28, 1947, the sale price was from the price list in effect on the first day of the month in which the shipment was made. And from March 1, 1947, to December 31, 1947, the sale price was from the price list prevailing on the date of shipment. There was thus only a very slight lag on two occasions in the correspondence between the sale price of the finished products and the replacement cost of their metal content. The close correspondence between such sales price and replacement cost and the slight lag in such correspondence was illustrated in graph form by a series of charts, Exhibits 12 to 20, prepared by Mr. D. L. Gordon, the appellant's auditor. Notwithstanding the lag referred to I find that the appellant's policy of having the sales price of its finished products closely reflect the replacement cost of their metal content was carried out in practice.

The appellant carried out its policy of matching its purchases of metals to its sales of finished products by monthly estimate and orders. During the first nine days of each month it estimated from the orders already received and those that might be expected the amount of the metal

content of such orders, calculated the amount of scrap that might be engendered in processing them and estimated the amount of scrap that might be expected from its customers and dealers. It was then able to determine the amount of raw metals required to replace what was taken out of its inventory for processing and its practice was to order for delivery in the following month the amount of metals that would be needed to make the inward flow of metals match the outward flow of the metal content of the finished products. This was a quantity matching with no regard being had to the factor of price. There could not, of course, be an exact matching for their might be delays in the delivery of the incoming metals or in the shipment of the finished products or errors in processing that would engender more scrap than had been calculated or in estimating the amount of scrap that would be brought in by customers or dealers or special circumstances, such as threatened strikes, might dictate the desirability of purchasing metals in advance of actual requirements and there might also be some fluctuations in the amount of the orders that could be filled from stock. But, apart from these factors, the general objective and practice was to maintain the inventory of metals and match the amount of metal coming in with that required for the out-going production subject to plus or minus adjustments according to the rise or fall in the volume of production. There was a natural tendency on the part of workmen to have somewhat more in the inventory than was actually required but this was held within close hands. The purchase price of the metals had nothing to do with the quantity of the purchases.

It was also established that the appellant did not attempt to use its raw materials in the order of their purchase or in any particular order. The raw metals could be identified up to the time they went into process but thereafter their identity was lost. It was impossible to maintain identification of the scrap. And it was not possible to identify the raw materials that had been used in processing a particular order. As the raw metals came in they were stored in the most convenient position and as they were required for use in production they were taken from the most convenient source. The metals did not deteriorate with age and it did not matter when they had come into the plant.

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One pound was as good as another. The appellant had no policy of using first the metals that had been first purchased or of using first those that had been last purchased. There was no attempt to maintain or follow the physical flow of the materials according to any particular order. Convenience of storage or source of use was the governing consideration.

The rate of turnover of the appellant's inventory was slow. About 80 per cent of its processing was according to its customers' specifications, the balance of its orders being filled from finished stock. The processing according to specifications required exactness and made for slowness of production. There was also a large amount of scrap engendered in the course of processing. This was put at 30 per cent. The evidence indicated that the inventory turned over three or four times a year. This was a slow rate.

It was also shown that the nature of the appellant's business was such that a large inventory of metals had to be kept on hand. About 60 per cent of every sales dollar represented the cost of the metal content of the finished products. The business was not seasonal but steady. About ten to twelve million pounds of metal were continuously in process, and enough metal had to be kept on hand to maintain production for from two and a half to four months.

On the facts, I find that in 1947 the appellant maintained a policy of having the sales price of its finished products closely reflect the replacement cost of their metal content, that it matched its purchases of metals to the metal content of its finished products, that its business required a large inventory and that the rate of turnover of its inventory was slow.

The manner in which the appellant kept its inventory accounts and ascertained the metals cost of its sales was described and explained by Mr. A. R. McGinn, its controller, and Mr. D. B. Crowley, its assistant controller. Mr. D. L. Gordon, the appellant's auditor, also gave evidence of its accounting methods and annual statements.

The appellant's fiscal year coincided with the calendar year and each year was regarded as a unit. It kept a perpetual inventory account of its metals, in their raw

state, in the course of process and in their finished condition. This recorded the amounts of metal received and the amounts taken out. The account was credited with the amounts of the metal content of the finished products only when they were actually shipped out. The accuracy of the perpetual inventory account was verified from time to time by physical check. The appellant also kept a purchase record showing the prices at which the metals had been purchased. With these two accounts the cost of the metals in the inventory at any given time could be determined. At the end of each year the amount and the cost of the inventory was ascertained. The manner in which the appellant ascertained its metals cost of sales for the year can be stated briefly. The opening inventory for the year was carried at the same cost as that of the closing inventory of the previous year. The purchases during the year at the prices paid were added to the opening inventory and from the total of this addition the amount of the closing inventory at the same cost as that of the opening one was deducted. The resultant figure was the metals cost of the sales during the year as ascertained by the Lifo method.

The Lifo method was first used by the appellant in 1936 and has been used by it ever since. But this use was only for its own corporate purpose of determining its income position and extended only to copper and zinc. The first time that it filed its income tax and excess profits tax returns on the Lifo method basis was in its return for 1946. In 1947 it extended the method to the ascertainment of the cost of its lead and tin and in its return for that year the cost of the copper, zinc, lead and tin content of its sales during the year was ascertained by the Lifo method.

How the amount of the cost of sales was determined, so far as it related to these four metals, was illustrated in detail by Exhibit 7. I shall refer only to the figures for copper. When the appellant began to use the Lifo method in 1936 it started with an inventory of 6,500,000 pounds of copper which it had purchased at 7·5 cents per pound, making a total cost of $487,500. The exhibit then shows the increments to this inventory in the years 1937, 1938, 1939, 1945, and 1946 in quantities and prices. For example, in 1946 there was an increment of 2,936,468 pounds at 11·5

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cents per pound amounting to $337,693.82. At the end of 1946 there was an inventory of 15,021,710 pounds which had cost a total of $1,439,867.78 at prices ranging from 7·5 cents to 11·5 cents per pound. This was the opening inventory for 1947. The total purchases of copper in 1947 amounted to 63,268,555 pounds at an average price of 18·854 cents per pound amounting to $11,928,728.71. The addition of these purchases to the opening inventory made a total of 78,290,265 pounds at the price of $13,368,596.49. From this amount the closing inventory for 1947 amounting to 14,291,007 pounds at the price of $1,355,836.93 was deducted. The resultant figure of 63,999,258 pounds at $12,012,759.56 represented the amount of copper used in the finished products sold in 1947 and its cost as ascertained by the Lifo method. The exhibit showed that more copper had been used in 1947 than had been purchased in that year to the extent of 730,703 pounds. This amount was regarded as having been withdrawn from the increment in 1946 and was priced at 11·5 cents per pound, that having been the price paid in 1946. The copper cost of sales in 1947 was thus ascertained at $12,012,759.56. The zinc, lead and tin costs of sales were ascertained in a similar manner.

The appellant carried forward its closing inventory of metals into its balance sheet as an asset at $1,848,497.89 with the following notation of its valuation: "Metals—raw, scrap, finished and in process at cost which with minor exceptions is computed on a 'last-in first-out' basis". This was sufficient notification that the appellant kept its accounts by the Lifo method. On this basis the closing inventory was carried at the same price as the opening one. Indeed, this was implicit in the Lifo method. Consequently, the closing inventory for 1947 carried forward the opening inventory of 1936, when the method was first used, at the cost of such opening inventory and the cost of the increments in the years since then.

The Department of National Revenue has always refused to recognize the Lifo method of accounting and when the appellant's returns for 1946 and 1947 came in with the metals cost of sales and the closing inventory computed according to the Lifo method it proceeded to value the

inventory on the traditional basis of cost or market whichever is lower. It put the prices of the metals in the inventory at their most recent prices, its view being that the metals most recently purchased were the ones that would be on hand at the end of the year. The result was that whereas the appellant had computed its closing inventory, as indicated, at $1,848,497.89 the Department value it at $3,696,646.06, an increase of $1,848,148.17 over the appellant's figures. There was a deduction of $236,391.74 in respect of the previous year which left a difference of $1,611,756.43. On the assessment for 1947 this amount was added to the amount of taxable income reported by the appellant and described in the notice of assessment, dated December 6, 1948, as Inventory Adjustment. This is the assessment against which the present appeal was brought.

There was nothing strange or unusual about the manner in which the appellant carried on business or kept its accounts. Mr. T. E. Beltfort, the manager of the Copper and Brass Research Association in the United States, who had a thorough knowledge of the brass industry, stated that the appellant's mill was a typical brass mill and that it was run in exactly the same way as the brass mills in the United States. It was the standard practice in the brass industry in that country to price the finished products on the basis of the replacement cost of their metal content and to keep the inflow of metals in accordance with the outflow of the metal content of the products. The charts prepared by Mr. Beltfort, Exhibits 5 and 6, show the close relationship between the sales prices of the copper and brass products and the purchase prices of the copper and brass. Mr. Beltfort also testified from his own knowledge that the Lifo method of accounting for inventory and ascertaining the materials cost of sales was in common use throughout the brass industry in the United States and had been in such common use for income tax purposes since the amendment to the Internal Revenue Code in 1938, regarding which more will be said later.

When the appellant began to use the Lifo method in 1936 it followed the practice of its parent company in the United States and that of the brass industry generally in that country. I have already mentioned that it did not use the method in filing its tax returns prior to making its

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returns for 1946. One reason for this was the Department refused to recognize the method and the appellant therefore, in making its tax returns adjusted its inventory account from the Lifo basis on which they had been kept to the Fifo basis required by the Department. During the war years, when the prices of metals were controlled, it was a matter of little consequence to the appellant whether it made its returns on the Lifo basis or adjusted its accounts to the Fifo basis to meet the views of the Department. But when the time came for filing the returns for 1946 there was a radical difference in the situation. The war was over and the prices of metals had risen sharply as already stated, first on January 22, 1947, and then on June 10, 1947, when the controls were lifted. It now became important to raise the issue. The decision to employ the Lifo method in its returns for 1946 and 1947 was made by the appellant on the recommendation of Mr. McGinn and with the approval of Mr. Gordon and after consultation and correspondence with the parent company and its auditor Mr. Peloubet. The return for 1946 was made on June 18, 1947. This was after the price increases referred to and there can be no doubt that these increases greatly influenced the appellant's decision. The reasons for the decision were put in various forms but they were all really the same. Mr. Quigley said that in 1947 it became obvious that the appellant should not pay taxes on an unrealized profit. Mr. Vanderploeg expressed the view that it was a matter of justice to the appellant to have its tax computed by a method of accounting that reflected its way of doing business rather than on increased prices of metals that had not affected the profits from its business. Mr. McGinn, who recommended the filing of the returns on the Lifo basis, said that early in January, 1947, he could see the distortion that was going to take place in 1947 if the appellant's income should be calculated on the Fifo basis. He admitted freely that while it did not matter prior to 1947 whether the tax returns were on a Fifo or Lifo basis it did make a difference in 1947. The difference is a substantial one and a large amount of tax is involved.

In his cross-examination of the appellant's witnesses counsel for the respondent sought to establish that the appellant had filed its returns for 1947 on the Lifo basis

in order to avoid the heavy tax to which it would be subject if the Fifo method of accounting were applied and the resulting so-called inventory profits were included in the assessment as an item of taxable income. There can be no doubt that the difference in tax incidence under the two methods, which resulted from the sharp increases in the prices of metals in January and June of 1947, was a major factor in the appellant's decision to make its return on the Lifo basis, notwithstanding the Department's refusal to recognize the method. It is no answer to the appellant's contention that it did not raise the issue before. If the Department's refusal to recognize the method was wrong it cannot become right merely because the appellant did not dispute it previously. The issue is now squarely before the Court and must be decided on the merits. What falls to be determined in this case is whether the Lifo method of accounting correctly reflects the appellant's net taxable income in 1947. If it does, then the appeal against the Minister's assessment must be allowed.

I now come to the evidence of the accounting experts explaining the accounting methods in dispute and the reasons that led to the formulation and adoption of the Lifo method. The experts called for the appellant were Mr. G. Richardson of the Canadian accounting firm of Clarkson, Gordon and Company, Mr. M. Peloubet of the New York accounting firm of Pogson, Peloubet and Company, Professor J. K. Butters, an associate professor of business administration at the Harvard School of Business Administration, and Mr. E. A. Kracke of the New York accounting firm of Haskin and Selves. In addition, several Canadian accountants were called for their expression of opinion as to the acceptability of the Lifo method and its applicability to the appellant's business. For the respondent, expert evidence was given by Mr. W. F. Williams, the Director General of Corporation Assessments in the Department of National Revenue, and Mr. J. C. Thompson of the International accounting firm of Peat, Marwick, Mitchel and Company.

I was very favourably impressed with the careful and able manner in which counsel for the parties prepared and presented their respective contentions and with the constructive attitude shown by the accounting experts. The

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Court is indebted to counsel and the experts for their exposition of the pros and cons of a new method of inventory accounting. It was made clear that the accounting profession is not a static one. Its leaders do not consider that the principles of accounting are like the laws of the Medes and Persians. They are not immutable. The profession is naturally and properly conservative in its attitude towards new accounting methods and critical of them. But it does not hesitate to accept and adopt a new method if it stands the tests of criticism and correctly reflects the true position of the business to which it is applied. The fact that a method is new does not condemn it. It is the objective of accountancy to record in figures the true facts of what has happened in the period of business to which the accounting relates. Accountants have freely recognized that methods of accounting that were reasonably adequate to record the truth when business was simple and prices of commodities were stable may not necessarily be sound in a world of complexity and price fluctuation. The result has been that traditional positions have been abandoned and new ones taken up when changing conditions made such shifts necessary in the interests of true accounting. One important difference in concepts of accounting that has developed in recent years was stressed by Mr. Kracke and Mr. Richardson. Accountants are no longer primarily concerned with the annual balance sheet of assets and liabilities. This was originally of prime importance particularly to the banker who was interested in the amount of capital security behind his loans. He was concerned with the amount for which the company could be liquidated for this was the measure of the credit that might safely be extended to it. Now the greater emphasis is put on the annual profit and loss statement. This has become the dominating accounting statement. Accountants now look at a company's position from the point of view of its being a going concern and are more anxious to portray its income position than to set out its liquidation possibilities.

This shift in emphasis from the balance sheet to the profit and loss statement is reflected in a difference of attitude towards inventory accounting. The modern attitude is shown in a bulletin on Inventory Pricing issued

by the Committee on Accounting Procedure of the American Institute of Accountants in July, 1947, which will be referred to as Bulletin No. 29. The portion of this bulletin consisting of the introduction, the first four statements and the discussion thereof was put in for the appellant as Exhibit 29. Statement 1 defines the term "inventory" as follows:

> The term "inventory" is used herein to designate the aggregate of those items of tangible personal property which (1) are held for sale in the ordinary course of business, (2) are in the process of production for such sale, or (3) are to be currently consumed in the production of goods or services to be available for sale.

I adopt this definition as applicable to the appellant's stock of goods. Its inventory embraces its finished products in stock, its work in process of production and its raw materials in their various forms, such as the raw metals purchased from the refineries, the scrap engendered in the course of processing and the scrap purchased from customers and dealers. Statement 2 sets out what is now the accepted objective of accounting for inventories in the following terms:

> A major objective of accounting for inventories is the proper determination of income through the process of matching appropriate costs against revenues.

And Statement 3 sets out that the primary basis of accounting for inventories is cost. It reads as follows:

> The primary basis of accounting for inventories is cost, which has been defined generally as the price paid or consideration given to acquire an asset. As applied to inventories, cost means in principle the sum of the applicable expenditures and charges directly or evidently incurred in bringing an article to its existing condition and location.

The net annual income of a company like the appellant is the difference between its gross income and the costs and expenses related thereto. It is the purpose of the annual statement of profit or loss to show this difference. There is no difficulty in ascertaining its gross income. That is the total amount of its sales during the year and whatever other incoming revenue it had. It is in the ascertainment of the related costs and expenses properly chargeable against the gross income from sales that the difficulty arises. Mr. Richardson emphasized that it is always necessary to allocate the costs and expenses incurred during a year as between those properly chargeable against the gross income

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from sales for the year and those to be charged against the gross income from sales for a future period. In accounting terminology the former portion is styled cost of sales for the year and the balance carried forward is called the closing inventory. This becomes the opening inventory of the following year. Thus each year a company like the appellant starts with its opening inventory and makes purchases of raw materials during the year. The accountant who is concerned with ascertaining the company's income position for the year cannot simply charge all the purchases against the sales regardless of their quantity. He must pay attention to the relationship between the quantity of finished products sold and the inventory and is faced with the problem of ascertaining what portion of the opening inventory and purchases made during the year is properly chargeable against the gross income from sales for the year as part of the cost of such sales and what should be carried forward into the closing inventory to be charged against the sales for a future period. The cost of sales for the year must be ascertained for the purpose of determining the company's income position. It is thus of the utmost importance to ascertain what is the appropriate cost of sales. The balance carried forward as the closing inventory is eliminated from the costs incurred during the year and prior thereto and treated as an asset in the company's balance sheet, although its true nature, if the company is looked upon as a going concern, is that of a residue of unabsorbed costs of sales to be charged against the sales for a future period. Under this concept of accounting the determination of the amount of the closing inventory and the value to be placed on it is a complement of the ascertainment of the cost of sales for the year and the determination of the company's income position. The cost of sales is first to be ascertained and the valuation of the closing inventory follows.

The appropriate cost of sales for the year may be determined, according to the experts, under one of several acceptable methods of accounting for inventories, depending upon the circumstances of the case. There was general agreement that the method to be used is that which will most nearly accurately reflect the true income position.

This view, which is now generally taken, was expressed in Statement 4 of Bulletin No. 29 as follows:

> Cost for inventory purposes may be determined under any one of several assumptions as to the flow of cost factors (such as "first-in first-out", "average", and "last-in first-out"); the major objective in selecting a method should be to choose the one which under the circumstances, most clearly reflects periodic income.

In addition to the three methods mentioned in Statement 4, Mr. Richardson described another method which he called the method of specific identification. Under this method the cost of specific items is established by physical identification of them. It is useful in a limited number of cases and necessary in some. It is, as Mr. Kracke pointed out, the proper system to employ in jewellers' shops where special precious stones are sold, or by art or antique dealers, where the cost of sales can be determined by reference to the sum paid for the specific article. But the method is inapplicable in cases where the goods in the inventory have similar characteristics and utility. There, in many cases, physical identification is impossible as, for example, in piles of scrap or coal, or in industries where the raw materials lose their identity in the process of production. In other cases, physical identification would be possible only with a great deal of effort of accounting or handling. Moreover, no useful purpose would be served in such cases by maintaining the identity of the goods. On the contrary, the method lends itself to manipulation or variations in profit depending on which item is selected. The result has been that the method of specific identification has been abandoned except in the cases where it is obviously applicable.

Mr. Richardson explained the differences in the three methods mentioned in Statement 4 but before doing so referred to the view that there is a presumption that the physical movement of goods out of an inventory will occur in the order in which they were received into it on the assumption that a prudent business man will move his oldest stock first. Historically, this was the common assumption and it is sound in certain cases as, for example, where the goods in the inventory are subject to physical deterioration or style changes. But there is no foundation for it in industries where the goods are not so subject.

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There the physical movement of goods will depend upon factors of convenience rather than the order in which they were received. For example, in a pile of ingots the item first received into stock will not be the item first removed for processing if it is at the bottom of the pile. Nor would a paper mill turn over its wood pile to obtain the logs at the bottom. Nor is there any presumption of a last-in first-out physical movement of goods. Indeed, in the three methods referred to there are no presumptions of physical flow of the goods in any particular order. In their place there are assumptions of a flow of cost factors.

Under the first-in first-out method, known as Fifo, the cost of the items of goods first received into stock is the cost assigned to the items first removed from stock and charged against the gross income from sales as an item of cost of such sales. It follows that the cost of the items in the closing inventory will be the cost of the corresponding quantity of items most recently received into stock. The Fifo method is not based on any assumption of a physical flow of goods out of stock in the order in which they were received into it, but on an assumption of a flow of cost factors, namely, that the cost of the items of goods first in will be regarded as the cost of the items first out. This was illustrated by Exhibit 22. It is not a case of goods first received into stock being necessarily the goods first removed from it. The goods may move in that order or they may not. What is first-in and first-out in the accounting for the inventory and, therefore, in the determination of the cost of sales is an item of cost. Thus the cost chargeable against the gross income from sales for the year is the cost of the earliest corresponding quantity of open items in stock and the cost assigned to the items in the closing inventory is the cost of the corresponding quantity of items most recently received.

Under the second valuation method, called the average cost method, the year is started with the opening inventory showing a quantity of goods at a certain cost. When purchases are made an average is struck between the cost of the goods on hand and that of the purchases either each time a purchase is made or at the end of a defined period.

As goods are removed from stock the cost assigned to them is the average cost existing at the time of the removal and this is the cost charged against the sales.

Then there is the last-in first-out method, called Lifo. Under this method the cost of the items last received into stock is the cost assigned to the items first taken out. Here again there is no assumption of physical flow of the goods in any order but only an assumption as to the order in which costs flow from the inventory account into the cost of sales. The effect of the Lifo method is that the cost of sales for any period reflects substantially the prices at which purchases were made during the same period. Regard must, of course, be had to the relationship of the quantity of goods purchased to the quantity sold. The effect of the method is that quantity for quantity the cost of sales reflects the replacement cost of their materials content. Thus in the case of a company like the appellant if the quantity of raw material purchased during the year corresponds exactly with the quantity used in the sales for the year the raw materials cost of the sales will be exactly the price paid for the raw materials purchased during the year and the closing inventory will be the same in quantity and cost as the opening inventory. If the quantity of raw materials purchased in the year exceeds the quantity used in the sales in the year the raw materials cost of the sales will be the price paid for the raw materials purchased during the year less the amount of the excess priced at the average price of the purchases during the year and the excess so priced will be carried into the closing inventory as an increment. On the other hand, if the quantity of raw materials purchased during the year is less than the quantity used in the sales for the year the raw materials cost of the sales will be the price paid for all the raw materials purchased during the year plus the amount of the shortage at the price paid for the most recent purchases in the previous year and the shortage so priced will be regarded as having been withdrawn from the opening inventory. The operation was illustrated by Exhibit 23.

It cannot be too strongly stressed that these methods of inventory accounting and determining the materials cost of sales do not depend upon any assumption of the physical flow of the goods in the inventory in any particular order.

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Nothing could be plainer from the evidence, notwithstanding the vigorous and persistent cross-examination by counsel for the respondent, that the three methods described in Statement 4 are not based on an assumed flow of the goods in any order. The accountants are not concerned with the physical flow of the goods at all. There has been a complete departure, except where the specific identification method is applicable, from the idea of determining costs according to physical identity of the goods. What matters is the flow of cost factors into and out of the inventory account. What is last-in and first-out or first-in and first-out is not an item of goods at all but an item of costs into and out of the inventory account. The objective of accountancy is to charge against the gross income from sales for the year the appropriate cost of the sales. As Statement 2 of Bulletin No. 29 puts it, a major objective of inventory accounting is the proper determination of income through matching appropriate costs against revenues. That is the prime consideration. The physical flow of the goods has nothing to do with the matter.

The story of the origin of the Lifo method of inventory accounting and its general acceptance in the United States in certain circumstances was clearly told by Mr. Peloubet and Mr. Kracke. These eminent United States accountants, with whose evidence I was favourably impressed, played an active part in this development. I shall deal with Mr Peloubet's evidence first. His firm have been the auditors of the appellant's parent company, the American Brass Company, since 1922 and he is familiar with its business operations as well as those of the appellant. In the early 20's the American Brass Company was running on a dual system. It kept its accounts on the Fifo basis because of the requirements of the tax authorities but it also kept unofficial operating records on substantially what is now called the Lifo basis for its own operating purposes. About 1924 or 1925 it was clear to the management that the inventory method then in use did not correctly portray the realized business profits of the organization for dividend purposes. This was due to the disturbed condition of prices. Mr. Peloubet filed a chart, Exhibit 28, showing the fluctuations in prices of four principal commodities, namely, cotton, wheat, pig iron and copper from 1900 to 1929.

This shows that prices were fairly stable between 1900 and 1915 but that there were violent price disturbances during and after the first world war. A similar chart Exhibit 32 shows sharp fluctuations starting in 1946. It took several years before the first price fluctuations forced themselves on the management and made it realize that the accounts did not properly show the true profits. It was disturbed about the amount of apparent inventory profits caused by merely marking up goods which they did not and could not sell and the fact that the accounts showed profits that were not really there. It was not the rise in prices that worried the management but rather their fluctuation and the distortion in the income position that followed from the existing accounting methods. The result was that in 1926 the entire Anaconda group of companies, including the American Brass Company, adopted for its corporate purposes the base stock method. This eliminated the inventory profits. The base stock method was applicable in an industry which had to carry a large amount of raw material at all times. The amount required was determined by the management and when so determined was carried permanently at a fixed price. The additions to it were carried at current prices. The principal distinction between it and the Lifo method was that if part of the base stock was sold it was replaced at the same price and a reserve was set up of the difference. It is an old method in England that was allowed there for tax purposes but limited to a few industries such as iron and steel. In 1933 the American Brass Company went on the last-in first-out method that was just coming into use. It was not then called the last-in first-out method but was simply described as a method that charges current cost against current sales and carries forward the opening inventory to the closing one at the same price. It was first referred to as Lifo in 1937. It was not originally adopted for tax purposes. An attempt was made in 1936 to get legislative recognition of it but this failed. In 1938, however, Mr. Peloubet appeared before the House Ways and Means Committee and the Senate Finance Committee of Congress as a representative of the Copper and Brass Mill Products Association and the Revenue Act amendment of 1938 was enacted to make the Lifo method effective. The legislation was defectively drafted and

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proved inoperative. But in the Revenue Act of 1939 as the result of the work of a group of three consultants, of whom Mr. Kracke was one, the Lifo method was legislatively recognized. Mr. Peloubet was thereafter a member of the Committee on Accounting Procedure of the American Institute of Accountants which issued its findings on Inventory Pricing as Bulletin No. 29 in July, 1947, to which I have already referred. There was no dissent on the part of any member of the Committee from the portion of the bulletin filed as Exhibit No. 29 and it may, in my opinion, be regarded as a generally accepted statement of principles.

I shall now summarize Mr. Kracke's account of the origin and acceptance of the Lifo method. At the beginning of the century the valuation of a company's inventory on the basis of "cost or market whichever is lower" was predominantly a balance sheet concept. At that time the balance sheet was the company's most important financial statement prepared largely to meet the needs of the banker. Moreover, in the simpler state of industry that then obtained a company's inventory lent itself to specific identification which was then the desired objective. With the coming of the industrial era the income account of the company grew in importance and the complexity in business operations gave rise to other methods of inventory valuation of which Fifo was the first and average cost the second. During the first decade and a half market fluctuations in certain basic goods were of a minor nature but during the first world war and in the post war period they were substantial and the older methods of valuation bore heavily on industries where the sale prices of the finished products were determined by the replacement costs of their materials content. Some of such industries, for example, textile mills using cotton and cereal mills using grains could protect themselves against price fluctuations, even with the continued use of the Fifo or average cost methods, by resort to the futures market and the system of hedging. Then when the profit or loss on the futures market was brought into account with the operating result calculated under the Fifo method the total approximated closely to what is now determined under the Lifo method. But there were other industries which could not protect themselves against price fluctuations by hedging. They were deeply concerned with

the distortion caused by these fluctuations particularly if their inventories were large and the rate of their turnover slow. The earliest effort in these industries to meet this situation, made between 1919 and 1929, was to use the base stock method. This failed to generate much enthusiasm and finally the oil industries evolved the concept of the last-in first-out assumption of the flow of costs as the proper one for their industry. Then in 1933 the American Petroleum Institute requested the American Institute of Accountants to set up a committee to discuss the whole field of inventory valuation with particular reference to the new method of last-in first-out which had been initiated by certain members of the American Petroleum Institute. The American Institute of Accountants then appointed its Inventory Committee with Mr. Kracke as its chairman. This committee collaborated with the American Petroleum Institute and finally in 1936, after deliberations that stretched over more than two years, brought in a unanimous report approving of the last-in first-out method of valuation of inventories in those industries where there was a close relationship between the sale price of the finished product and the replacement cost of the materials content and there was a large inventory and a slow rate of turnover. The petroleum industry adopted the method for the proper determination of its profits and without regard to whether it would be accepted for tax purposes. Mr. Kracke stressed that the committee found that this method was not an attempt to deal with an assumed physical flow of goods. The assumption was one of a flow of costs in the books that were related to the revenue in the books and what was attempted was a true matching of the revenue with the related costs. Mr. Kracke gave an interesting illustration of a case where it was not desirable to attempt to follow physical identity. A refinery might one day derive its crude oil from pipe lines and another day draw it from tanks where it had been stored for a year or two years. Thus there might easily be quite a mixture and there could be quite a range of cost prices. There was also danger of evaporation. Moreover, if a company wanted to favour its earnings it might utilize the cheaper oil in the tanks instead of the more expensive oil in the pipeline and so lead to monopoly earnings. The Committee considered this undesirable and

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found that a rigid last-in first-out system that based itself on the flow of costs rather than on any attempt to follow through a physical flow of goods was the only method that could make for a real, defensible earning or profit or loss in those industries. Mr. Kracke was one of the consultants to the Treasury Department of the United States in 1938 and 1939. In 1938 the Revenue Act first recognized the Lifo method but the wording of the 1938 amendment was such that it was unworkable. It did not follow the outline that Mr. Peloubet had discussed before the House and Senate Committees. A committee of consultants, of which Mr. Kracke was a member, was then appointed by the Department to consider the problem. It recognized that the method had found a proper place in business and the question was how to apply it. The Department expressed a desire that the consultants should submit a list of the industries that would be entitled to use this method. The consultants' preference was that the law should recite the specific conditions which had been dealt with in the deliberations with the American Petroleum Institute, namely, quickness of communication of replacement cost of the raw materials to the prevailing sale price of the product, size of inventory and slowness of turnover, of which the price factor was the most important. It was finally agreed that it should be left to the election of the taxpayer to use the method if he considered that it best reflected the operating conditions under which he worked, unless the Commissioner felt that it was improper, in which case he could deny the right. The law was correspondingly amended in 1939 to allow the use of the Lifo method. Thereafter, Mr. Kracke was a member of the Committee on Accounting Procedure of the American Institute of Accountants and chairman of the Sub-committee on Inventory Valuation. This continued the exploration of inventory problems which eventually led to Bulletin 29 in July, 1947. The work was done through a questionnaire addressed to one hundred of the largest companies in the United States in various industries. This produced a pattern which showed that eventually accountants may safely look for a condition whereby the various industries can be allocated into three groups of methods of valuating inventories and determining costs, namely, Fifo, average cost, and Lifo.

It is generally agreed by accountants, with very few exceptions, that there is no single inventory accounting method that is applicable in all circumstances. Each method, even that of physical identification, has its proper place and the method to be selected is dependent upon the circumstances of the case. It was the objective of the Committee on Accounting Procedure of the American Institute of accounts in its promulgation of the principles stated in Bulletin No. 29, as Mr. Kracke put it, to bring industries into their respective profit determinations where they belonged by reason of the operating characteristics of the industry. To put it in other phraseology, meaning the same thing, the method that ought to be selected is the one that is in accord with the company's genius of profit making and most nearly accurately reflects its income position according to the manner in which it carries on its business.

The Fifo method was the first method to be adopted at the beginning of the century and was largely predicated on perishable goods. It is also clear that in a business, such as the ordinary retail business, where sales prices are based on the prices paid for stock received and are altered only when the stock purchased at earlier prices has been exhausted, the Fifo method will probably give the best reflection of income according to the actual course of trading. And, as Mr. Kracke pointed out, Fifo is well suited to the liquor industry where the sales price of the liquor sold in any year has nothing to do with the price of grain in that year but is related to the price of grain several years previously depending upon the age of the liquor. It is the price of that grain which should be considered in ascertaining the cost of the sales of the liquor.

The average cost method, which is really a variation of the Fifo one, will take care of a large field of industry where there is a relationship between sales prices and replacement costs but only after varying lapses of time as, for example, in the tobacco industry where it is usual to have two or three years' lapse for the maturing of the tobacco and the matured crops are mixed. There the average cost method is ideal. Likewise, it is the proper one in the case of an investment trust selling securities out of its portfolio.

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Where prices are reasonably stable it makes little, if any, difference which of the three methods is used. The cost of sales under each of them will be approximately the same. But when the prices paid for goods received into stock are subject to fluctuations there may be a substantial difference, depending upon the extent of the fluctuations and the size and rapidity of turnover of the inventory. This fact led to criticism of the correctness of the Fifo method in certain circumstances. While it was recognized that its range of proper use was a wide one, it was felt, as the evidence of Mr. Peloubet and Mr. Kracke shows, that its universal application was not justifiable and that there were circumstances in which its use did not accurately reflect the income position of the business to which it was applied.

The first criticism of the Fifo method was that when there were price fluctuations and the rate of inventory turnover was slow the method resulted in so-called inventory profits or losses that were fictional. This criticism was particularly strong when sales were made on the basis of prices that had no relationship either to the opening inventory prices or to those obtaining at the time of the sales. In such cases there was no justification for claiming a profit merely because there had been an increase in the price of the goods in the closing inventory over that which obtained at the date of the opening one when there was no difference in the quantity of the goods and their character and utility were the same. A second criticism was that in an industry in which a large inventory must be maintained at all times and the rate of its turnover is slow it was unrealistic and untrue to say that because of a rise in prices there were inventory profits, as would be the case under the Fifo method, when such so-called profits had not been realized and could not be realized without liquidating the business. In such circumstances, it was inconsistent with the business continuing as a going concern to ascribe inventory profits to it. It was also urged that the fictional character of the so-called inventory profits was shown by the fact that on a subsequent fall in prices the so-called profits disappeared and so-called inventory losses took their place, although the quantity, character and utility of the goods in the inventory remained unchanged.

The Lifo method was designed to meet these criticisms and produce greater reality in determining the income position. It was formulated by accountants to reflect the opinions of practical business men who considered that when a business is carried on in such a way that sales prices closely reflect replacement costs the correct profit or loss of the business cannot be determined by charging against the gross income from sales the cost of their materials content that obtained several months previously if it was different from the current cost, as would be the result under the Fifo method. It is the related cost of sales that ought to be ascertained. The Lifo method, therefore, charged against the gross income from sales the cost of their materials content that was current at the time of the sales and thus matched the appropriate costs against the revenues, thereby accomplishing the major objective of inventory accounting set forth in Statement 2 of Bulletin No. 29.

The evidence of Mr. Peloubet and Mr. Kracke shows that the Lifo method developed gradually. It was a radical change in accounting practice and naturally provoked discussion and criticisms. The criticisms have died out and now, as Mr. Richardson pointed out, there are very few accountants who oppose its use in the circumstances that are appropriate to it.

According to Mr. Richardson there were three main criticisms of the method. The first was that it does not reflect physical realities, namely, that only in exceptional circumstances would the physical flow of goods be on a last-in first-out basis. There is no substance in this criticism in view of the fact that accountants are now generally in agreement that physical identification of the goods is neither necessary nor desirable in the ascertainment of the appropriate cost to be charged against gross income and the determination of net income.

The second criticism was that the Lifo method excluded inventory profits from the computation of income and it was urged that although advocates of the method claimed that there were no inventory profits because they had not been realized the fact was that the profits had been realized and re-invested in stock at a higher price. This criticism, like the first one, is based on an assumption of physical

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flow of the goods on a first-in first-out order and on the assumption that the goods first received into stock had in fact been sold and a profit realized on them which had been re-invested in stock at a higher price which was still on hand. In my opinion, there was no merit in this criticism. It has already been shown that there is no assumption of physical flow of the goods in any particular order in any of the inventory accounting methods under discussion, except that of specific identification. And there is no foundation in fact to establish the criticism in the appellant's case.

The third criticism was that the Lifo method resulted in a valuation of the closing inventory that was meaningless from the point of view of the balance sheet since it was not related to current prices and the valuation was dependent partly upon the date when the method was adopted and partly upon the date of the increments from year to year. This criticism was answered by Mr. Richardson. It is not primarily the purpose of an inventory accounting method to determine the value of the closing inventory. If it were so all inventories would be valued at the market price of the goods. The more important objective is to reflect as nearly accurately as possible the income position according to the manner of carrying on business. Consequently, the accounting profession has agreed that when there is a conflict between a method which would lead to a more correct determination of income and one that might be preferable from the balance sheet point of view the balance sheet must give way to the income account. The ascertainment of the costs properly chargeable against the gross income is the primary objective of the accounting for that determines the net income and the valuation of the closing inventory follows as a complement for balance sheet purposes.

Mr. Williams and Mr. Thompson objected to the Lifo method on the ground that in a period of rising prices it resulted in the creation of an unauthorized inventory reserve. Mr. Williams explained that, in his opinion, a reserve was created whenever an asset was undervalued and that there was such an undervaluation of the closing inventory under the Lifo method. The objection is due

to a misconception of the true nature of the closing inventory. Earlier in these reasons I referred to Mr. Richardson's discussion of the problem involved in ascertaining what portion of the opening inventory and purchases made during the year is properly chargeable against the gross income from sales for the year as the materials cost of such sales. Once that is ascertained by whatever method is appropriate the balance is carried forward as the closing inventory and included in the balance sheet. I have already referred to the shift in accounting emphasis from the balance sheet to the profit and loss statement. Mr. Richardson also referred to the changed attitude towards the balance sheet itself that has developed in modern accounting practice. Instead of being a statement of assets and liabilities largely based on the concept of liquidating value, cost has come to play a dominant roll as distinct from value and the balance sheet is now not so much a statement of values as a statement of unabsorbed costs and liabilities. Mr. Richardson stated that many illustrations could be given of the changed attitude towards various items in the balance sheet, but it is sufficient to say that within the modern concept of it the closing inventory is not to be regarded as an asset to be liquidated but rather as a residue of unabsorbed costs incurred in the past but applicable to the future to be charged against the gross income of a future period. This view of the closing inventory is the same whatever accounting method is applied. It has thus nothing to do with the determination of the income position.

It was also urged by Mr. Williams and Mr. Thompson that the Lifo method resulted in an averaging of profits that was not authorized by law. So far as the Lifo method eliminates so-called inventory profits or losses it may perhaps be said that it levels off the hills and fills up the valleys of profits and losses but that is not the correct way of describing the result. What really happens is that when a company like the appellant follows a deliberate policy of avoiding speculation or trading in its inventory and confines itself to its processing business and follows a policy whereby the sales price of its finished products closely reflects the replacement cost of their materials content and matches its purchases to its sales its income position is not affected by the rise or fall of materials. It makes the same profit or

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sustains the same loss whether prices go up or down and the Lifo method reflects its actual course of business. The method accomplishes the same result for it as is accomplished in certain industries by hedging and bringing its results into account along with those of the processing operations. Mr. Richardson showed the results of the Lifo method as compared with those of the Fifo one both on a falling market and on a rising one by Exhibits 25 and 26.

The problem in this case is the ascertainment of the appellant's materials cost of sales in 1947 that may properly be chargeable against its gross income from sales for 1947. There is no definition of "cost" in the Income War Tax Act. Net taxable income as determined under it means in effect for the appellant its gross income from the sales of its finished products for 1947 and any other revenues it might have in that year less the 1947 costs that are related to such gross income. What costs are properly chargeable against the gross income must depend upon accepted business and accounting principles unless the Act declares otherwise. The Act being silent on the subject it is necessary to seek the aid of the accountant and the business man. The question for decision is whether the Lifo method properly ascertained the appellant's materials cost of sales in 1947. This depends upon whether the method is an acceptable accounting method and whether it was appropriate in the circumstances of the appellant's business.

There cannot be any doubt that the Lifo method of inventory accounting and ascertaining the materials cost of sales is now an accepted method in certain circumstances. That fact is beyond dispute in the United States. It is noteworthy that after the American Petroleum Institute in 1933 requested the American Institute of Accountants to set up a committee to discuss inventory valuation and particularly the new Lifo method which some of its members had initiated the Inventory Committee of the American Institute of Accountants under the chairmanship of Mr. Kracke unanimously approved the method for use in the circumstances already mentioned. Then there was the adoption of the method by the Treasury Department of the United States leading first to the abortive amendment of 1938 and then the effective legislation of 1939. Here there are two interesting facts to note. In the first place,

the 1939 legislation made the method an elective one and gave it a wider scope of application than that which the Inventory Committee had contemplated. There is also Mr. Kracke's statement that, in his opinion, the Commissioner of Internal Revenue could have allowed the method without any legislative action on the part of Congress in view of his broad power to determine what accounting method fairly reflected the taxpayer's income. While it is not a matter for this Court to decide I must say that I was impressed with Mr. Kracke's opinion. Furthermore, we have the statement in Bulletin No. 29 that "cost for inventory purposes may be determined under any one of several assumptions as to the flow of cost factors (such as "first-in first-out", "average", and "last-in first-out"). There is also Mr. Peloubet's evidence that Lifo is a generally accepted accounting method in the United States. This was given not as a matter of opinion but as one of personal knowledge. It is a recognized and accepted method in the cases to which it applies. As an illustration of the extent of its use there is Table 29 in Appendix A of Professor Butters' book on Inventory Accounting and Policies, Exhibit 34, showing the number of companies in the non-ferrous metals fields that were on the Lifo method in 1947. And I have already referred to Mr. Beltfort's statement that the Lifo method is in common use in the brass industry in the United States. There was also the evidence of Professor Butters regarding the method.

The evidence of the acceptance of the Lifo method in Canada is almost as convincing. Mr. Richardson stated that criticism of it has largely died out and that there are very few accountants who oppose its use. Mr. Richardson said that Lifo is now well established as an acceptable method. Then there were the statements of other Canadian accountants of high standing. Mr. K. Carter of the accounting firm of McDonald, Currie and Company said that Lifo is a generally acceptable accounting method in Canada for determining cost. He agreed with the first four statements in Bulletin No. 29. Mr. L. McDonald of the accounting firm of Price, Waterhousse and Company did not like the Lifo method because the inventory figure in the balance sheet was relatively meaningless but he

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admitted that it was a generally accepted method and expressed the view that if the attitude of the Department were to change there would be a greater acceptance of it. And Mr. G. Jephcott of the accounting firm of P. S. Ross and Sons said that Lifo was a generally acceptable accounting method in Canada. Then there was the Dominion Bureau of Statistics Reference Paper of May, 1949, Exhibit 33, showing the number of companies in Canada that were on the Lifo basis of valuing their inventories.

The experts for the respondent were against the Lifo method. Mr. Thompson denied its acceptability and went so far as to say that there were no circumstances in which it should be applied. Mr. Williams did not go so far as this. While he could not as a tax official accept the method for tax purposes he admitted that there might be circumstances in which it would most clearly reflect income.

While I have great respect for the respondent's experts I have no hesitation in finding that the Lifo method is an acceptable and recognized inventory accounting method in the circumstances that are appropriate to it.

After careful consideration of the opinions of the experts I have come to the conclusion that where a manufacturing company avoids speculation or trading in its materials and makes the sales price of its finished products closely reflect the current replacement cost of their materials content and matches its purchases of materials to its sales of finished products so that the inflow of the materials equals the outflow of the materials content of the finished products and it must continuously maintain a large inventory and the rate of its turnover is slow the Lifo method of inventory accounting and ascertaining the materials cost of its sales for the year is the method that most nearly accurately reflects its income position according to the manner in which it carries on its business and is the method that ought to be applied in ascertaining the materials cost of its sales and determining its net taxable income.

As to whether the Lifo method is appropriate in the circumstances of the appellant's business the evidence is overwhelming. I have already found on the facts that the circumstances in which the method is an acceptable one exist in this case. The evidence and opinions of the experts

and others support this finding. Mr. McGinn, the appellant's controller, thought that the Lifo method was the best recognized inventory method to reflect correctly the appellant's method of doing business. Mr. Gordon reviewed the appellant's income tax and excess profits tax returns for 1947 and considered that they fairly reflected its income calculated on the Lifo method. Then we have the strong, clear cut opinion expressed by Mr. Peloubet who was thoroughly familiar with the appellant's operations. He said that the application of the Lifo method to a primary producing brass mill such as the appellant's was probably the clearest, simplest and most easily operated application of Lifo that could be found. In his opinion, it was the proper method to be used for such a business. It more clearly reflected the periodic income of such an enterprise than any other accounting method of which he had knowledge. By "clearly" he meant "fairly" or "accurately" or, to be more precise, "most nearly accurately". Then there was Mr. Kracke's carefully considered view that Lifo was definitely the proper method to use for the purpose of arriving at the appellant's profits. In his opinion, it was the proper method because it most nearly accurately reflected the appellant's true profits. I must say that the opinions of such eminent accountants as Mr. Peloubet and Mr. Kracke carried great weight with me. The Court also had the assistance of several well known Canadian accountants. Mr. Carter considered that Lifo was the best method of arriving at a fair measurement of the appellant's annual net profits. And Mr. McDonald said that under the circumstances of the appellant's case Lifo was preferable to either Fifo or average as a method of determining the appellant's profit or loss, because it more clearly reflected periodic income. And Mr. Jephcott considered that Lifo was the most desirable plan of determining the appellant's cost that could be utilized. For the respondent Mr. Thompson and Mr. Williams refused to agree that the Lifo method was appropriate.

Under the circumstances, I find that the Lifo method was appropriate in the circumstances of the appellant's business. This means that it was entitled to use the method in ascertaining the cost of the metal content of its finished products that was properly chargeable against its gross

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income for sales and that the method correctly reflects its net taxable income in 1947 and I so find. It follows that the appeal from the assessment for 1947 must be allowed.

While I need not say more I also find that the method employed by the Minister in arriving at his assessment was not a proper one. This is not a case in which either of two accounting methods is acceptable. Only the one method, namely, the Lifo method, is appropriate. The Minister used the Fifo method in ascertaining the appellant's materials cost of sales which left it with a much larger income than it earned. The result of this method has been to ascribe to it greater profit than could have come to it through its processing charges. The additional profit so ascribed is said to be inventory profit. The criticisms of the Fifo method mentioned by Mr. Richardson apply here. It seems plain to me that when a company so conducts its business as to avoid the risk of profit or loss through the rise or fall of its raw materials its income position cannot be correctly determined if so-called inventory profits or losses which it has not earned or sustained are brought into its accounts. To do so is to use an accounting system that is not in accord with its business policy and practice and does not fairly reflect its income position.

There is only one other comment to make. Although the appellant filed its 1947 returns with its cost of sales ascertained by the Lifo method its standard profits were computed on the Fifo basis. This may make a difference in the amount of excess profits tax. If it does it seems proper that since its net taxable income should be determined under the Lifo method its standard profits ought to be computed under the same method, particularly since it has kept its corporate accounts by that method ever since 1936.

For the reasons given, I find that the assessment for 1947 is invalid and the appeal against it must be allowed with costs.

Judgment accordingly.

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Feb. 29

April 24

BETWEEN:

DIAMOND TAXICAB ASSOCIATION LTD. ..... } APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

Revenue—Income—Income War Tax Act, R.S.C. 1927, c. 97, s. 3(1)(a)(b) —Contracts for services issued by a taxicab association—Amounts paid for service contracts income within meaning of s. 3(1) of the Act—Appeal from the Income Tax Appeal Board dismissed.

The appellant Association entered into service contracts with taxicab owners and operators under the terms of which it offered certain services and facilities for a monthly fee. In 1930 the appellant expanded its facilities and, in order to effect this, it issued a number of new service contracts and levied a charge upon the applicants who were accepted for membership. The moneys so received were entered in the appellant's books as a capital receipt and were so assessed for income tax purposes. In 1946 and 1948, with a view to further expansions, the appellant decided that members should pay a charge of $200 and non-members one of $500 for each new service contract, these charges resulting in total amounts of $63,000 in 1946 and $59,100 in 1948. These amounts were entered in the appellant's books as capital receipts as had been done in 1930, but were added by the Minister to the appellant's taxable income in respect of those two years as being proceeds from sales of contracts. From these assessments the appellant appealed to the Income Tax Appeal Board which dismissed the appeal.

Held: That the amounts paid to the appellant Association for the issue of service contracts were in payment for services that it undertook by the contracts to furnish its members and non-members and the amounts so paid constitute income within the meaning of section 3(1) of the Income War Tax Act, R.S.C. 1927, c. 97.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before Mr. Guillaume Saint-Pierre, Q.C., Deputy Judge of the Court, at Montreal.

R. de Wolfe MacKay, Q.C., for appellant.

Raymond Decary and *J. Claude Couture* for respondent.

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

Saint-Pierre D.J. now (April 24, 1952) delivered the following judgment:

Il s'agit d'un appel du jugement du président de la Commission d'Appel de l'Impôt sur le revenu en date du 2 août

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1951 qui a rejeté avec dépens l'appel de l'appelante de la décision du Ministre du Revenu National qui avait déclaré comme tombant sous l'article 3 de l'impôt sur le revenu les montants reçus par l'association en 1946 et en 1948 sur l'émission de nouveaux contrats de service.

Quels sont les pouvoirs de l'appelante?

Le 7 juin 1922 l'appelante a été incorporée par lettres patentes émises sous la partie (1) de l'acte des compagnies de la province de Québec.

L'objet de l'association est de fournir et de donner des services, facilités, informations, privilèges et droits aux propriétaires et opérateurs d'automobiles et de taxicabs et autres personnes ou société faisant affaires comme chauffeurs et opérateurs, c'est l'exhibit A-2.

Le 9 juillet 1946 des lettres patentes supplémentaires ont été émises quant aux actions de l'association, c'est l'exhibit A-4.

Le 20 août 1946 de nouvelles lettres patentes supplémentaires ont été émises quant au capital de l'association, c'est l'exhibit A-5.

L'appelante a produit comme exhibit A-3 une forme de contrat de service.

C'est un contrat entre l'appelante et un membre. Par ce contrat ce membre a droit à tous les services accordés par l'association à ses membres. Le premier service est le téléphone. Le second service est le poste de stationnement. Le membre doit payer à l'association à l'avance, le premier de chaque mois, à titre de rémunération pour ses services en vertu du contrat un montant de $..... ou tout autre montant qui peut de temps en temps être déterminé par l'association.

Le contrat est un contrat annuel et peut se renouveler automatiquement d'année en année et il peut se terminer par chacun des contractants par un avis.

L'appelante a fait entendre devant le président les témoins suivants:

1° M. Paul Meriot, président de l'association.

2° M. Howard West, directeur et secrétaire de l'appelante, qui a corroboré le témoignage de M. Meriot.

Il résulte du témoignage de M. Meriot les faits suivants:

L'appelante a été incorporée le 7 juin 1922 par lettres patentes et dont l'objet est de fournir aux propriétaires d'automobiles et de taxicabs les services, facilités, informations, privilèges, etc.

L'association n'opère pas d'automobiles, ni de taxicabs et n'est pas propriétaire de taxicabs. L'association rend services aux propriétaires de taxis comme le service de téléphone, des postes de stationnement, des concessions, de la publicité dans le bottin du téléphone Bell, etc.

L'association pour ses services passe un contrat de service indiquant les services qu'elle s'engage à rendre et chaque contrat de service est émis pour un taxi de sorte qu'un individu peut avoir 10, 15, 20 contrats de service.

Le loyer mensuel du contrat de service a varié entre $22, $25 et $30 par mois suivant les années, mais pendant les années 1946 et 1948 ce loyer mensuel était de $22 par mois. Une personne pouvait avoir autant d'actions qu'elle voulait dans l'association sans s'occuper des contrats de service qu'elle avait.

Durant l'année 1930, dans le but d'obtenir du capital nécessaire afin d'obtenir les facilités requises pour le service du téléphone, l'association a chargé à ceux qui voulaient un contrat de service un honoraire en plus du loyer mensuel et cet honoraire a été considéré comme capital dans les livres de l'association et a été considéré comme tel par les officiers de l'impôt sur le revenu.

Avant le 1er mai 1946, 235 propriétaires opéraient 470 taxis avec des contrats de service. Durant le mois de mai 1946, 201 contrats de service ont été émis à des anciens et nouveaux propriétaires et ces propriétaires n'ont rien payé pour l'émission de ces contrats de service à la suite de cet ajouté, la flotte des taxis était de 671 et il y avait 671 contrats de service.

En juillet 1946, 185 propriétaires et détenteurs de contrat de service ont acquis toutes les parts de l'association soit 2,640 actions et ont décidé d'augmenter la flotte de 315 nouveaux contrats de service aux seuls actionnaires et ces actionnaires devaient payer pour ces nouveaux contrats de service un honoraire de $200 pour chaque contrat de service.

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Cet honoraire était une contribution volontaire des actionnaires pour créer un fonds pour dépenses capitales. A la suite de cet ajouté, la flotte des taxis était de 986 et il y avait 986 contrats de service.

En 1948 comme l'association avait 2,640 actions, l'association a résolu de donner un droit par action et dix droits donnaient droit à un contrat de service ce qui a déterminé 264 nouveaux contrats de service. Un actionnaire avec dix actions pouvait obtenir un contrat de service moyennant un honoraire de $200 si ce contrat était pour lui ou un membre de l'association et moyennant un honoraire de $500 si cet actionnaire avait transféré son droit à une personne qui n'était ni actionnaire et ni membre de l'association. L'objet de cet honoraire pour ces contrats de service avait pour but des dépenses capitales et de fait l'association a acheté les lots 175 et 181 de la rue Prince-Arthur qui lui ont coûté $17,000 et $21,000 et elle a passé un contrat de construction pour la somme de $87,850. L'argent pour ces dépenses capitales a été pris à même le montant perçu par l'association sur l'émission des contrats de service en 1946 et en 1948. Une personne pouvait être membre de l'association sans en être un actionnaire.

En 1946 au moment d'acheter les actions, les membres de l'association n'étaient pas forcés de le faire et ils continuaient à être membres. Ceci explique la différence entre 185 actionnaires et 235 membres. Il y avait donc 40 personnes qui étaient membres de l'association sans en être actionnaires.

En 1946, les actionnaires et membres ont reçu pour leur $200 un contrat de service. En 1948, les actionnaires et membres ont reçu pour leur $200 un contrat de service et ceux qui n'étaient ni actionnaires ni membres mais étrangers, ce qu'ils ont reçu pour leur $500 c'était un contrat de service.

En payant $200 les actionnaires contribuaient à édifier un fonds pour fins de dépenses capitales, il en était de même de ceux qui payaient $500.

Les faits apparaissant au dossier sont les suivants:

L'association appelante a été incorporée en 1922.

Les revenus ordinaires de l'association proviennent des loyers mensuels des contrats de service et ces revenus ont toujours été sujets à l'impôt sur le revenu.

En 1930 l'association ayant besoin de capitaux au sujet du service de téléphone a émis des contrats de service sujets à un honoraire initial en plus du loyer mensuel et les officiers de l'impôt sur le revenu ont considéré cet honoraire initial comme non imposable vu que cet honoraire devait servir à des dépenses capitales. Quel honoraire a été payé sur ce contrat de service et sur quoi le département de l'impôt sur le revenu à cette époque s'est-il basé pour rendre cette décision, il n'y a rien dans le dossier qui l'indique.

En 1946 l'association ayant besoin de capitaux pour s'agrandir a émis 315 contrats de service à ses actionnaires, lesdits contrats sujets à un honoraire de $200 et l'association a retiré du paiement de ces honoraires un montant de $63,000 et les officiers de l'impôt sur le revenu ont considéré cet honoraire comme revenu et sujet à l'impôt sur le revenu.

En 1948 l'association ayant besoin de capitaux additionnels pour s'agrandir a émis 264 contrats de service, certains de ces contrats aux actionnaires ou membres de l'association sujets à un honoraire de $200 et certains de ces contrats à des étrangers qui avaient obtenu des transferts des actionnaires, sujets à un honoraire de $500 et l'association a retiré du paiement de ces honoraires un montant de $59,100 et les officiers de l'impôt sur le revenu ont considéré cet honoraire comme revenu et sujet à l'impôt sur le revenu.

Comme il est facile de le constater les officiers du département de l'impôt sur le revenu ont pris deux positions opposées relativement à la transaction de 1930 et relativement aux transactions de 1946 et 1948, quoique dans chacune de ces transactions l'association a procédé de la même manière.

Si l'émission des contrats de service en 1930 sujet à un honoraire n'a pas été considérée par les officiers du département comme un revenu sujet à l'impôt comment se fait-il qu'en 1946 et en 1948 cette émission de contrat de service sujet à un honoraire peut-elle être considérée par les officiers du département comme un revenu sujet à l'impôt?

Il aurait été intéressant pour la Cour de connaître les motifs qui ont fait agir les officiers du département en 1930 et de constater si de fait ces officiers se sont trompés ou

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non, car si les officiers du département avaient raison en 1930, comme l'association a procédé de la même façon en 1946 et 1948 les officiers des années 1946 et 1948 auraient dû suivre la décision prise par les officiers en 1930.

Sur quoi s'appuie le département de l'impôt sur le revenu pour les années 1946 et 1948?

Sur l'appel devant le président de la Commission d'Appel de l'Impôt sur le Revenu l'avocat de la Couronne a plaidé ce qui suit au paragraphe 11:

11. That the profits realized by the appellant from its dealings in contract are income within the meaning of section 3 of the Income War Tax Act.

Dans sa défense sur le présent appel l'avocat de la Couronne plaide ce qui suit:

B. That the amounts of $63,000 and $59,100 received respectively in the taxation years 1946 and 1948 are income of the appellant under the provisions of section 3 of the Income War Tax Act.

Le président de la Commission d'Appel de l'Impôt sur le Revenu a décidé dans son jugement dont il y a appel ce qui suit:

This rendering of services under different forms to taxi owners being the only object of the association and the fees received for the rendering of services bring the only income of the association I fail to see how the amounts received by the association in 1946 and 1948 do not constitute income to the association.

Je suis donc appelé à décider si les montants reçus par l'association en 1946 et en 1948 sur l'émission des contrats de service constituent un revenu pour l'association.

L'article 3, paragraphe 1, de la loi de l'impôt sur le revenu, définit comme suit le revenu:

3. (1) Pour les objets de la présente loi "revenu" signifie la gratification ou le profit ou gain annuel net, soit déterminé et susceptible de computation en tant que gages, salaires ou autre montant fixe ou non déterminé en tant qu'honoraires ou émoluments ou comme étant des profits tirés d'une profession ou d'une occupation ou vocation industrielle ou commerciale financière ou autre, ou directement ou indirectement reçu par une personne de tout office ou emploi, ou de toute profession ou vocation ou de tout commerce, industrie ou affaire, suivant qu'il y a lieu que sa provenance soit du Canada ou d'ailleurs; et doit comprendre l'intérêt, les dividendes ou profits directement ou indirectement reçus de fonds placés à intérêt sur toutes valeurs ou sans garantie, ou d'actions, ou de tout autre placement, et que ces gains ou profits soient partagés ou distribués ou non, et aussi les profits ou gains annuels dérivés de toute autre source, y compris

a) Le revenu, mais non la valeur, des biens acquis par don, legs, testament ou transmission; et

b) les annuités reçues en vertu d'un contrat (autres que les paiements décrits à l'alinéa (c) du présent paragraphe) sauf une partie de chaque montant reçu sous son régime qui, à l'égard du montant global, a le même rapport qu'entre le montant que le détenteur d'annuités pourrait, en vertu du contrat, avoir choisi de recevoir au lieu de l'annuité ou, si le contrat ne prévoit aucun choix de ce genre, la valeur actuelle (calculée de la manière que le ministre peut prescrire par règlement) de l'annuité à l'époque de son ouverture, et le montant global de l'annuité prévue par le contrat (calculé, dans le cas d'une annuité à vie, sur l'hypothèse que le détenteur d'annuité vivra sa période de vie moyenne établie d'après les tables de mortalité approuvées par le ministre). Toutefois, la présente disposition ne doit pas s'interpréter comme portant atteinte à l'application du paragraphe deux du présent article.

Cette définition est très large et surtout si le contribuable réussit à échapper dans la première partie de cette définition, il y a la dernière partie qui comprend "profits et gains dérivés de toute autre source" qui peut l'atteindre.

Pour répondre à la question posée il faut se demander qu'elle est la nature du contrat qui a été émis soit en faveur des actionnaires en 1946 soit en faveur des actionnaires, membres et non membres en 1948? La nature du contrat c'était un contrat de service comme celui qui a été produit comme exhibit A-3 et par lequel contrat l'association s'engageait à fournir en faveur de la personne à qui le contrat était émis les services que l'association fournit à tous ses membres. La déposition de M. Meriot à la page 30 confirme ce point, voici ce qu'il dit:

Q. You call that a levy? Do you give them something in return which is called a service contract?—A. Yes, we do.

et à la page 23:

Q. Now, Mr. Meriot, with respect to the amounts of $200 and $500 respectively that were paid to get a contract, it was a matter of no payment no contract, isn't that right?—A. Well, yes. No payment, no contract.

En conséquence en 1946 et en 1948 l'émission des contrats de service donnait à la personne en faveur de qui il était émis le droit d'obtenir les services de l'association.

La clause 6 du contrat de service se lit comme suit:

6. The member shall pay to the association in advance on the first day of each month by way of remuneration for his services under the contract the sum of $24 per month or such lesser amount as may from time to time be determined by the association.

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Si cette clause 6 du contrat de service en juillet 1946 quand les 315 contrats de service ont été émis et en 1948 quand les 264 contrats de service ont été émis avait été remplacée par la suivante:

6. The member shall pay to the association by way of remuneration for his services at the signature of present contract an amount of $200 in cash and in advance on first day of each month the sum of $24 per month or such lesser amount as may from time to time be determined by the association.

est-ce que l'association pourrait prétendre que le montant de $200 n'est pas un revenu pour l'association provenant de services rendus? Il ne fait aucun doute que ce montant de $200 serait du revenu comme le loyer.

Est-ce que parce que le contrat n'a pas été modifié mais que ce montant de $200 a été payé pour du service, ceci change la situation, je suis d'opinion que non.

Mais M. Meriot et l'avocat de l'appelante prétendent que pour l'année 1946 ce paiement de $200 était une contribution volontaire des actionnaires pour fins de dépenses capitales et par conséquent ce n'était pas du revenu. Mais ils oublient que cette contribution volontaire n'était pas un don fait à l'association mais que chaque actionnaire en faisant cette contribution volontaire avait droit de se faire remettre par l'association un contrat de service dans la forme de l'exhibit A-3 par lequel contrat l'association s'engageait à lui fournir ses services à même la somme de $200 que cet actionnaire avait payée et en payant en plus les versements mensuels.

Quant à l'année 1948 il n'est pas question dans le dossier de contribution volontaire et par conséquent l'obtention du contrat de service sur paiement de la somme de $200 ou de $500 suivant le cas, était pour du service que l'association s'engageait à fournir. Ceci expliquerait le changement d'attitude des officiers du département de l'impôt sur le revenu et la raison qui a motivé ce changement.

La raison est que l'association en exigeant un honoraire pour l'émission du contrat de service a retiré un honoraire provenant des services que l'association s'engageait à fournir à ces détenteurs de contrat de service et cet honoraire tombait sous le paragraphe 1 de l'article 3 de la loi de l'impôt sur le revenu. De fait l'acquéreur d'un contrat de service obtenait de l'association un droit au service de l'association;

il est vrai que ce service était sujet à des versements mensuels en plus de l'honoraire initial payé. Mais, pour les 315 contrats de service de 1946 et les 264 contrats de service de 1948, pour les obtenir il fallait tout d'abord verser à l'association un honoraire initial de $200 ou de $500 suivant le cas, et à ces dates de juillet 1946 et en 1948 personne ne pouvait obtenir de service de l'association sans avoir un contrat de service et payer pour ce contrat un honoraire initial de $200 ou de $500. Cet honoraire initial faisait donc partie des honoraires payés par l'acquéreur pour obtenir les services de l'association.

Il est vrai que cette personne qui avait obtenu un contrat de service pour s'en servir devait payer en plus un versement mensuel mais en juillet 1946 et en 1948 si une personne avait voulu payer uniquement un versement mensuel pour obtenir un contrat de service, l'association aurait refusé de lui donner ses services, il faut donc conclure comme le président et comme M. Meriot qu'en juillet 1946 et en 1948, pas de contrat, pas de service, et pas de paiement de l'honoraire de $200 ou de $500, pas de contrat.

Le procureur de l'appelante prétend que l'émission du contrat de service ne donnait aucun droit au propriétaire de ce contrat et que le propriétaire du contrat n'avait des droits que lorsque, se servant de ce contrat, il payait le loyer mensuel. Si ce raisonnement était exact pourquoi l'émission de ces contrats de service en juillet 1946 et en 1948, car le propriétaire d'un taxi, actionnaire, membre ou non, qui aurait refusé de payer cet honoraire pour un contrat de service, aurait-il pu avoir les services de l'association? Il n'aurait pu les avoir et M. Meriot lui-même l'admet dans sa déposition.

L'association a reçu pour les contrats de service: 1° un honoraire exigé de tout acquéreur actionnaire des 315 contrats de service la somme de $200 pour l'année 1946 et l'honoraire exigé de tout acquéreur, actionnaire, membre ou non membre, des 264 contrats de service la somme de $200 ou de $500 suivant le cas pour l'année 1948; 2° le montant mensuel mentionné au contrat de service. Au point de vue de l'impôt, peut-on faire une différence entre l'honoraire reçu pour l'obtention du contrat de service et l'honoraire reçu pour versement mensuel de l'usage du

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contrat de service. Je suis d'opinion que non, car dans un cas comme dans l'autre l'honoraire reçu par l'association provient de contrats de service.

Le fait que l'association en percevant l'honoraire du contrat de service le place dans ses livres comme capital, change-t-il la nature du montant payé pour ce contrat? Je suis d'opinion que l'honoraire payé pour ce contrat est pour du service et que le fait de l'association de le placer dans ses livres ne change pas la nature du contrat.

Vu que je suis d'opinion que l'honoraire payé pour l'émission d'un contrat de service est pour du service, je suis d'opinion qu'il s'agit d'un revenu au sens de la sous-section 1 de l'article 3 de la loi de l'impôt sur le revenu.

L'avocat de l'appelante prétend que l'association ne fait pas commerce, qu'elle n'achète rien et ne vend rien, qu'elle est une organisation de service. Une organisation de service comme l'appelante est une organisation commerciale qui peut déterminer elle-même la façon de se faire payer ses services. Dans la détermination du paiement de ses services l'association est-elle limitée à un loyer pour ses services ou peut-elle réclamer un honoraire fixe, ou un honoraire fixe et un loyer, ou seulement un loyer. Le contrat fait la loi des parties et si la personne qui offre ses services exige un honoraire fixe et un loyer et si la personne qui demande ses services est prête à payer un honoraire fixe et un loyer, les deux parties s'étant entendues, elles sont liées par ce contrat. Dans le présent cas l'association pour ses services a exigé un honoraire fixe et un loyer et le propriétaire de taxi a consenti de payer un honoraire fixe et un loyer pour les services de l'Association, il y a contrat de louage de service qui lie les deux parties.

Voyons maintenant si le président a fait erreur dans l'exposé des faits.

A la page 3 de son jugement, il dit ce qui suit:

> The evidence shows that the income of the appellant is derived from fees received from the members of the association and from certain non members who pay such fees as are determined by the association to obtain from said association the service which it is permitted to give, in accordance with the powers conferred to it by its letters patent.

Dans cette phrase le président parle des honoraires reçus des membres de l'association et des honoraires reçus par les personnes qui ne sont pas membres pour obtenir les services de l'association. Je crois qu'il aurait été plus juste de

dire: La preuve démontre que les revenus de l'appelante proviennent des honoraires perçus chaque mois des porteurs des contrats de service et pour les années 1930 et juillet 1946 et en 1948 des honoraires reçus par l'appelante pour l'émission des contrats de service soit aux actionnaires, soit aux membres, soit aux personnes qui n'étaient pas membres.

L'avocat de l'appelante prétend que le président a fait erreur dans son jugement en disant que l'acquisition d'un contrat de service donne au propriétaire le droit au service.

A la page 3 le président dit ceci:

> It must be borne in mind that only the acquisition of a contract made it possible for a taxi driver to obtain services supplied by the association. Without a contract—no service. Without the payment of $200 or $500, according to the case, no contract. It seems to me in those circumstances that, as far as the appellant is concerned, it received the fees in payment of services.

L'avocat de l'appelante prétend que le montant payé pour le contrat n'était pas un honoraire mais que c'était un montant payé pour des dépenses capitales parce que la compagnie n'avait pas d'argent. Il prétend de plus que, quand les contrats ont été émis, les porteurs n'avaient pas droit au service à moins qu'ils ne paient l'honoraire mensuel de $21. Conséquemment, le paiement volontaire par les actionnaires d'une charge n'était pas des honoraires en paiement du service tel que référé par le président mais était une charge. Sur ce point le savant procureur de l'appelante fait erreur et il suffit de référer à la déposition de M. Meriot aux pages 23 et 30, que j'ai déjà citée, pour s'en convaincre.

Il résulte donc que le président avait raison quand il dit "sans un contrat pas de service et sans le paiement d'un honoraire de $200 ou $500 suivant le cas pas de contrat". En conséquence, en autant que l'appelante est concernée elle a reçu des honoraires en paiement de service qu'elle était appelée à rendre.

L'avocat de l'appelante prétend que le président a fait erreur en acceptant ce qui a été fait en 1930 et en le refusant pour les années 1946 et 1948.

Tout d'abord le président quant à l'année 1930 ne se prononce pas mais relate ce qui a été fait et il relate également ce qui a été fait pour les années 1946 et 1948. Sauf pour ce qui a trait au revenu comme je l'ai expliqué plus

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haut, je suis d'opinion que le président a bien soumis les faits provenant de la preuve qui avait été faite devant lui.

L'avocat de l'appelante soumet dans son mémoire certaines propositions que je vais examiner.

1° No tax can be imposed without words clearly showing the intention to tax. Et il réfère aux décisions suivantes: *Spooner* v. *Minister of National Revenue* (1); *Ormond Investment Co.* v. *Betts* (2); *Partington* v. *Attorney General* (3); *Attorney General* v. *London County Council* (4). Cette proposition du procureur de l'appelante doit être acceptée.

2° What is income?

Il réfère à la section 3 de la loi de l'impôt sur le revenu et particulièrement à cette partie:

> The net annual profits from a trade or commercial or financial or other business or calling.

et il prétend qu'il n'est pas question de commerce car il n'y avait pas d'achat de contrats et de revente. Il réfère de plus à la déposition de M. Meriot aux pages 12 et 13, et il réfère de plus aux causes suivantes: *Daly* v. *Minister of National Revenue* (5); *Boyce* v. *Whitwick Colliery Co. Ltd.* (6); *Minister of National Revenue* v. *Saskatchewan Co-operative Wheat Producers* (7); *Spooner* v. *Minister of National Revenue* (*supra*).

La section 3, paragraphe 1, se lit comme suit:

> For the purpose of this Act "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary or other fixed amount, or unascertained as being fees or emolument, or as being profits from a trade or commercial or financial or other business or calling directly or indirectly received by a person from any office or employment, or from any profession or calling or from any trade, manufacture or business as the case may be whether derived from sources within Canada or elsewhere, etc.

Comme je suis d'opinion que le montant perçu par l'association sur l'émission de ces contrats de service est un honoraire pour services, comme le président de la Commission, je suis d'opinion que cet honoraire perçu tombe sous les dispositions de l'article 3 mentionné ci-dessus.

(1) (1928-34) C.T.C. 178 à la p. 186-187.
(2) (1928) A.C. 143 at p. 162.
(3) (1869) L.R. 4 H.L. 100 at 122.
(4) (1901) A.C. 26.
(5) (1950) C.T.C. 254 à p. 258.
(6) (1931-34) 18 T.C. 655.
(7) (1928-34) C.T.C. 47 à p. 54

Dans la cause de *Boyce* v. *Whitwick Colliery Co. Ltd.* (*supra*) il y avait deux matières distinctes: la procuration de l'eau et la construction d'un aqueduc, tandis que dans la présente cause il y a qu'une seule opération *obtenir du service* par l'obtention d'un contrat pour lequel l'acquéreur paie deux honoraires; le premier pour l'émission de son contrat de service et le deuxième pour le service. Mais il n'y a qu'une seule opération—l'obligation par l'association de fournir du service.

3° The intention is the determining factor. Il cite les autorités suivantes: *Tebreau (Johore) Rubber Syndicate Ltd.* v. *Farmer* (1); *McDonough* v. *Minister of National Revenue* (2); *Anderson Logging Company* v. *The King* (3); *Economic Trust Company* v. *Minister of National Revenue* (4); et il réfère à la déposition de M. Meriot aux pages 16, 19, 21 et 22, 24 et 29, pour établir que le montant reçu par l'émission des contrats de service devait servir à des dépenses capitales, qu'il indique.

Sur ce point juridique, soit l'intention de la partie qui reçoit un revenu de s'en servir à des fins capitales la question n'est pas là, car tout contribuable pourrait demander à ce que son revenu ne soit pas imposable, vu qu'il veut s'en servir pour des fins capitales et ainsi le but de la loi ne pourra être atteint.

4° Substance of the transaction.

La compagnie avait dans ses livres entré les montants perçus pour des fins capitales et il réfère à la déposition de M. Meriot aux pages 15, 17, 18 et 19, et aux causes suivantes: *Collins* v. *The Firth-Brearley Stainless Steel Syndicate Ltd.* (5); *Economic Trust Company* v. *Minister of National Revenue* (*supra*).

La cause de Collins ne lui semble pas profitable suivant la phrase suivante: "The particular way in which the item has been dealt with in the balance sheet or in the profit and loss account does not bind the Court, . . ." et sur ce point je suis d'opinion que la substance de la transaction était un revenu pour l'association.

(1) (1903-11) 5 Tax Cases 658 at 665.
(2) (1949) C.T.C. 218.
(3) (1925) S.C.R. at p. 45.
(4) (1946) C.T.C. at p. 163.
(5) (1923-25) 9 T.C. 520 at 569.

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5° Prior treatment by Income Tax Division. *Rellim Limited* v. *Vise* (1) et il réfère également à la déposition de M. Meriot aux pages 19 et 20. Sur ce point le procureur de l'intimé a répondu en citant les causes suivantes: *Woon* v. *Minister of National Revenue* (2); *Kennedy* v. *Minister of National Revenue* (3); et l'avocat de l'appelante, à la page 46 de l'argument devant le président, a admis les raisons données par l'avocat de l'intimé.

6° Alternative argument.

If the contracts can be considered as assets which can be bought and sold, they constituted the capital of the Company and the sale thereof constitutes a capital receipt in the same manner as the sale of any other right owned by the Company.

et il réfère aux causes suivantes: *Margerison* v. *Tyresoles Ltd.* (4); *Withers* v. *Methersole* (5); *Wain-Town Gas & Oil Co.* v. *Minister of National Revenue* (6).

Je suis d'opinion que l'honoraire perçu pour l'émission du contrat de service n'est pas un actif de l'association mais n'est qu'un contrat de service, c'est-à-dire, un bail pour lequel l'acquéreur paie deux honoraires, l'honoraire du contrat et l'honoraire mensuel.

7° Analogy to lump sum payment on the sale of an exclusive right under a patent, plus a royalty for the right to use the patent. Et il réfère aux causes suivantes: *Collins* v. *Firth Brearly Stainless Steel* (*supra*); *C.I.R.* v. *British Salmson Aero Engines* (7); *Margerison* v. *Tyresoles Ltd.* (*supra*).

Je suis d'opinion qu'il n'y a aucune analogie entre les causes citées ci-dessus et la présente cause, car dans ces causes il s'agit de brevet d'invention et de royauté tandis que dans la présente cause il n'est pas question de brevet d'invention ou de royauté mais il est question pour l'acquéreur du contrat de service de payer un honoraire pour obtenir ce contrat de service et un honoraire mensuel.

Le procureur de la Couronne a soumis les propositions et les décisions suivantes:

1° Income tax is a personal tax. *McLeod* v. *Minister of Customs and Excise* (8); *The King* v. *Montreal Telegraph Company* (9).

(1) (1951) T.R. 17 à p. 28.
(2) (1950) C.T.C. p. 263.
(3) (1928) 34 C.T.C. p. 1.
(4) (1941-43) 25 T.C. 59.
(5) (1948) 1 All E.R. 400.
(6) (1950) C.T.C. 355.
(7) (1928) 22 T.C. 29.
(8) (1926) S.C.R. 457.
(9) (1925) Ex.C.R. 79.

2° Income tax is a tax on income. *James E. Wilder* v. *Minister of National Revenue* (1); *Allan Morrison* v. *Minister of National Revenue* (2).

3° Of the meaning of the word "trade". *Barry* v. *Cordy* (3); *Allan Morrison* v. *Minister of National Revenue* (*supra*).

4° The test of chargeability to the tax. Simon's Income Tax, London, Butterworth & Co. (Publishers) Ltd., Bell Yard, Temple Bar, 1948, Vol. 1, No. 4, at p. 4.

a) Receipt in the course of trade:—

Premium received;

B. G. Utting & Co., Ltd., v. *Hughes* (*H. M. Inspector of Taxes*) (4); *Imperial Tobacco Co.* (*of Great Britain and Ireland*) *Ltd.* v. *Kelly* (5); *George Thompson & Co., Ltd.* v. *C.I.R.* (6).

Without the premium factor:

T. Beynon and Co., Limited v. *Ogg* (*Surveyor Taxes*) (7); *The Gloucester Railway Carriage & Wagon Co. Ltd.* v. *C.I.R.* (8); *The Rees Roturbo Development Syndicate Ltd.* v. *Ducker* (*H. M. Inspector of Taxes*) and v. *The Commissioners of Inland Revenue* (9); *Associated London Properties, Ltd.* v. *Henriksen* (10); *Atlantic Sugar Refineries Ltd.* v. *Minister of National Revenue* (11); *William John McDonough* v. *Minister of National Revenue* (12).

b) Receipt from repeated transactions:—

Allan Morrison v. *Minister of National Revenue* (13); *Pickford* v. *Quirke* (14); *John Cragg* v. *Minister of National Revenue* (15).

c) Receipt from acts within the corporate powers:—

Anderson Logging Company v. *The King* (16); *Shove* v. *Dura Manufacturing Co. Ltd.* (17).

(1) (1951) C.T.C. 304.
(2) (1928) Ex.C.R. 75.
(3) (1946) 2 All. E.R. 396 (C.A.)
(4) (1938) 23 T.C. 174.
(5) (1943) 25 T.C. 292.
(6) (1927) 12 T.C. 1092.
(7) (1918) 7 T.C. 125 (K.B.D.).
(8) (1923-25) 12 T.C. 720.
(9) (1927) 13 T.C. 366.
(10) (1944) 26 T.C. 45.
(11) (1948) Ex.C.R. 622.
(1949) C.T.C. 196.
(12) (1949) Ex.C.R. 300.
(13) (1928) Ex.C.R. 75.
(14) (1927) 13 T.C. 251.
(15) (1951) C.T.C. 322.
(16) (1925) S.C.R. 45.
(1926) A.C. 140.
(17) (1941) 23 T.C. 779.

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5° If there is no trade, still the receipts are an annual profit or gain. *Allan Morrison* v. *Minister of National Revenue* (*supra*); *Ryall* v. *Hoare* (1); *Sherwin* v. *Barnes* (2); *Wilson* v. *Mannooch* (3); *Henry Goldman* v. *Minister of National Revenue* (4).

Of the meaning of "annual profit or gain":—

Ryall (*Inspector of Taxes*) v. *Hoare* and *Ryall* (*Inspector of Taxes*) v. *Honeywell* (5); *Martin* v. *Lowry and Martin* v. *Commissioners of Inland Revenue* (6).

6° Destination of Profit is irrelevant.

Simon's Income Tax, London, Butterworth & Co. (Publishers) Ltd., Bell Yard, Temple Bar, 1949, Vol. II, No. 20, at p. 20, Simon's Income Tax, Vol. 1, No. 39 at p. 46. *Mersey Docks and Harbour Board* v. *Lucas* (7); *Sowrey* (*Surveyor of Taxes*) v. *Harbour Mooring Commissioners of King's Lynn* (8); *Dewar* v. *Commissioners of Inland Revenue* (9); *Blake* v. *Imperial Brazilian Railway Company* (10); *Nizam's Guaranteed State Railway Company* v. *Wyatt-Q.B.D.* (11); *City of Dublin Steam Packet Company* v. *O'Brien-K.B.D.* (12); *Armitage* v. *Moore-Q.B.D* (13); *Parker* v. *Chapman-K.B.D.* (14).

7° Capital expenditures in payor's hands not necessarily capital receipt in recipient's hands. *Ross* v. *Minister of National Revenue* (15).

De toutes ces décisions, celle qui a le plus d'analogie avec la présente cause est celle de *B.G. Utting Co. Ltd.* v. *Hughes* (*supra*) où le propriétaire a reçu en plus de son loyer un montant pour accorder un bail. Or, dans la présente cause l'association a reçu en plus de son loyer du contrat de service un honoraire pour accorder un bail de service.

Sur le tout, je suis d'opinion de rejeter l'appel avec dépens.

Judgment accordingly.

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(1) (1923) 8 T.C. 521.
(2) (1931) 16 T.C. 278.
(3) (1937) 21 T.C. 178.
(4) (1951) C.T.C. 241.
(5) (1923) 2 K.B. 447.
(6) (1927) A.C. 312.
(7) (1883) 2 T.C. 25.
(8) (1883-90) 2 T.C. 201.
(9) (1933-35) 19 T.C. 561.
(10) (1884) 2 T.C. 58.
(11) (1890) 2 T.C. 584.
(12) (1912) 6 T.C. 101.
(13) (1900) 4 T.C. 199.
(14) (1927-28) 13 T.C. 677.
(15) (1950) Ex.C.R. 411.

BETWEEN:

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Mar. 13

May 7

HALL DEVELOPMENT COMPANY OF VENEZUELA, C.A., ... } PLAINTIFF;

AND

B. and W. INC. .....DEFENDANT.

Practice—Application for order staying proceedings pending trial of action in another country—The Patent Act, 1935, S.C. 1935, c. 32, s. 60(1)—Interested person—General Rules and Orders, Rule 2(1) (a)—Order XXV, r. 4 Supreme Court of Judicature of England—Applicant must prove action vexatious in point of fact.

The defendant applied for an order staying proceedings until after the final determination of an action in a United States Court.

Held: That proof that the plaintiff was engaged in dealing with the same kind of thing as the defendant and was in competition with it was sufficient to make it an "interested person" within the meaning of section 60(1) of The Patent Act, 1935.

2. That there is no presumption that an action is vexatious from the fact that an action with reference to the same subject matter has been taken in another country.

3. That on an application for an order staying proceedings in an action on the ground that an action with reference to the same subject matter has been taken in another country the onus of proof is on the applicant to show that the action is in fact vexatious and he must satisfy the Court not only that the continuance of the action would work an injustice to the defendant but also that the stay would not cause any injustice to the plaintiff.

APPLICATION for an order staying proceedings.

The application was heard by the President at Ottawa.

H. G. Fox Q.C. for plaintiff.

M. B. Gordon for defendant.

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

THE PRESIDENT now (May 7, 1952) delivered the following judgment:

This is a motion on behalf of the defendant for an order staying proceedings in this action until after the final determination of an action in the United States District Court, Southern District of California, Central Division, between Jesse E. Hall as plaintiff and Kenneth A. Wright and B. and W. Inc. as defendants. After hearing counsel for the parties I dismissed the motion for reasons which I

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merely enumerated. Subsequently, counsel suggested that my reasons ought to be reported. Under the circumstances, I think it would be desirable to set them out with greater particularity than I did orally.

The plaintiff is a Venezuela corporation and the defendant a California corporation. The plaintiff claims to be the assignee and owner of certain inventions made by one Jesse E. Hall and of the applications for Canadian letters patent for such inventions made by him and brings this action for a declaration that the defendant's Canadian reissued letters patent No. 472,221, dated March 13, 1951, is invalid. The action is brought under section 60(1) of The Patent Act, 1935, Statutes of Canada, 1935, chap. 32, which provides:

> 60. (1) A patent or any claim in a patent may be declared invalid or void by the Exchequer Court of Canada at the instance of the Attorney General of Canada or at the instance of any interested person.

The United States action, which has been pending for several years, involves the interpretation and construction of a contract, dated September 15, 1944, between Jesse E. Hall and Kenneth A. Wright and also the question of the rights of the parties to the inventions of Hall and Wright in foreign countries and to file applications for patents in foreign countries and one of the grounds stated in the notice of motion for the stay was that the present action involves in many respects a duplication of the determination of rights which are now in process of determination before the United States District Court and that such action may result in it appearing that the plaintiff in the present action has no rights in the inventions and applications referred to in the statement of claim and is therefore not an interested party within the meaning of section 60(1) of The Patent Act, in which case it would not have the necessary status to bring the action. I am satisfied that there is no substance in this submission and that the plaintiff is sufficiently "interested" to enable it to sue. It is not necessary that it should be entitled to the invention or application claimed by it. It is enough to show, as it has sufficiently done by the affidavit of Thomas E. Schofield, that it was engaged in dealing with the same kind of thing as the defendant and was in competition with it. It would not matter, therefore, whether the United States District

Court action might result in some one other than the plaintiff being found entitled to the invention and application claimed by it: *vide Bergeon* v. *The De Kermor Electric Heating Co. Ltd.* (1); *Refrigerating Equipment Ltd.* v. *Waltham System Incorp.* (2).

There is no provision in the General Rules and Orders of this Court governing the practice and procedure in a motion of this sort so that under Rule 2(1) (*a*) resort must be had to the practice and procedure in force in similar actions in the Supreme Court of Judicature in England. There Order XXV, r. 4, provides:

> The Court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

There are several reasons for finding that the defendant is not entitled to succeed under this rule. In the first place, the issues in the United States District Court action are not the same as in this one. Nor is there similarity in the remedies sought. If the plaintiff succeeds in this action it will have a judgment in rem which would not be available in the United States District Court action.

There is a more serious objection to the motion. Even if the issues in the two actions were the same the defendant has not succeeded in showing, as he must do, that the present action is frivolous or vexatious. The English cases on the subject were recently carefully reviewed by McRuer C.J. H.C. in *Empire Universal Films* v. *Rank et al* (3). He referred to *McHenry* v. *Lewis* (4); *Peruvian Guano Company* v. *Bockwoldt* (5) and *The Christiansborg* (6) and also to *St. Pierre* v. *South American Stores (Gath & Chaves) Ld.* (7). In the latter case the earlier decisions were mentioned and the important case of *Logan* v. *Bank of Scotland* (No. 2) (8) was also considered. These authorities establish that on a motion for an order staying proceedings in an action it is not sufficient to show that

(1) (1925) Ex. C.R. 160; (1926) S.C.R. 72.
(2) (1930) Ex. C.R. 154 at 157.
(3) (1947) O.R. 775.
(4) (1882) 22 Ch. D. 397.
(5) (1883) 23 Ch. D. 225.
(6) (1885) 10 P.D. 141.
(7) (1936) 1 K.B. 382.
(8) (1906) 1 K.B. 141.

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proceedings have been taken with reference to the same subject matter in another country. In such a case there is no presumption that the action in this country is vexatious. The applicant for the order must show that there is vexation in point of fact. The Court should not lightly interfere with the plaintiff's right of suit and must be careful to avoid depriving him of benefits and advantages that might rightfully accrue to him from suing in both countries. On the other hand, it will not hesitate to order a stay in a proper case. To establish that the action is vexatious in point of fact the applicant for the order of stay must satisfy the Court not only that the continuance of the action would work an injustice to the defendant because it would be oppressive to him but also that the stay would not cause any injustice to the plaintiff. The onus of proof that these conditions exist lies on the applicant. In my view, it has failed to discharge it. Indeed, the evidence of loss of business given by Mr. Schofield indicates that a stay of proceedings would cause injustice to the plaintiff and the defendant has failed to show that the continuance of the action would work any injustice to it.

For these reasons, I ordered that the motion be dismissed with costs in the cause to the plaintiff in any event of the cause. It was also ordered that the defendant should have an extension of time of four weeks for the delivery of its statement of defence.

Judgment accordingly.

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March 24

BETWEEN:

JOHN A. BROWNE .....CLAIMANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Revenue—Customs Act, R.S.C. 1927, c. 42, ss. 168, 176, 203(c)—Action to recover money deposited with Crown as security following seizure of automobile—Attempt to defraud the revenue of Canada—Misrepresentation of fact made by claimant on bringing an automobile into Canada from the United States—Forfeiture of deposit.

The action is one to recover from the Crown money deposited with it by the claimant pursuant to an arrangement by which he was allowed to retain possession of a United States made automobile which had been seized by officers of the Crown while in claimant's possession on the grounds that it had been brought into Canada contrary to the Customs Act, R.S.C. 1927, c. 42, s. 203(*c*). The money had been declared forfeited to the Crown by the Minister of National Revenue.

The Court found that certain statements of fact made by the claimant at the time he brought the automobile into Canada and statements giving his address in the United States as a permanent one and in Canada as a temporary one were misrepresentations and untrue.

Held: That the claimant committed a breach of s. 203 of the Customs Act and the failure on his part to pay the proper duties on the automobile together with the misrepresentations of fact made by him constituted an attempt to defraud the revenue by avoiding payment of the duties and the money deposited with the Crown is forfeited.

2. That the matter is to be determined by the law of Canada and the law of a foreign country or any interpretation placed upon that law by an official of a foreign country are not to be considered.

ACTION by claimant to recover money deposited with the Crown and declared forfeited.

The action was tried before the Honourable Mr. Justice Cameron at Toronto.

E. J. Walters for claimant.

G. B. Bagwell, Q.C. for respondent.

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

CAMERON J. at the conclusion of the trial delivered the following judgment:

This is a case in which the claimant seeks to recover from the Crown the sum of $800 which amount was declared forfeited to the Crown by the Minister of National Revenue on December 21, 1950 and due notice whereof was served upon the claimant.

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The claimant then invoked the provisions of Section 176 of the Customs Act, Chapter 42, Revised Statutes of Canada 1927, which is as follows:

> If the owner or claimant of the thing seized or detained, or the person alleged to have incurred the penalty, within 30 days after being notified of the Minister's decision, gives him notice in writing that such decision will not be accepted, the Minister may refer the matter to the court.

And pursuant to that section, the claimant having objected to the Minister's decision, the matter was referred to this Court and in due course pleadings were filed.

The onus in this case is on the claimant under the provisions of Section 262 which I do not find it necessary to read.

The seizure in question was that of a United States made Buick motor car which was seized in the possession of the claimant on September 29, 1950, on the grounds that it had been brought into Canada contrary to the provisions of Section 203, subsection (*c*) and was therefore subject to forfeiture.

Following the seizure an arrangement was made by the terms of which the claimant, as I understand it, paid certain storage charges in connection with the car from the time of its seizure and gave an undertaking that the car would be taken out of Canada to the United States within a definite specified time, and under which arrangement also, the claimant deposited with the Crown the sum of $800 until such time as the Minister under the Act should make his decision as to whether that deposit should be forfeited. It is in connection with that amount which the Minister subsequently declared forfeited that these proceedings are now taken.

Section 203 subsection (*c*) of the Customs Act is as follows:

> If any person in any way attempts to defraud the revenue by avoiding the payment of the duty or any part of the duty on any goods of whatever value; such goods if found shall be seized and forfeited or if not found but the value thereof has been ascertained, the person so offending shall forfeit the value thereof as ascertained, such forfeiture to be without power of remission in cases of offenses under paragraph (*a*) of this subsection.

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I might point out that the concluding part of that subsection (*c*) which I have just read is not here applicable, as it is not suggested that the claimant smuggled or clandestinely introduced into Canada the goods referred to in subsection (*a*) thereof.

In my view section 168 was also applicable and I point out that, because of the contention of counsel for the claimant that the Crown instead of forfeiting the car has accepted a deposit of somewhat less than its value and somewhat less than is shown to have been the total of all taxes which would have been paid on the car on the date when it came into Canada, which according to my recollection, aggregated something over $900 to cover customs duty at the then value plus sales tax and plus excise tax. Section 168 of the Act is as follows:

> Any collector or other proper officer may, as may also the court with the consent of the collector or other proper officer at the place where the things seized are, order the delivery thereof to the owner on the deposit with the collector or other proper officer, in money, of a sum equal at least to the full duty paid value, to be determined by the collector or other proper officer of the things seized and the estimated costs of the proceedings in the case.

Now, it is true that in this case the amount asked for was somewhat less than the total amount. I do not think that is of any importance. The claimant is not in any way prejudiced but rather he is benefitted by the fact that in the result the amount which was deposited and which is now asked to be forfeited is somewhat less perhaps than the full penalty which could have been exacted had a harsher view prevailed.

As I have said, the car in question was purchased in United States and according to the evidence was last brought into Canada by Mr. Browne, the plaintiff, at the port of entry of Fort Erie, Ontario, on September 18, 1950 and it is on the basis of that entry and the statements then made that it is now alleged that the claimant is in breach of Section 203, subsection (*c*) and perhaps other sections of the Customs Act. In the main, however, the breach lies under Section 203, subsection (*c*).

There is introduced into evidence, a document Exhibit 2 entitled Traveller's Vehicle Permit number D505946, which it is shown was issued to Mr. Browne in connection with

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this car at the time he brought the Buick car into Canada on September 18, 1950. Mr. Browne's signature appears thereon above the words "signature of owner". In that permit, which is really an application, he states as follows:

I, J. A. Browne,

underneath which are the words "print here name of owner of car" and I continue:

permanently residing at 2803 Buffalo Road, Erie, Pennsylvania, being a temporary visitor in Canada at 158 Humbercrest, Toronto.

and under the last address which I have given are the printed words "visiting address in Canada"—

hereby apply for a permit to use in Canada the vehicle and outfit described hereunder, conditional that the vehicle and outfit will not be used for hire or primarily for the carriage of articles and that same will be exported within two months from the date hereof

and then follows particulars of the car in question, identifying its make, its year, its serial number and the license number which it then bore, number 2957U of the State of Pennsylvania. And that is followed by the signature of the claimant herein. And it is on the basis of the statements therein given by Mr. Browne that these proceedings were taken.

I emphasize the fact that therein Mr. Browne stated that he was permanently residing at 2803 Buffalo Road, Erie, Pennsylvania and that his visiting address in Canada was 158 Humbercrest, Toronto.

That vehicle permit was granted pursuant to regulations duly established under the Customs Act. I quote from the summary which has been produced by counsel, Section 1 thereof:

Automobiles imported by non-residents for their personal transportation may be admitted without the payment of duty thereon, under Traveller's Vehicle Permit, Form E50—

and I pause to note that Exhibit 2 is form E50—

subject to the following regulations:

(a) On arrival at the frontier customs port of entry, the driver of the automobile shall report at customs and apply for a permit. The applicant for a permit shall be a non-resident of Canada and a temporary visitor therein. He, or she, shall be the owner of the automobile or a member of the immediate family of the owner, who is also a non-resident of Canada, or shall be able to produce written authority from the owner to use such vehicle.

(b) The automobile shall be admissible only when imported for the use of the non-resident permit holder for the transportation of such non-resident, his family and guests, and such incidental carriage or articles as may be necessary and appropriate to the purposes of the journey, but not to be used for the transportation of persons or articles for hire nor in any case primarily for the carriage of articles. The use by any other person than the non-resident permit holder shall result in seizure and forfeiture of the vehicle.

It is pursuant to the provisions of that regulation and pursuant to the application Exhibit 2 that Mr. Browne was permitted to bring into Canada the American-made Buick car and for the Crown it is alleged that had the true facts been stated, Mr. Browne would not have been permitted under any condition to bring the car into Canada.

I pause for a moment merely to point out that under the then existing emergency Foreign Exchange Conservation Act, I think it is called, and which was then in force, no United States-made Buick car or I think any car could then have been imported into Canada except by special permit.

The dispute centres around the representations made on Exhibit 2 by Mr. Browne, the first one being that his permanent residence was at 2803 Buffalo Road, Erie, Pennsylvania, and secondly that he was a temporary visitor in Canada, and I would add the third, that his visiting address in Canada was 158 Humbercrest, Toronto.

Following the seizure of the car, investigations were made chiefly from statements received from Mr. Browne himself and the Crown then came to the conclusion that these representations were in fact contrary to the facts of the case, and it was for that reason that the deposit of $800 was declared to be forfeited.

It is necessary on the evidence to determine whether those allegations and representations, where they were representations, were true or untrue. I think that without question that it was on the strength of those representations that the vehicle was permitted to enter Canada, otherwise it would have been refused admittance.

Mr. Browne has for a good many years, undoubtedly, been resident in Canada. He states that he has been for many years and continuing, I think, up to the present time President of two Canadian Corporations both having head

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office in Toronto or its vicinity, and one a manufacturing concern in Collingwood, Ontario. He is married, he has two children, and for a great many years has resided at 158 Humbercrest Road, Toronto, the address which, on Exhibit 2, he states was to be his visiting address. That house belongs to his wife but it is there that Mr. Browne has resided since, I think, the year 1936 or 1938—at any rate for a substantial number of years. His livelihood was secured from his positions as President of the two Canadian corporations. In so far as I am aware, there was no remuneration of any sort from any individuals or corporations in the United States. Some five years ago, perhaps a little more, Mr. Browne and presumably other officers of his corporation, decided that it would be advantageous at some time to either open a branch office of their concern or establish a new concern in United States. Mr. Browne's businesses consist in the main of importing china, some of which is in a finished form and to others of which he applies the pattern after it is imported into Canada, and it is shown by the evidence that over a period of twelve months, these importations amounted to somewhere between one-half and three-quarters of a million dollars. For some years, quite naturally, Mr. Browne had found it necessary to go to United States quite frequently, perhaps as often as twice a month, for the purpose of making contacts with those from whom he made purchases in United States and matters of that sort, and I assume that for a part of the time at least he used his own Canadian car.

Some years ago, and following the thought that a new business might be started in the States, Mr. Browne also found it advisable to spend a portion of his time while in United States in endeavouring to secure suitable locations, to interest certain acquaintances there in the possibility of joining him in the business and on occasions he spent considerably longer than the normal time. When he visited the United States the normal time was about two or three days and on occasions of this sort he did spend somewhat longer than that, as he says, up to a matter of, I think, four or five weeks. But his evidence is that not more than half of the time in latter years was spent in connection with the latter activities. He travelled by

motor considerably in the States and at some stage it was suggested to him that as he spent such a great deal of time there it would be desirable—I don't think he said it was necessary—to purchase a United States car. And in 1949 he purchase his first Buick. In January 1950 that car was turned in as a trade-in on a new American car, the car which was later seized in September, 1950.

Now, I return to the question of the statements made on Exhibit 2 by Mr. Browne. The first one was that he was permanently residing at 2803 Buffalo Road. The facts were that Mr. Browne found it necessary when he was in the United States to have a forwarding address, a place where he was welcome as a guest, a place where perhaps he could be reached, and so he did make very friendly arrangements with some of his acquaintances to be entertained in their home. No room was set aside for him, he made no attempt to move any furniture there, he left a few trifling articles of clothing on occasion, realizing that he would probably go back, but that I take it was purely a matter of convenience.

The address given in Exhibit 2 is in Erie, Pennsylvania, but at an earlier stage there had been another address in, I think, another city, I am not positive on that point. At any rate, Mr. Browne said that at some stage he found it convenient to have an address closer to the Canadian border. The address given as to permanent residence in Erie, Pennsylvania, was that of a Doctor Wood whom he hoped to interest in a financial way in the concern which he hoped at some time to establish in the United States. Efforts were made to secure locations and at one time a warehouse was located and probably used, although I am not sure of that point. At any rate, it is shown that throughout all this time Mr. Browne's family remained in Toronto. On each occasion when he returned to Toronto he would return to 158 Humbercrest Road. I assume his children were probably at school. He continued to be President of the corporations from which he drew his livelihood. And on the whole of the evidence I am satisfied beyond any doubt that there never was a stage at any relative time when Mr. Browne could have said "I am moving out of Canada to United States to take my resi-

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dence." That may have been his hope. It would depend on the establishment of the business, probably the success of that business.

In my view, Mr. Browne at no relative time had a permanent residence or any residence in fact other than in the city of Toronto. I do not think that the places that he used as his addresses in the United States amount to anything more than having taken a room in the hotel.

On that finding of fact there is no question in my mind that the statement contained in Exhibit 2 that he was permanently residing at 2803 Buffalo Road, Erie, Pennsylvania amounted to a misrepresentation of fact.

The same thing applies to the statement that he was a temporary visitor in Canada and that his visiting address in Canada was 158 Humbercrest, Toronto, when the reverse of these statements was the truth, that is, his permanent address was 158 Humbercrest, Toronto, and when he went to the United States his temporary address there, a place where he may have temporarily resided for a few days, was no doubt 2803 Buffalo Road, Erie, Pennsylvania.

Had these facts been brought to the attention of the customs officials, there is no question that this difficulty would not have arisen. He would have been prevented from bringing his car into Canada and it was only on the strength of this representation that the temporary Traveller's Vehicle Permit, Exhibit 2 was issued to him.

There is possibly something to be said for the contention advanced by Mr. Walters, counsel for Mr. Browne. I think he has made everything possible of the case that was in his custody and his main contention rests on another document, Exhibit 1.

Some time in 1949, Mr. Browne applied to the U.S. Consul in Toronto for a resident alien's border crossing identification card, and some months later, Exhibit 1 was issued to him. The card itself shows that it was issued at Niagara Falls, New York, on June 24, 1949 and that thereafter he was first admitted at Buffalo, New York, on July 23, 1949.

Mr. Browne's evidence is that at the time of the application he disclosed to the immigration officials the exact position which he was in, his purposes in going to the States,

his home in Canada, and that in the result they were content to issue to him Exhibit 1. On the back of that this statement appears:

> This card presented to any U.S. immigrant inspector at a port of entry of the United States will be accepted as prima facie evidence of rightful holder's status as a lawful permanent resident of the United States on date of issue

and so on.

Mr. Browne relies very largely upon that statement that he had satisfied the United States authorities that he was then a lawful permanent resident and he says that when he brought the car into Canada on September 18, 1950, as I recall the evidence, that he showed Exhibit 1 to the Canadian authorities and he says that inasmuch as Exhibit 1 says he was a lawful permanent resident of United States he was then quite entitled to complete Exhibit 2 and allege that he was in fact permanently residing in Erie, Pennsylvania.

I am not supplied with a copy of any application Mr. Browne may have used when he applied for the resident alien's border crossing identification card but Mr. Browne gave his own evidence as to what he had then stated.

I must decline, however, to accept the opinion of some clerk in the U.S. Consul's office as to whether under the law of Canada Mr. Browne could allege truly that in 1950 he was permanently residing in United States and therefore entitled to the benefit of Section 1 of the regulations established under the Customs Act and which I have read. One might be inclined to weigh the matter more in favour of a completely inexperienced person, a woman who had no knowledge of customs duties, perhaps, and of import and that sort of thing, although I am not sure that there is any discretion in that matter in the court. But in the case of Mr. Browne, president of two corporations dealing in imports from the United States, travelling in the United States, constantly meeting customs officials and having at least some knowledge of the regulations under which imports could be made into Canada, I find myself unable to agree that any consideration should be given under these circumstances. I am satisfied that he knew sufficiently about the customs laws of Canada to know that he could not bring into Canada an American car without declaring

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that he was in fact a Canadian and paying the proper duties, if the car could in fact have been brought in, notwithstanding other regulations.

That being so, I must hold that the statements contained in Exhibit 2 and admittedly signed by Mr. Browne were not in accordance with the facts and that he is quite unwarranted in placing any reliance whatever upon Exhibit 1 or any statements therein contained as to his status. The matter is to be determined under the law of Canada, not under the law of any foreign country or the interpretation placed thereon by an official of a foreign country.

It follows, therefore, that Mr. Browne did commit a breach of Section 203, subsection (*c*) of the Customs Act and that by reason of the misrepresentations contained in Exhibit 2, the failure to pay the proper duties, and the representations, constitute an attempt to defraud the revenue by avoiding the payment of the duties on the car in question.

For these reasons, the claim will be dismissed and there will be judgment for forfeiture, the Crown being entitled to be paid its costs after taxation.

Judgment accordingly.

1952

March 26

June 18

BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

SAMUEL H. LEVENTHAL *et al*.....DEFENDANTS.

Revenue—Sales tax—Special War Revenue Act, R.S.C. 1927, c. 179, ss. 86 and 89—Liability for tax on sale of secondhand or used goods—No presumption that sales tax paid on prior sale—Interpretation of statutes.

Held: That a licensed wholesaler is liable for sales tax under Part XIII of the Special War Revenue Act, R.S.C. 1927, c. 179 on goods sold by him unless he can bring himself within the exemptions or other relief from sales tax provided in the Act and it is immaterial that such goods sold are secondhand or used goods.

2. That there is no presumption under the Special War Revenue Act that the sales tax has been paid on a prior sale of goods.

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INFORMATION exhibited by the Deputy Attorney General of Canada to recover from defendants sales tax alleged due the Crown under the provisions of the Special War Revenue Act, R.S.C. 1927, c. 179 and amendments thereto.

The action was tried before the Honourable Mr. Justice Archibald at Winnipeg.

R. D. Guy, Q.C. and *K. E. Eaton* for plaintiff.

W. P. Fillmore, Q.C. for defendants.

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

ARCHIBALD J. now (June 18, 1952) delivered the following judgment:

In the Information filed in this matter, the plaintiff claims that the defendants are liable to pay sales tax as licensed wholesalers, pursuant to the appropriate provisions of Part XIII of the Special War Revenue Act (since entitled and hereinafter referred to as "The Excise Tax Act"), in the amounts and on the last day of the months following, that is to say:

Date of Sale	Purchaser	Tax	Penalty as at *May 1*, 1951
April 1947	Tomlinson Construction Co. Ltd., Mixermobile	$ 880.00	$ 281.60
July 1947	Huggard Equipment; Dragline	1,280.72	384.21
Oct. 1947	S. Simkin; Tractor	340.00	95.20
March 1948	Tomlinson Construction Co. Ltd., Grader	176.00	43.42
July 1948	B. Penner; Tractor	480.00	105.60
		$3,156.72	$ 910.03
		910.03	
		$4,066.75	

Also from paragraph 5 of said Information, for certain penalties in respect of certain other sales.

The Information was heard before me at Winnipeg, Manitoba, on the 26th day of March, 1952. At the hearing of said Information, counsel for the defendants was furnished with information respecting paragraph 5 of the Information.

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Archibald J.

With respect to the items enumerated in paragraph 4, the matter resolves itself into a question of law as to whether there is any liability on the defendants to pay the amount claimed, because, it is urged, the relevant sections of The Excise Tax Act at that time, are not applicable to *second-hand goods*. It is therefore necessary to refer briefly to certain facts, and these are agreed by and between counsel for the parties. These facts are as follows:

(*a*) The defendants from June, 1944, to late in 1949, carried on in partnership the business of importing, buying, selling and distributing, new and used machinery, engineer and some equipment and other like and kindred merchandise.

(*b*) That from the end of October or November 1, 1945, to March 31, 1949, the defendants were licensed wholesalers under the Special War Revenue Act.

(*c*) That the goods enumerated in paragraph 4 of the Information, were sold at the dates therein stated, and that the sums of money therein named, correctly state the amounts of money therein indicated as due and payable by defendants if they are liable to pay same or any part thereof.

(*d*) That the goods referred to in said paragraph 4 are all used or secondhand goods and that defendants made no return relative to said goods as holders of a license as licensed wholesalers.

(*e*) That the defendants did not produce any books or records which would indicate sales tax had been at any time paid on original sales or other transactions respecting said goods, excepting as to the Huggard Equipment dragline and to the Simken tractor. The defendants submit that their own books of record were lost in the Winnipeg Flood of 1950 and cannot now be produced for examination in Court. However, having regard to the argument before me and the memoranda later submitted to me by counsel in their briefs, the question of the loss of defendants' records need not be discussed by me.

In The Excise Tax Act, provisions respecting sales tax are to be found in Parts XIII and XIV of the said Act. The references in the Act relevant and important to this case are to be found in sections 86 and 89. Section 86(1) reads:

86(1). There shall be imposed, levied and collected a consumption or sales tax of eight per cent on the sale price of all goods

(*a*) produced or manufactured in Canada

(i) payable, in any case other than a case mentioned in subparagraph (ii) hereof, by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier, and

(ii) payable, in a case where the contract for the sale of the goods (including a hire-purchase contract and any other contract under which property in the goods passes upon satisfaction of a condition) provides that the sale price or other consideration shall be paid to the manufacturer or producer by instalments (whether the contract provides that the goods are to be delivered or property in the goods is to pass before or after payment of any or all instalments), by the producer or manufacturer *pro tanto* at the time each of the instalments becomes payable in accordance with the terms of the contract;

(*b*) imported into Canada, payable by the importer or transferee who takes the goods out of bond for consumption at the time when the goods are imported or taken out of warehouse for consumption; or

(*c*) sold by a licensed wholesaler, payable by the vendor at the time of delivery by him, and the said tax shall be computed on the duty paid value of goods imported or if the goods were manufactured or produced in Canada, on the price for which the goods sold were purchased by the said licensed wholesaler and the said price shall include the amount of the excise duties on goods sold in bond.

Exemptions from sales tax are specified in sections 86(2) (*b*) (*c*) (*d*) (*e*) (*f*) and (*g*); and 89(1) (2) and (3). Provisions for deductions, refunds and drawbacks are specified in section 105, subsections (1) to (7) inclusive.

Counsel for the plaintiff urges, and I agree with him, that the reading of section 86 (*a*) (*b*) and (*c*) is clear and unambiguous, and means exactly what it says, namely, that a sales tax shall be imposed on *all goods* (*a*) produced or manufactured in Canada; (*b*) imported into Canada; (*c*) sold by a licensed wholesaler. He points out that (*c*) is not alternative to either sections (*a*) or (*b*) or (*a*) and (*b*), and further directs attention to the fact that in as much as all the goods to which sales tax applies, are either produced or manufactured in Canada, or imported into Canada,

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section (*c*) has reference solely to *goods sold by a licensed wholesaler* and the fact that such goods are secondhand or used is not material. Therefore, in the absence of proof by the defendants that they are entitled either to exemptions or other relief from the sales tax pursuant to the provisions already referred to, the sales tax, as imposed, must be borne by the defendants. Moreover, he points out that section *86(1) (c)*, refers to a tax payable whether the goods were either imported into, or manufactured or produced in Canada, and therefore cannot be merely or simply an alternative to *86(1)(b)*.

Counsel for the defendants seeks dismissal on the ground (i) that sales tax has either already been paid or should be *presumed* to have been paid on a prior sale of each of the five machines referred to in the plaintiff's Information, in short, that sales tax is not payable by a licensed wholesaler if the Crown has already collected tax on a sale of such article or articles by somebody else; (ii) that the tax imposed by section 86(1) (*c*) of The Excise Tax Act is simply an alternative because of the presence of the word "or" in the last line of section (1) (*b*).

Neither counsel could indicate to me any authority or judicial decision dealing with the interpretation of these sections in question.

I am unable to agree with counsel for the defendants that the use of the word "or" in the last line of 86(1) (*b*) gives rise to any ambiguity in the remainder of the section or justifies an interpretation that 86(1) (*c*) is an alternative to the tax provided in section 86(1) (*b*). The wording does not justify any departure from or qualification of the well known and long established guide to interpretation of statutes so well stated in Maxwell on The Interpretation of Statutes, 9th ed., at page 3:

> The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and, otherwise, in their ordinary meaning; and, secondly, that the phrases and sentences are to be construed according to the rules of grammar. From these presumptions it is not allowable to depart where the language admits of no other meaning.

Moreover, a reading of the context and the other provisions in the statute indicates that Parliament intended the section to mean what it says. There is provision for exemptions and the defendants, in order to avail themselves of any such exemptions, must demonstrate that the facts bring them within those exemptions or entitle them to the relief provided in the relevant sections, which, from their wording, contemplates payment before seeking a refund.

As to the argument that with respect to secondhand goods there is a presumption that sales tax had been paid on a prior sale, it should be pointed out that The Excise Tax Act does not indicate that any such presumption exists. As already pointed out, examination of the context and the wording of the Act is against such a presumption, and I do not find in the citations given me by counsel for the defendants, that I would be justified in giving effect to such a presumption. The Act prescribes the cases and instances which entitle a taxpayer to relief and to be entitled to any such relief *he must demonstrate* that he satisfies the requirements prescribed by the statute. The burden is on him to do so. See *Kennedy* v. *The Minister of National Revenue,* (1); *Walter G. Lumbers* v. *The Minister of National Revenue,* (2).

Counsel for the defendants stressed the hardship and unfairness which would result from imposition of sales tax a second time on the same articles. That may well appear to be the consequence but in the circumstances of this kind of case, that is a matter for Parliament and not one for this Court. Reference has already been made to the long established rules of interpretation, and the Court must follow the wording of the statute notwithstanding the consequences which apparently may result. This has been repeatedly stated and I am not going to elaborate, other than to refer to the well known and oft quoted observation of Lord Cairns in *Partington* v. *The Attorney-General,* (3), where he says:

> As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be.

(1) (1929) Ex. C.R. 36. (2) (1943) Ex. C.R. 202; (1944) C.L.R. 167.
(3) 4 L.R. E. & I. A. 100 at 122.

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The plaintiff is therefore entitled to judgment as sought in this Information, subject however to any adjustments necessary as a result of the admissions made respecting paragraph 5 of the Information.

The plaintiff is also entitled to the costs of these proceedings.

Judgment accordingly.

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Apr. 25

May 20

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... } APPELLANT;

AND

SOCIÉTÉ COOPÉRATIVE AGRICOLE DU COMTÉ DE CHÂTEAUGUAY... } RESPONDENT.

Revenue—Income—Income War Tax Act, R.S.C. 1927, c. 97, s. 5(1)(b)—Agricultural co-operative association—The Co-operative Agricultural Association Act, R.S.Q. 1941, c. 120—Amounts paid by way of interest on shares called "preferred shares" by the Act represent interest on capital invested by subscribers and not interest on borrowed capital—Appeal from the Income Tax Appeal Board allowed.

The respondent, an agricultural co-operative association governed by the Co-operative Agricultural Association Act, R.S.Q. 1941, c. 120, paid during its 1947 and 1948 fiscal periods certain amounts by way of interest to holders of shares called "preferred shares" by section 5(1) of the Act which reads as follows:

"...The Association shall have the right to issue preferred shares. The Board of Directors may fix the denomination thereof and determine the rate of interest thereon, which shall not exceed seven per cent. Such preferred shares shall be repayable by the Association on the conditions determined by the Board of Directors and stated in the certificate of issue. The holders of preferred shares shall not be entitled to be present nor to vote at the meetings of the Association."

These amounts were claimed by the respondent as deductible expenses in its income tax returns for those years. The Minister disallowed the deductions and, on an appeal from the assessments, the Income Tax Appeal Board held that the amounts so paid represented interest on borrowed capital and were deductible from income.

Held: That subscribers to preferred shares are from the financial point of view of the Association on an equal footing with subscribers to ordinary shares. Both have subscribed to the capital of the Association with the expectation of receiving a profit from their investments. This profit is represented in the case of the ordinary share by the refund mentioned in section 25, as amended, of the Co-operative Agricultural Act, R.S.Q. 1941, c. 120, and in the case of the preferred share by the interest fixed in the resolution passed by the board of directors, this interest, however, to be drawn on profits.

2.—That the amounts paid by the respondent Association in 1947 and in 1948 to its preferred shareholders represent interest on the capital invested by them and result from the profits made by the Association. Consequently, section 5(1)(*b*) of the Income War Tax Act, R.S.C. 1927, c. 97 is not applicable.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before Mr. Guillaume Saint-Pierre, Q.C., Deputy Judge of the Court, at Montreal.

Guy Favreau and *Raymond Décary* for appellant.

Victor Pager, Q.C., for respondent.

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

SAINT-PIERRE D.J. now (May 20, 1952) delivered the following judgment:

Il s'agit d'un appel du jugement de la Commission d'appel de l'impôt sur le revenu en date du 22 juin 1951 au sujet de l'avis de cotisation pour les années d'imposition 1947 et 1948 de la Société Coopérative Agricole du Comté de Châteauguay du village de Ste-Martine, dans la province de Québec.

La Commission d'appel de l'impôt sur le revenu accueillit l'appel de l'intimée et ordonna à l'appelant que l'avis de cotisation soit amendé pour chacune des années d'imposition 1947 et 1948 afin que lesdites sommes payées à titre de dividendes aux actionnaires privilégiés soient accordées en déduction du revenu de l'intimée pour les années d'imposition 1947 et 1948.

L'appelant soumet comme motifs d'appel les suivants:

15. L'appelant invoque les dispositions de l'article 5(1)(*b*) de la Loi de l'impôt de guerre sur le revenu.

16. L'appelant soumet que les montants de $1,354.99 et de $1,467.61 qui furent payés par l'intimée aux détenteurs d'actions privilégiées à titre de dividendes au cours des années d'imposition 1947 et 1948 ne sont pas des montants payés pour intérêt sur le *capital emprunté* et employé dans le commerce pour produire le revenu.

17. L'appelant soumet que le revenu de l'intimée pour chacune des années d'imposition 1947 et 1948 a été proprement cotisé selon les dispositions de la Loi de l'impôt de guerre sur le revenu.

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L'intimée nie les allégations de l'appel et plaide spécialement ce qui suit:

10. L'intimée est une Société Coopérative Agricole formée en vertu de/et régie par la Loi des Sociétés Coopératives Agricoles (S.R. Quebec Chap. 120 et amendements).

11. L'intimée a payé en *intérêts* à des personnes désignées par la loi susdite comme porteurs d'"actions privilégiées" les sommes qui font l'objet du présent appel.

12. L'intimée afin de déterminer son revenu imposable pour chacune des années 1947 et 1948, a fait entrer les sommes payées par elle en *intérêts* sur lesdites "actions privilégiées", dans les *dépenses et charges déductibles.*

13. Les montants payés en *intérêts* tels que susdits, sont en réalité pour l'intimée *une charge d'exploitation et non pas une distribution* de profits, le capital obtenu par l'intimée au moyen d'"actions privilégiées", au sens de ladite Société Coopérative Agricole (S.R. Quebec Chap. 120 et amendements), étant en réalité *du capital emprunté* et employé dans ses affaires par l'intimée pour produire le revenu.

14. Nonobstant les mots que la loi susdite emploie pour les désigner, les titres appelés "actions privilégiées" représentent *des emprunts* "sui generis" et ne correspondent nullement aux titres ayant la même appellation et qui sont émis en vertu des lois sur les compagnies à responsabilité limitée.

et elle demande à ce que cet appel soit rejeté et que la décision de la Commission d'appel rendue le 22 juin 1951 soit maintenue, le tout avec dépens.

La cause a été soumise et les parties ont procédé à l'enquête. Les témoins suivants ont été entendus:

1° Émile Simard, gérant de la Société Coopérative Agricole du Comté de Châteauguay, témoin de l'appelant. Il produit comme exhibit A-1 les rapports de l'impôt sur le revenu pour les années 1947 et 1948, les avis de cotisation, les avis d'objection et l'avis du Ministre. Il produit comme exhibit A-2 un extrait des Minutes de la Société Agricole de Châteauguay pour les années du 27 avril 1944, 3 juin 1944 et le 19 juin 1944. Il produit comme exhibit A-3 une copie d'un certificat d'actions privilégiées. Il produit comme exhibit A-4 une liste du nombre d'actions ordinaires et d'actions privilégiées pour l'année 1947. Il produit comme exhibit A-5 une liste du nombre d'actions ordinaires et d'actions privilégiées pour l'année 1948. Il déclare que le certificat des actions privilégiées ne correspond pas aux résolutions passées par la Société.

D. D'un autre côté le porteur du certificat était satisfait de prendre le certificat dans la forme qu'il était et la Société était satisfaite de lui fournir le certificat dans la forme qu'elle avait, n'est-ce pas?

R. C'était la méthode employée.

D. Je ne vous parle pas de valeur légale, je vous parle de garantie, le porteur d'un certificat d'actions privilégiées ne pouvait pas faire vendre les biens de la Société s'il n'était pas payé de son certificat, à moins de prendre un jugement et saisir après?

R. Absolument.

D. Tandis que le porteur d'un prêt hypothécaire avait la garantie que les biens de la Société étaient là pour le payer?

R. C'est bien cela.

L'intimée a fait entendre les témoins suivants:

M. Émile Simard. Il produit comme exhibit R-1 une liste des personnes porteurs d'actions ordinaires et d'actions privilégiées pour l'année 1947 et comme R-2 la même liste pour 1948. Il produit comme exhibit R-3 une formule de contrat d'achats et de ventes. Il déclare qu'à l'assemblée du 12 décembre 1947, l'assemblée de la Société Coopérative a adopté le bilan qui a été produit et que les sommes reçues des actions privilégiées ont été employées pour les fins du développement de la Société. Les intérêts sur les actions privilégiées étaient payés le 15 juillet 1947 et le 15 juillet 1948.

M. Raymond Houde, comptable, est celui qui a préparé le bilan et qui a indiqué dans les charges de la Société, les intérêts sur le capital ordinaire de même que sur le capital privilégié.

Le procureur de l'appelant pose la question suivante: Est-ce que le capital formant la cause de l'action privilégiée est du capital emprunté ou du capital investi dans le capital-action de la Société Coopérative?

Il réfère tout d'abord à la cause de *McCool* v. *Ministre du Revenu National* (1) confirmé par la Cour Suprême du Canada Tax Cases Stikeman 1949 à la page 385 où il a été décidé que "la section 1(*b*) de la Loi de l'impôt de guerre ne peut s'appliquer qu'à du capital emprunté". Il ajoute qu'il doit exister une relation juridique essentielle de prêteur à emprunteur entre l'actionnaire qui souscrit une action privilégiée et la Société Coopérative. Cette relation juridique provient de la loi et c'est dans la loi que l'on doit trouver s'il s'agit d'un prêt ou d'un placement de capital.

Il se base tout d'abord sur l'article 3, dernier paragraphe, qui dit que la "Société comprend également en plus des actionnaires ordinaires, les souscripteurs d'actions privilégiées". Il ajoute que les articles 4 et 5 ne font pas de

(1) (1948) Ex.C.R. 548.

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distinction entre l'action ordinaire et l'action privilégiée et que l'actionnaire privilégié n'est pas un créancier de la Société et, par conséquent, un prêteur, mais qu'il est débiteur des créanciers de la Société jusqu'à concurrence du montant global de la mise qu'il a souscrite ou de la mise qui correspond au montant de ses actions.

Il s'appuie sur les articles 13-1B et 13B qui ne fait pas de distinction entre l'action ordinaire et l'action privilégiée. L'article 5-1B de la Loi de l'impôt ne fait pas de distinction quand il s'agit d'intérêts déductibles ou exempts d'impôt ou quand il s'agit d'intérêts ou de dividendes sur actions privilégiées et il cite la cause de *Re Income War Tax Act* v. *Crassweller* (1) où il a été décidé que le bénéfice, quel qu'il soit, que retire une personne en raison et à cause de sa qualité d'actionnaire ou à raison du capital-actions qu'elle détient d'une compagnie c'est toujours un dividende, qu'on l'appelle "intérêt" ou "dividende" c'est un revenu de la nature d'un dividende.

Il s'appuie sur les bilans de la Société où pendant les années 1947 et 1948 la Société a porté au compte "capital" les actions ordinaires et les actions privilégiées mais ne les a pas portées au compte "emprunt".

Dans l'exhibit A-2 il n'est pas question d'emprunt. Le certificat est conforme à la résolution et par conséquent conforme à la loi. Il conclut que l'émission d'actions privilégiées est une augmentation du capital et il admet que la Société Agricole n'est pas une compagnie mais c'est une Société par actions suivant l'article 1889 du Code Civil et que dans le cas de liquidation l'actionnaire ordinaire comme l'actionnaire privilégié seraient responsables jusqu'à concurrence de leur mise et pas plus. Dans le cas de doute quant à l'interprétation de l'article 5-1B il faut l'interpréter à l'encontre de celui qui l'invoque et en faveur de la loi générale. *Wilder* v. *Ministre du Revenu National* (2); *Lumbers* v. *Ministre du Revenu National* (3).

Dans la loi des compagnies, les actionnaires privilégiés sont propriétaires du capital-actions. *Dupuis Frères* v. *Ministre du Revenu National* (4). Dans la cause de

(1) (1949-50) T.A.B. Cases p. 1.
(2) (1949) Ex.C.R. p. 347.
(3) (1943) Ex.C.R. p. 202.
(4) (1927) Ex.C.R. p. 207.

Younger v. *Imperial Tobacco* (1) les tout nouveaux membres participent de façon à être responsables vis-à-vis de ceux qui ne le sont plus. La disposition de la loi qui permet la souscription en trois parties ou en trois versements n'exclut pas le capital privilégié.

Concernant les actionnaires qui n'ont pas droit de vote il réfère à l'Édition Waganese, 1931, p. 474 et Lighthall Dominion Companies Act, édition 1935, p. 104. Il réfère de plus à la cause de *Rubas* v. *Parkinson* (2) pour établir qu'il faut examiner le caractère du revenu et non pas le droit de vote, et l'actionnaire privilégié est assuré à même les profits de la Société de cette partie des profits qui équivaut à 5 p. 100 de sa mise dans le capital. Il conclut au maintien de l'appel sur le principe qu'il ne s'agit pas d'un prêt mais d'une mise de capital avec expectative de profit représenté par l'intérêt.

Le procureur de l'intimée pose la question suivante: Les sommes perçues au taux de 4 p. 100 sur ce qu'on appelle les actions privilégiées émises par la Société constituent-elles de l'intérêt sur de l'argent prêté oui ou non? Il déclare que c'est uniquement sur la nature de la transaction que porte tout le débat et qu'il faut examiner la nature de la transaction et non pas la terminologie employée pour résoudre la question. Il réfère à Law Reports, Queen's Bench Division, Vol. 1, Inland Revenue et à la cause du *Ministre du Revenu National* v. *Saskatchewan Grain Growers Association* en 1930. Pour déterminer la nature des rapports juridiques il faut examiner la loi et la résolution en vertu desquelles ces emprunts ont été versés entre les mains de la Société. Il ne faut pas tenir compte des certificats d'action car il n'y a pas de résolution qui les approuve et ces certificats contiennent des conditions qui ne sont pas autorisées par la loi. *Steel* v. *Ramsay* (3).

Il fait l'historique de la loi.

En 1925, c'est le chapitre 57, S.R.Q. 1925, loi concernant les sociétés coopératives agricoles.

L'article 3 à cette date se lisait comme suit:

La société doit se composer d'au moins 25 personnes qui signent une déclaration.

(1) (1935) 58 B.R. p. 310. (2) (1929) 3 D.L.R. p. 1.
(3) (1931) A.C. p. 270.

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A cette date il n'y avait pas d'actions privilégiées. L'article 5 ne parle pas d'actions privilégiées.

L'article 9 se lisait comme suit:

La société se compose des personnes qui ont signé la déclaration mentionnée dans l'article 3 et de toutes celles qui par la suite, souscrivent des actions de cette société.

Cette loi a été amendée par le chapitre 38 de 20 George V et l'article 3 a été remplacé par l'article 2 du chapitre 38 de 20 George V et l'article 2 comprend "les producteurs actionnaires", "les producteurs affiliés" et les "actionnaires privilégiés".

L'article 5 a été amendé en y ajoutant "les actionnaires privilégiés".

L'article 9 a été amendé en y ajoutant après le mot "actions" dans la troisième ligne le mot "ordinaires". C'est l'article 8 de la présente loi qui détermine ce qui suit:

La société se compose de personnes qui ont signé la déclaration mentionnée dans l'article 3 et de toutes celles qui, par la suite, souscrivent des actions ordinaires dans cette société.

Comme conséquence de cet amendement les actionnaires privilégiés ne seraient pas les personnes qui composent la société.

L'article 19 est amendé en remplaçant le mot "sociétaire" par les mots "producteur actionnaire" quant à l'assemblée générale.

Par ces amendements le procureur de l'intimée conclut que l'actionnaire privilégié n'a pas droit de vote, ne peut pas être représenté aux assemblées et n'est pas même dans la catégorie des personnes dont se compose la société.

Il déclare que partout dans la loi où le mot "action" est employé seul il s'agit des actions des actionnaires ordinaires et il s'appuie sur l'article 14 qui déclare que dans le cas de défaut du producteur actionnaire de remplir ses obligations il est rayé de la liste des membres et ses actions sont converties en actions ordinaires. Il déclare de plus que les actionnaires privilégiés n'ont aucun privilège au sens de la loi.

Le fait que l'action privilégiée soit rachetable l'assimile pour le moins à un prêt et il n'y a rien dans la loi qui soit prévu au cas de défaut de paiement de l'intérêt qui donnerait un rang quelconque supérieur à celui de l'action ordinaire.

Il soumet que l'émission qui a été faite est une émission d'obligation et non pas une émission de capital privilégié et il réfère à la cause de *Touquoy Gold Mining Company* (1). Il admet que dans le certificat et dans les résolutions il n'est pas question d'emprunt. La transaction qui a été faite est vraiment un prêt ou un emprunt, et le paiement de l'intérêt est une charge d'une façon constante et il conclut à ce que l'appel soit rejeté.

La question soumise est celle de savoir si les paiements faits par la Société en 1947 et en 1948 aux actionnaires privilégiés de ladite Société sont des intérêts sur un prêt fait par lesdits actionnaires ou si ce sont des intérêts sur du capital investi par lesdits actionnaires et qui résultent des profits de ladite Société. Si ces montants résultent d'un prêt, la section 5(1)(*b*) de la loi de l'impôt sur le revenu ne s'applique pas et si ces montants proviennent de profits du capital investi, la section 5(1)(*b*) de l'impôt sur le revenu s'applique.

Le président de la Commission d'appel de l'impôt sur le revenu base son jugement sur la décision rendue dans la cause de *Tonquoy Gold Mining Company* (*supra*) où le tribunal en est arrivé à la conclusion que bien qu'on ait appelé l'émission qui avait été faite une émission d'actions privilégiées, il s'agissait véritablement d'une émission de débentures et qu'il s'agissait d'un emprunt contracté par la compagnie. Si on lit cette cause on constate les faits suivants:

En vertu de sa charte, 1897, c. 108, s. 7, les actionnaires avaient le droit d'émettre des "bonds, débentures or *preferred shares, under its seal*" et qu'il était prévu que ces "bonds" et "débentures" seraient payables à tel temps et à telle place et qu'ils porteraient intérêt à tel taux et que ces "bonds", "débentures" ou stocks préférentiel donnaient droit au porteur à des priorités ou privilèges et seraient sujets à telles conditions que la compagnie pouvait décider.

A une assemblée du 30 juillet 1903, il a été décidé d'émettre une série de "preferred shares" conformément à l'article 17 pour une somme n'excédant pas $12,000 et que lesdites actions privilégiées ou débentures porteraient intérêt à

(1) (1906) Eastern Law Reports, Vol. 1, p. 142.

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8 p. 100 payable semi-annuellement et qu'elles seraient remboursées dans une, deux ou trois années à l'option de la compagnie.

En conformité avec cette résolution un avis a été adressé aux actionnaires récitant la résolution et indiquant à quel usage servirait ce montant et ajoutant de plus que ces actions privilégiées "would constitute a first lien on all assets of the Company, including mining areas, woodland, machinery and plan" et que le principal et l'intérêt sera payable en plein avant que les actions ordinaires puissent participer sur les profits de la compagnie.

A la suite un "trust deed" a été passé et il était prévu que le "trustee" "to hold the property of the company embraced in the deed of trust for the repayment of *said loan* with interest as aforesaid". Il ne fait aucun doute qu'il s'agissait dans ce cas d'un prêt représenté par des actions privilégiées comme il aurait pu être représenté par une débenture. Cette cause ne peut pas s'appliquer à la présente cause car ni dans la loi, ni dans les résolutions de la Société, ni dans les certificats émis il n'est question de prêts.

Le président après avoir fait la distinction entre la loi des compagnies et la loi visant les sociétés coopératives d'agriculture et mettant de côté le certificat émis comme *ultra vires* en vient à la conclusion que les montants payés aux détenteurs des "actions privilégiées" émises par l'appelante représentent un intérêt sur du capital emprunté et n'ont pas les caractéristiques des dividendes payés sur les actions privilégiées d'une compagnie à fonds social.

Comme le chapitre 120 S.R.Q. 1941 et ses amendements est la loi qui voit à la création des sociétés coopératives d'agriculture, il me faut donc référer à cette loi. Avant d'entrer dans l'interprétation de cette loi, comme elle ne le fait pas, il nous faut se demander qu'est-ce qu'une action, qu'est-ce qu'une action ordinaire, qu'est-ce qu'une action privilégiée.

Une action c'est la mise de fonds souscrite par une personne au capital d'une compagnie ou d'une société avec l'expectative de retirer un revenu à même les profits. Une action ordinaire pourrait se définir comme une action qui n'a rien de spécial, on l'appelle également action commune. Une action privilégiée c'est une action à laquelle sont attachés certains privilèges déterminés soit par la loi, soit par

la résolution de l'assemblée générale des actionnaires et dans le cas de sociétés coopératives agricoles par le bureau de direction.

D'après la loi concernant les sociétés coopératives agricoles, chapitre 120, S.R.Q. 1941, il y a deux sortes d'actions, les actions ordinaires et les actions privilégiées. Les articles spécifiques ayant trait aux actions privilégiées sont les suivants: 3, 5-1, 5-8, 14, 25 et 31. L'article 3 détermine la composition de la société et déclare que "la société comprend également les souscripteurs d'*actions privilégiées*". L'article 5 détermine les privilèges attachés à ses actions: 1° dénomination non limitée, 2° taux d'intérêt n'excédant pas 7 p. 100, 3° rachetable aux conditions fixées par le bureau de direction; et l'article ajoute "que les porteurs de ces actions privilégiées n'ont pas le droit d'assister ni de voter aux assemblées de la société". L'article 5-8 donne à la société agricole le droit de souscrire et d'acquérir des actions ordinaires *ou privilégiées* de la société coopérative fédérée de la province de Québec. L'article 14 déclare que si un producteur actionnaire fait défaut de remplir ses obligations, le bureau peut le rayer de la liste des membres et convertir ses actions ordinaires en actions *privilégiées*. L'article 25 avant l'amendement de la loi 11 George VI, chapitre 45 en 1947 se lisait comme suit: "L'assemblée générale se basant sur ce compte rendu, détermine le montant des *bénéfices* dont elle fait la répartition. Après paiement du *dividende* en faveur des *actions privilégiées* et du montant à être versé au fonds de réserve, la société peut distribuer le surplus aux producteurs actionnaires, etc." Cet article 25 a été remplacé par le suivant: "L'assemblée générale détermine en se basant sur cet état, le montant des excédents d'opération à répartir". Elle affecte ce montant à la constitution de réserves, ainsi qu'à l'attribution de ristourne aux membres, etc. L'article 31, deuxième paragraphe, dit que les dissidents ont droit d'être remboursés des sommes versées au capital de la société au moyen d'une action *privilégiée* portant intérêt à cinq pour cent.

Quels sont les articles où il est question des actions ordinaires? Ce sont les articles 5-6, 5-8, 5-9, 8, et 14. L'article 5-6 dit que "pour devenir sociétaire un producteur doit souscrire au moins cinq actions *ordinaires* ou le nombre

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d'actions ordinaires supérieur à cinq fixé par règlement, pourvu que, dans ce dernier cas, le nombre total des actions n'excède pas cinq cents dollars". L'article 5-8 donne à la société agricole le droit de souscrire et d'acquérir des actions *ordinaires* ou privilégiées de la société coopérative fédérée de la province de Québec. L'article 5-9 donne à la société agricole le droit de faire des conventions avec la société fédérée des agriculteurs quant à la souscription aux actions *ordinaires* et privilégiées de ladite société. L'article 8 détermine la composition de la société en déclarant qu'elle se compose des personnes qui ont signé la déclaration mentionnée dans l'article 3 et de toutes celles qui, par la suite, souscrivent des actions *ordinaires* dans la société. L'article 14 déclare que si un producteur *actionnaire* fait défaut de remplir ses obligations, le bureau peut le rayer de la liste de ses membres et convertir ses actions *ordinaires* en actions privilégiées.

Quels sont les articles de la loi où il est question d'actions seulement sans dire s'il est question d'actions ordinaires ou d'actions privilégiées?

L'article 4 dit que "chaque société est de la nature d'une société par *action*". Or, comme la société par action comprend des actionnaires ordinaires et des actionnaires privilégiés, le mot action comprend les deux. De plus cet article dit: La responsabilité de ces membres ou actionnaires étant limitée au montant de leurs mises respectives. Cet article ne fait de distinction entre les actionnaires ordinaires et les actions privilégiées mais limite leur responsablité à leurs mises de fonds. Je suis d'opinion que cet article s'applique aux actionnaires ordinaires comme aux actionnaires privilégiés ainsi que je l'expliquerai plus tard.

L'article 5 dit: "que le montant de chaque *action* est de dix dollars payables en quatre versements annuels égaux dont le premier pas plus tard qu'un mois après la date de la souscription. Cet article s'applique sans aucun doute aux actions ordinaires mais peut également s'appliquer aux actions privilégiées, si le bureau de direction décide de fixer la dénomination des actions privilégiées à la somme de dix dollars. L'article 5-2 permet de remplacer les *actions* de vingt dollars par des actions de dix dollars. Comme l'article ne distingue pas, je suis d'opinion qu'il

s'agit d'actions ordinaires et d'actions privilégiées. L'article 5-3 dit que "la société peut décider par règlement que les *actions* souscrites après son adoption seront payables comptant ou en moins de quatre versements" et détermine le montant de chacun. L'article ne mentionne pas de quelles actions il s'agit et je suis d'opinion que cet article peut s'appliquer aux actions ordinaires et aux actions privilégiées si le règlement de la société en décide ainsi.

L'article 5, parag. 5, dit que "la société peut confisquer sommairement *toutes les actions* sur lesquelles il n'a été fait aucun versement depuis deux ans et disposer de telles actions que les directeurs prescrivent par règlement". Cet article ne mentionne pas de quelles actions il s'agit et je crois que cet article peut s'appliquer aux actions ordinaires et aux actions privilégiées.

L'article 6 dit: Les *actions* sont nominatrices et transférables en remplissant les formalités prescrites par les règlements de la société. Toutefois, elles ne peuvent être transportées qu'à un cessionnaire accepté par la société. L'article ne mentionne pas de quelles actions il s'agit et je crois que cet article peut s'appliquer aux actions ordinaires et aux actions privilégiées si le règlement de la société en décide ainsi.

L'article 12 dit: La société ou son bureau de direction peut faire amender ou abroger entre autres des règlements concernant l'admission des sociétaires, le transfert des *actions* et le maximum des *actions* qu'un sociétaire peut souscrire.

L'article ne mentionne pas de quelles actions il s'agit et je crois que cet article s'applique aux actions ordinaires et aux actions privilégiées si le règlement de la Société en décide ainsi. Mais quant au maximum des actions qu'un sociétaire peut souscrire, il ne s'agit que des actions privilégiées car l'article 5-6 règle le cas des souscriptions des actions ordinaires.

L'article 13-c dit ceci: Transporter en tout ou en partie à une institution financière ou à toute autre personne aux conditions jugées convenables les versements dus ou à échoir sur les actions souscrites par les sociétaires comme sûreté subsidiaire du paiement de tout prêt fait à la Société

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par billet ou autrement. Le mot "actions" n'est pas déterminé et par conséquent il peut s'appliquer aux actions ordinaires comme aux actions privilégiées parce que le mot *"sociétaire"* s'applique aux actionnaires ordinaires comme aux actionnaires privilégiés, ce que nous verrons plus loin.

L'article 13-2 se lit comme suit: Le montant total des sommes empruntées ne doit jamais excéder quatre fois le montant des *actions souscrites* et celui du fonds de réserve. Le mot "actions" n'est pas déterminé et par conséquent il peut s'appliquer aux actions ordinaires comme aux actions privilégiées.

L'article 20 dit: Un producteur actionnaire n'a qu'un seul vote quel que soit le nombre de *ses actions*, etc. Le mot "actions" ici s'applique à des actions ordinaires vu que les actionnaires privilégiés n'ont pas le droit de vote.

L'article 24 dit ceci avec l'amendement: Cet état doit être approuvé par le vérificateur et contenir

1° La liste des sociétaires à la clôture de l'exercice, le nombre d'*actions souscrites* et le montant payé par chaque actionnaire;

2° Un état succinct de l'actif et du passif de la société;

3° Un état des opérations de l'année avec indication des profits et pertes;

4° Tous autres renseignements exigés à cette fin par les règlements de la société. S.R. 1925, c. 57, a. 24.

Le mot "actions" n'est pas déterminé et par conséquent il peut s'appliquer aux actions ordinaires comme aux actions privilégiées. Mais, comme en vertu de l'article 22 un état des affaires est envoyé au Ministre de l'agriculture, celui-ci est intéressé à connaître la liste des sociétaires, le nombre d'actions *ordinaires et privilégiées* souscrites et le montant payé pour chaque action ordinaire ou privilégiée afin de se rendre compte de la situation financière de la Société.

En examinant la loi concernant les sociétés coopératives agricoles il est facile de constater que cette loi comprend deux parties. La première partie concernant la composition de la société au point de vue de son capital et la seconde partie concernant l'administration de la Société. La partie concernant la composition de la Société au point de vue de la formation de son capital ou de sa structure financière est couverte par les articles 1 à 6 inclusivement.

En effet, dans ces articles le législateur a déterminé la composition de la Société, les souscriptions aux actions privilégiées, le montant des actions ordinaires, comment les actions sont souscrites, le défaut de ceux qui ont souscrit, le droit de souscrire et d'acquérir des actions de la Société coopérative fédérée des agriculteurs de la province de Québec et a déterminé que le capital de la Société est variable, que les actions sont nominatives et transférables à certaines conditions. La deuxième partie concernant l'administration de la Société couvre les articles 7 à 32 et comprend la forme de la déclaration des membres fondateurs, article 7, la composition de la Société au point de vue administratif, article 8, les pouvoirs généraux de la Société, article 9, les contrats valides, article 10, le bureau de direction, article 11, les règlements de la Société, article 12, les pouvoirs du bureau de direction, article 13, inexécution des contrats, article 14, vente d'animaux, article 15, primes de conservation, article 16, choix du président du bureau de direction, article 17, engagement d'un gérant, article 18, composition de l'assemblée générale, article 19, droit de vote, article 20, décisions de l'assemblée générale, article 21, tenue de comptes, article 22, peine dans certains cas, article 23, état à faire au Ministre, article 24, fixation des bénéfices, article 25, examen des minutes par les membres, article 26, signature des contrats, article 27, responsabilité du secrétaire-trésorier, article 28, accès aux livres, article 29, exemption de taxes, article 30, coopérative formée avant 1930, article 31, usage du mot "coopérative", article 32.

La loi emploie de plus des termes différents pour désigner les personnes de la société coopérative. Elle se sert des mots "fondateurs" aux articles 1 et 7, "sociétaires" aux articles 5-2, 5-3, 12, 13-c, 19, 24, et "membres" dans les articles 3, 14, 17, 18, 19, 25 amendé. Comment doit-on déterminer la signification de ces termes? Je suis d'opinion que ces termes spécifiques doivent être déterminés dans les articles où ils sont placés; s'agit-il de la partie financière les mots "fondateur", "sociétaire", "membre" s'appliquent à toutes les personnes qui ont souscrit au capital de la Société soit comme actionnaire ordinaire ou soit comme actionnaire privilégié. Cette interprétation se justifie par l'article 22 de la loi qui dit: "un état des affaires de la Société est préparé et attesté par le secrétaire-trésorier et

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une copie de cet état doit être transmise au Ministre de l'agriculture" et par l'article 24 qui dit: "cet état doit être approuvé par le vérificateur et contenir la liste des sociétaires existant au 31 décembre, le nombre d'actions souscrites et le montant payé par chaque actionnaire". Or, comment le Ministre de l'agriculture peut-il se rendre compte de la situation financière de la Société, s'il n'a pas devant lui la liste des actions souscrites tant par les actionnaires ordinaires que par les actionnaires privilégiés, afin de connaître le capital de la Société et sa situation financière.

Je suis donc d'opinion que le mot "sociétaire" employé dans cet article 24 s'applique aux souscripteurs d'actions ordinaires comme aux souscripteurs d'actions privilégiées. C'est mon opinion que le souscripteur d'actions privilégiées au point de vue financier de la Société est sur le même pied que le souscripteur d'actions ordinaires. Tous les deux ont souscrit au capital de la Société avec l'attente de recevoir un profit de cette mise du capital. Ce profit dans le cas de l'action ordinaire devant être représenté par la ristourne de l'article 25 et dans le cas de l'action privilégiée par l'intérêt mentionné dans la résolution qui autorise la prescription mais cet intérêt devant être pris à même les profits.

Jusqu'à l'année 1947, date à lequelle l'article 25 a été amendé, cet article se lisait comme suit: "L'assemblée générale se basant sur ce compte rendu détermine le montant *des bénéfices* dont elle fait la répartition. Après paiement de dividendes en faveur des actions privilégiées et du montant à être versé au fonds de réserve, la Société peut distribuer le surplus aux producteurs actionnaires . . ." Il ne fait donc pas de doute que le souscripteur d'une action privilégiée en 1944 devait recevoir *un dividende* sur le montant des *bénéfices*. L'amendement de cet article 25 en 1947 a-t-il changé la situation? Cet amendement se lit aujourd'hui comme suit: "L'assemblée générale détermine en se basant sur cet état le montant des excédents d'opérations à répartir. Elle affecte ce montant à la constitution de réserves ainsi qu'à l'attribution de ristournes aux membres". De quel état est-il question? C'est l'état de l'article 24 qui montre: 1° la liste des souscripteurs, 2° un état succinct de l'actif et du passif, 3° un état des opérations de l'année, 4° tous autres renseignements. Pourquoi n'est-il plus ques-

tion des dividendes aux actions privilégiées? Parce que ces dividendes sont inclus dans l'état au chapitre de l'actif et du passif et comme ils sont fixés par résolution il n'y avait pas lieu comme pour les ristournes de les fixer par l'assemblée générale.

L'article 4 dit ceci: "La responsabilité de ces membres ou actionnaires étant limitée au montant de leur mise de fonds". Cet article s'applique-t-il aux actionnaires ordinaires comme aux actionnaires privilégiés? Je suis d'opinion que cet article s'applique aux actionnaires ordinaires comme aux actionnaires privilégiés vu que c'est la mise de fonds qui détermine la responsabilité et que cette mise de fonds est souscrite aussi bien par les actionnaires ordinaires que par les actionnaires privilégiés.

Le procureur de l'intimée soumet que l'actionnaire privilégié n'est pas un sociétaire ou membre de la Société parce qu'en vertu de l'article 14 si un producteur-actionnaire néglige de remplir son contrat, il cesse d'être membre de la coopérative et devient un actionnaire privilégié.

J'ai répondu déjà à cette objection en admettant que ce producteur-actionnaire cesse d'être membre de la coopérative au point de vue de l'administration de la Société mais qu'il continue d'être membre au point de vue financier.

Il ne faut pas perdre de vue qu'il s'agit de la classe agricole et la loi n'a pas voulu que ce producteur perde son capital et c'est la raison pour laquelle la loi le fait entrer dans la classe des actionnaires privilégiés, ce qui lui permettra de récupérer son capital et de recevoir des intérêts en attendant cette récupération.

Le procureur de l'intimée soumet que l'action privilégiée souscrite ne comporte aucun privilège, voyons si cette assertion est exacte.

Dans la société coopérative agricole le capital qui peut être investi par un producteur-actionnaire est limité, articles 5, 6 et 7, tandis que dans le cas de l'actionnaire privilégié il n'y a pas de limite à sa mise de fonds, article 5-1. La dénomination des actions de l'actionnaire ordinaire est limitée tandis que dans la dénomination des actions privilégées ceci est laissé à la discrétion du bureau de direction qui peut en fixer la dénomination à $50, $500 ou $1,000.

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L'actionnaire ordinaire recevra sur sa mise de fonds ce qui aura été déterminé par l'article 25 tel qu'amendé tandis que l'actionnaire privilégié recevra l'intérêt fixé par le bureau de direction pourvu que cet intérêt ne dépasse pas 7 p. 100 et pourvu que les bénéfices de la Société le permettent. L'actionnaire ordinaire n'a pas droit d'en exiger le rachat tandis que l'actionnaire privilégié pourra voir ses actions être rachetées par la Société aux conditions fixées par la résolution et indiquées dans le certificat d'émission.

L'actionnaire ordinaire a le droit d'assister et de voter aux assemblées de la Société tandis que l'actionnaire privilégié n'a pas ce droit.

Il résulte donc que l'actionnaire privilégié a les privilèges que je viens de mentionner.

Le procureur de l'intimée soumet que l'actionnaire privilégié est un prêteur parce qu'il doit recevoir son capital à une date déterminée. Ce n'est certes pas un prêteur en vertu de la loi, car la loi ne le considère nulle part comme prêteur mais elle le considère comme un actionnaire ordinaire avec cette différence qu'il peut être remboursé à date fixe. De plus, cet actionnaire privilégié n'a aucune garantie sur les biens de la Société à l'encontre d'un porteur de débentures qui a toujours la garantie sur les biens de la société.

Peut-on assimiler les intérêts payés aux actionnaires privilégiés comme une charge de la Société de la même nature que les taxes ou que les intérêts payés aux porteurs de billets ou de débentures? Oui, si ces actionnaires privilégiés étaient des prêteurs au même sens que les porteurs de débentures ou de billets et non, s'ils ne le sont pas. Or, comme je suis d'opinion que les actionnaires privilégiés ne sont pas des prêteurs comme les porteurs de débentures ou les porteurs de billets mais sont des souscripteurs au capital de la Société avec expectative de recevoir des intérêts basés sur les profits que la Société pourra réaliser, comme les actionnaires ordinaires sont des souscripteurs au capital de la Société avec expectative de recevoir la ristourne mentionnée à l'article 25 je suis donc d'opinion que les intérêts payés aux actionnaires privilégiés ne sont pas une charge de la Société de la même nature que les taxes et les intérêts payés aux porteurs de billets ou de débentures.

En vertu de l'article 9 de cette loi, la Société a le pouvoir d'acquérir et de posséder des immeubles et en vertu du paragraphe (b) de l'article 13, la Société a le pouvoir d'hypothéquer ces immeubles pour assurer le paiement de toute dette et emprunt ou l'exécution de toute autre obligation. En vertu du même paragraphe (*b*) la Société a le droit d'emprunter des fonds et transporter sous forme de garantie les sûretés ou les biens de la Société et même de donner en garantie de tel emprunt un gage sur les produits de la ferme et les animaux reçus en consignation, mais dans ce cas il faut que le bureau de direction ait été autorisé par le vote d'au moins les deux tiers des membres présents à l'assemblée annuelle ou à une assemblée spéciale. De plus, le montant total de l'emprunt d'après le paragraphe 2 du même article ne doit jamais excéder quatre fois le montant des actions souscrites et celui du fonds de réserve.

Il ressort donc de ce qui est dit ci-dessus que l'emprunt fait par la Société est sujet à une procédure particulière qui dénote bien la différence entre l'émission d'actions privilégiées et un emprunt, car les actions privilégiées comme les actions ordinaires doivent servir à déterminer le montant de l'emprunt afin qu'il n'excède pas le montant des actions souscrites soit comme actions ordinaires, soit comme actions privilégiées. Donc en me basant sur la loi, je suis d'opinion que l'actionnaire privilégié comme l'actionnaire ordinaire est un propriétaire dans le capital de la Société jusqu'à concurrence de la mise de fonds qu'il a souscrite. Dans la cause de *Dupuis Frères* v. *Ministre des Douanes* (1) spécialement à la page 210 le Juge Audette dit ceci:

> The mere existence of some features which might in such respect make it resemble a bond or debenture is not sufficient to make the preferred share which is an actual part of the authorized capital of the company, a bond or debenture or anything like it, and thereby transform it into "borrowed capital" for the purpose of assessment. Such dividends are paid only out of profits, a bond is quite different, it is primarily a liability.

Dans la présente loi les actions privilégiées sont comprises dans cette partie de la loi où il est question du capital, articles 1 à 6 inclusivement, et de plus les dividendes ou intérêts sont payés à même les profits, article 25 avant l'amendement, et depuis l'amendement, et articles 22 et 24 de la loi, et ce ne sont pas des débentures ni des "bonds" en

(1) (1927) Ex.C.R. p. 208.

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faveur des souscripteurs mais ce sont des actions. Ceci me justifierait de maintenir l'appel vu que les deux parties ont soumis que cette cause devait être décidée en me basant sur la loi concernant les sociétés coopératives agricoles, mais examinons si dans l'émission de ces actions privilégiées la Société a suivi cette loi.

Le 26 avril 1944 la Société passe une résolution qui est produite comme exhibit A-2 et qui déclare:

> Que tous les membres de cette Société soient priés et tenus de prendre une part privilégiée au montant de cent dollars ($100) le taux d'intérêt devant être de 4 p. 100.

Cette résolution était conforme à l'article 5 du chapitre 120 S.R.Q. 1941, sauf qu'elle n'indiquait pas que la part privilégiée était rachetable et c'est pour couvrir ce point que le 3 juin 1944 une nouvelle résolution, exhibit A-2, fut passée se lisant comme suit:

> Que tous les membres porteurs d'une part privilégiée au montant de cent dollars ne pourront en demander le remboursement avant cinq ans. Toutefois, la Société se réserve le droit de racheter en tout temps cesdites parts après un avis de quatre-vingt-dix jours.

A la suite de ces deux résolutions toute personne pouvait souscrire des actions privilégiées dans le capital-action de la Société, et la Société leur donnait un certificat dans la forme produite comme exhibit A-3. A la face du certificat il était attesté que cette personne était le détenteur d'actions privilégiées entièrement libérées du capital de ladite Société coopérative agricole d'une valeur nominale de..... dollars, transférables dans le livre de la Société et émises en vertu de cette résolution et étaient sujettes aux conditions énoncées au verso. Ce certificat était signé par le président et le secrétaire, conformément à l'article 27 de la loi. Au verso voici ce qui était écrit: Lesdites actions privilégiées ont les privilèges, droits et priorités et sont sujettes aux restrictions et dispositions qui suivent, savoir:

> 1° Le détenteur d'actions privilégiées aura droit de recevoir à même les *profits* de la Société un *dividende* préférentiel non cumulatif au taux de ..... l'an.

Cette clause était conforme à l'article 25 de la loi avant son amendement en 1947, de sorte que le souscripteur de l'action privilégiée de 1944 à 1947 et qui est encore en possession de tel certificat ne peut se plaindre qu'il n'est

pas conforme. Quant à celui qui aurait souscrit des actions privilégiées après 1947, j'ai déjà expliqué que cette clause est conforme à la loi.

2° Le détenteur d'actions privilégiées aura droit dans toute liquidation, dissolution ou autre distribution de l'actif de la société entre ses actionnaires (autrement que par voie de ristourne à même le surplus) au remboursement du montant capitalisé sur ses actions, avec tous dividendes déclarés et impayés, s'il y en a.

Cette clause n'est pas couverte par les résolutions mais elle ne rend pas le certificat nul.

3° Les droits des détenteurs d'actions privilégiées se limitent à ceux prévus par les paragraphes 1 et 2 ci-dessus.

4° La société aura le droit de racheter en tout temps, quand il en aura été décidé par résolution de son bureau de direction, la totalité ou partie desdites actions privilégiées.

Cette clause est conforme à l'article 5 de la loi et à la résolution de la Société en date du 3 juin 1944.

5° Les détenteurs des actions privilégiées pour rachat devront présenter leurs certificats au bureau de la société dans l'avis de rachat et les remettre sur paiement du prix de rachat. Ces certificats seront ensuite annulés. Le droit aux dividendes sur les actions privilégiées ainsi rachetées cessera automatiquement à la date fixée pour le rachat et les porteurs desdites actions ainsi rachetées n'auront plus dans la suite aucun droit contre ou dans la société, sauf celui de recevoir le paiement du prix de rachat.

Cette clause détermine la procédure pour le rachat et détermine les conséquences du rachat. C'est une clause administrative.

6° Conformément aux dispositions du deuxième paragraphe de l'article 5 de la loi des Sociétés coopératives agricoles les actions privilégiées ne confèrent pas à leurs détenteurs le droit d'assister et de voter aux assemblées générales.

Cette clause n'est que du remplissage, car tout le monde est censé connaître la loi et c'est en réalité la reproduction de l'article 5 de la loi.

Je suis donc d'opinion que le certificat n'est pas illégal mais qu'il est conforme aux résolutions passées par la Société, sauf le paragraphe 20, et que celle-ci avait le pouvoir de passer telles résolutions en vertu des articles 5 et 25 de la loi. Je suis également d'opinion que les paiements faits par la Société en 1947 et en 1948 aux actionnaires privilégiés de la Société sont des intérêts sur du capital investi par les actionnaires et qui résultent des profits de la Société.

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Saint-Pierre D.J.

En conséquence, le sous-paragraphe (*b*) du paragraphe (1) de l'article 5 de la loi de l'impôt sur le revenu ne s'applique pas, vu qu'il ne s'agit pas de paiements faits sur un emprunt, mais de paiements faits sur du capital investi et qui résulte des profits de la Société.

Je maintiens l'appel de la décision du président de l'appel de l'impôt sur le revenu en date du 22 juin 1951 et je déclare que les sommes de $1,354.99 pour l'année 1947 et de $1,467.61 pour l'année 1948 sont sujets à l'impôt sur le revenu de ladite Société. Le tout avec dépens.

Judgment accordingly.

1950

April 24

1952

Sept. 15

BETWEEN:

NATIONAL TRUST COMPANY LIMITED as Executor of the last Will and Testament of Robert Ray McLaughlin, deceased ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97 ss. 2(r) (i), 3, 6(f)—Presumption of validity of assessment—Onus of showing assessment erroneous on appellant—Meaning of "personal and living expenses" under s. 2(r) (i) not to be applied in cases not within its express words—Reasonable expectation of profit a question of fact.

Held: That an assessment under the Income War Tax Act carries with it a presumption of validity until the contrary is shown and the onus of showing that it is erroneous in fact or in law lies on the taxpayer who appeals against it.

2. That section 2(r) (i) of the Income War Tax Act extends the meaning of the term "personal and living expenses" far beyond its ordinary one and care must be taken to see that it is not applied in cases that do not fall within its express words.

3. That a taxpayer cannot be deprived of the right to deduct expenses to which he would ordinarily be entitled otherwise than by express words.

4. That where it is material to prove a person's intentions evidence may be given of what he said.

5. That whether Mr. McLaughlin maintained his farm with a reasonable expectation of profit is a question of fact.

6. That Mr. McLaughlin was engaged in the business of farming and cattle breeding bona fide for profit and with a reasonable expectation of profit.

APPEAL under the Income War Tax Act.

The appeal was heard before the President of the Court at Toronto.

W. Judson K.C. and *C. C. McGibbon* for appellant.

J. Singer K.C. and *P. H. McCann* for respondent.

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

THE PRESIDENT now (September 15, 1952) delivered the following judgment:

These appeals are brought by National Trust Company Limited as executor of the last Will and Testament of Robert Ray McLaughlin, who died on September 23, 1947, against his income tax assessments for 1944 and 1945 levied after his death.

Mr. McLaughlin was a farmer and cattle breeder near Oshawa in Ontario. Up to and including the years under review he had carried on his farming operations at a loss, according to his accounting, and in his income tax returns had always deducted these losses from his income from other sources. His right to make these deductions was not challenged in any of the assessments for the years prior to 1944. But in the assessments for 1944 and 1945 the Minister allowed a deduction of only 50 per cent of the farm operating losses and also disallowed the claims for depreciation allowances, although in previous years similar claims had been allowed. From these assessments the appellant appealed to the Minister who served notice on the appellant of his intention to reassess the estate and disallow the deduction of the farm operation losses on the grounds that they were personal and living expenses within the meaning of section 2(*r*) (i) of the Income War Tax Act, R.S.C. 1927, chap. 97, and, therefore, prohibited from deduction by section 6(*f*) of the Act. After complying with the requirements of the Act the appellant now brings his appeals from the two assessments to this Court.

The sections of the Act particularly to be considered in this case are section 6(*f*) which provides:

6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of

(*f*) personal and living expenses:

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and section 2(*r*) (i) which provides:

> 2. In this Act, and in any regulations made hereunder, unless the context otherwise requires,
>
> (*r*) "personal and living expenses" shall include *inter alia*—
>
> (i) the expenses of properties maintained by any person for the use or benefit of any taxpayer or any person connected with him by blood relationship, marriage or adoption and not maintained in connection with a business carried on *bona fide* for a profit and not maintained with a reasonable expectation of a profit;

The issue is whether Mr. McLaughlin's farm operating expenses were personal and living expenses within the meaning of section 2(*r*) (i) of the Act. If they were their deduction from his other income was prohibited by section 6(*f*). But if they were not, there was no reason why their deduction should not be allowed, in which case the appeals must be allowed.

It follows from what I have said that if the expenses were personal and living expenses within the meaning of the section the Minister had no right to allow 50 per cent of them as a deduction and his action in so doing was contrary to the Act. The Minister is bound by the Act and where it provides that in computing the amount of the profits or gains to be assessed a deduction shall not be allowed in respect of certain sums he has no authority to allow their deduction. He must make his assessment in accordance with the directions of the Act.

Moreover, the fact that the deduction of the farm operating expenses had been allowed in the assessments for the years prior to 1944, even after the enactment of section 2(*r*) (i), must not be taken as an admission by the Minister that the expenses were not personal and living expenses within the meaning of the section. If they were personal and living expenses their deduction ought not to have been allowed and the failure to disallow them cannot enure to the benefit of Mr. McLaughlin's estate. Indeed, no inference should be drawn from that fact.

It is well established that an assessment under the Income War Tax Act carries with it a presumption of validity until the contrary is shown and that the onus of showing that it is erroneous in fact or in law lies on the taxpayer who appeals against it: *vide Dezura* v. *Minister of National*

Revenue (1); *Johnston* v. *Minister of National Revenue* (2); *Bower* v. *Minister of National Revenue* (3): *vide* also the discussion of the nature and extent of the onus in *Goldman* v. *Minister of National Revenue* (4). Consequently, if the appellant is to succeed it must show that the facts of Mr. McLaughlin's case are such as to put his farm operating expenses outside the ambit of section 2(*r*) (i) of the Act.

The section was enacted in 1939 by section 2 of An Act to Amend the Income War Tax Act, Statutes of Canada, 1939, chap. 46, to offset the effects for the future of the decisions of this Court in *Malkin* v. *Minister of National Revenue* (5) and *Hatch* v. *Minister of National Revenue* (6). In each of these cases the taxpayer had received the benefit of the deduction of certain expenses which the taxing authority considered were substantially personal and living expenses. In the *Malkin* case the appellant had entered into a trust agreement with his four children and a trustee whereby he and they transferred their respective interests in a certain residence property to the trustee. Certain investments had also been transferred to him from which he received an income. It was one of the terms of the agreement that the trustee should maintain the residence property but the appellant was permitted to occupy it rent free. It was unsuccessfully sought to assess him on the trustee's income from the investments on the ground that it was required to be applied in payment of what were essentially his personal and living expenses. This case accounts for the first part of section 2(*r*) (i), but the *Hatch* case and one of the cases referred to in it seem to have been the sources of the rest of the section. In the *Hatch* case the appellant was the owner of a personal corporation which, for a time, merely held investments for him. But in 1927 the corporation began to operate a horse breeding farm and racing stable. The appellant included in his income tax return money received from the personal corporation after it had deducted the farm and stable expenses. It was unsuccessfully contended that these

(1) (1948) Ex. C.R. 10 at 15.
(2) (1947) Ex. C.R. 483; (1948) S.C.R. 486.
(3) (1949) Ex. C.R. 61 at 63.
(4) (1951) Ex. C.R. 274.
(5) (1938) Ex. C.R. 225.
(6) (1938) Ex. C.R. 208.

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expenses were personal and living expenses of the appellant and, therefore, not deductible. It was after these decisions that Parliament enacted the section.

The section extends the meaning of the term "personal and living expenses" far beyond its ordinary one so that, while full effect must be given to it in the circumstances specified, no matter how unusual it is, since Parliament has so enacted, care must be taken to see that it is not applied in cases that do not fall within its express words. Just as tax liability cannot be fastened on a person unless his case clearly comes within the express words of the taxing enactment so a taxpayer cannot be deprived of the right to deduct expenses to which he would ordinarily be entitled otherwise than by express words. It is the letter of the law that governs: *Partington* v. *Attorney General* (1).

It is, therefore, necessary to examine the component elements of section 2(*r*) (i) to see whether they existed in Mr. McLaughlin's case. I think that it must be admitted that his farm operating expenses were expenses of properties maintained by him for the use or benefit of himself and his wife and family and that the first condition of the section was in existence.

The next enquiry is whether the expenses were expenses of properties that were not maintained in connection with a business carried on bona fide for a profit. To take Mr. McLaughlin out of this requirement of the section the appellant must show that his farm operating expenses were those of a business that was carried on bona fide for a profit. It was contended for the respondent that Mr. McLaughlin was not in a business at all, and that his farm operations in 1944 and 1945 were not "a trade or commercial or financial or other business or calling" or "office or employment" or "profession or calling" or "trade, manufacture or business" within the meaning of section 3 of the Income War Tax Act. The facts are against this contention and I reject it. The evidence is conclusive that Mr. McLaughlin was a farmer. That was his calling or business and he had no other. He was not what is commonly called a gentleman or hobby farmer. He had always been interested in farming and wanted to become a farmer.

(1) (1869) L.R. 4 H.L. 100 at 122.

He never wanted to be anything else. Farming was his life work and he had no interest in any other occupation. He lived on his Elmcroft farm and had no other place of residence. He directed all the farm operations himself and worked along with his men in every kind of farm work. He worked hard and for long hours. He supervised the program of crop rotation, bought all necessary seed and fertilizer and looked after the harvesting. He attended to all the necessary repairs of fences, buildings and machinery. He was regarded by the community as a hard-working, thorough and competent farmer who ran his farm well. Mr. McLaughlin also personally supervised the building-up of his Holstein herd. He made all the breeding decisions himself, took steps to keep up the milk production of his cows and kept their production records carefully. He was recognized as an outstanding cattle breeder and an authority on Holsteins. He received the award of Master Breeder from the Holstein Friesian Association of Canada of which he was a director and vice-president. On the evidence, I find as a fact that Mr. McLaughlin was engaged in the business of farming and cattle breeding.

I am also satisfied from the evidence that he carried on his business as a farmer and cattle breeder bona fide for a profit. He was not merely indulging himself in an activity for pleasure. He was anxious to make a success of his work. Mr. F. Batty, a neighbouring farmer, who knew him well, stated that when he started farming he knew that his ambition was to make money on the farm. He had heard him say that he was going to make it pay. His widow, Marjorie O. McLaughlin, also said that he intended to carry on his farming for a profit. She had had many conversations with him on the subject. He realized that more money was going into the farm than was coming out but he expected that it would reach the place where it would break even and begin to make a profit. Although he suffered several set-backs in his program he never had the slightest intention of giving the farm up. He always hoped that he would get it on a paying basis so that it would be an attractive proposition to his sons. He had a conviction that he could make a go of it on a paying proposition and hoped that he would have it paying by the

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time his son George, who was going to the Agriculture College at Guelph, would be ready to start. Counsel for the respondent objected to the admissibility of the evidence I have just referred to on the ground that it was hearsay but I am of the view that it was admissible as an exception to the hearsay rule. There is abundant authority to support this view. In *Sugden* v. *Lord St. Leonards* (1) Mellish L.J. put the rule thus:

> wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what was said, because that is the only means by which you can find out what his intentions were.

Vide also 4 C.E.D. (Ont.) p. 584 and Wigmore on Evidence, 3rd Edition, para. 1714, where it is said that statements of a person's own mental or physical condition have long been the subject of an exception to the hearsay rule. But it is not necessary to rely on what Mr. McLaughlin said for there is plenty of other evidence from which it may be inferred that he intended to make a profit. He had first thought of specializing in the breeding of Shorthorn cattle but decided at an early date that they did not seem to be paying their way and he switched to Holsteins so that while he was building up his herd he could obtain a revenue from the sale of milk. He became the Oshawa Dairy's biggest and best milk producer. He had also intended to breed horses but gave this up as a non-paying proposition. Similarly, he switched from Southdown to Suffolk sheep because the former were a losing venture. Mr. Hagerty, who had been Mr. McLaughlin's foreman, said that he was always trying to do something that would make labour a little easier and cut down expense. This led him to gradual mechanization to save labour expense. He was regarded as a good farm manager. He was interested in the best seeds and fertilizers and established improved grazing clover pastures to increase the carrying capacity of his farms per acre. He was thorough in all his work and careful in his expenditures. In my opinion, there is no doubt at all that Mr. McLaughlin was engaged in the business of a farmer and cattle breeder bona fide for profit. This finding takes him out of one of the requirements of section 2(*r*) (i).

(1) (1876) L.R. 1 P.D. 154 at 251.

But it is not enough to establish that Mr. McLaughlin was engaged in the business or calling of a farmer and cattle breeder bona fide for profit. The appellant must also show that he did so with a reasonable expectation of profit. This is the most difficult portion of the onus resting on it. Whether Mr. McLaughlin maintained his farm with a reasonable expectation of profit is a question of fact to be determined in the light of all the circumstances. It was shown that he, according to his own income tax returns, had suffered farm losses in every year since 1920, that the total of these losses exclusive of depreciation came to $289,578.09 and that his claims for depreciation totalled $123,322.87. On these facts, counsel for the respondent argued that it could not be said that in 1944 and 1945 he was maintaining his farm with a reasonable expectation of profit. While there is force in this contention there are other facts to be considered.

Here it would be desirable to give a brief historical review of Mr. McLaughlin's farm operations. He began farming in 1917 when he was only 20 years of age. This was on the Elmcroft farm of 214 acres. By 1945 his holdings had expanded to 1034 acres. In 1918 and 1919 he was in the Canadian Army. When he came back he started to raise Shorthorn cattle but the price of beef cattle began to fall and in 1923 he changed from Shorthorns to Holsteins. This was because he considered that dairy cattle could do better and he could obtain milk revenue while he was building up his herd. Unfortunately, he ran into a serious infection of Bang's Disease which caused a great set-back in his efforts to build up a pure bred herd. There was great expense in treating the infected cattle, loss in selling animals at butcher prices and failure to get the natural offspring. By about 1935 his herd was free of Bang's Disease and he was able to make progress with his breeding program. He used the best sires he could obtain, kept strict account of the production records of his cows for pedigree purposes, and culled his herd rigorously, keeping only the best heifers and selling those that did not seem to fit in with his herd blood lines. In 1942 he made an important change in his breeding program. In that year he bought several outstanding Holstein cows from the Victoria Farms. This brought the standard of his Holstein

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herd up so that it was one of the ten best Holstein herds in Canada. His sires were used for artificial insemination and there were more bulls of his breeding used for that purpose in Ontario than of any other breeding. By 1944 the price of bull calves was going up, the average being $500 in that year, $800 in 1946 and $1,400 in 1948. In 1948 his son sold a five months old bull for $9,400 and in 1949 he sold one bull for $6,800 and another for $2,500.

I have some doubt whether evidence of what happened subsequently to 1945 is admissible in the determination of whether Mr. McLaughlin was in 1944 and 1945 operating with a reasonable expectation of profit but I have come to the conclusion that I can determine the question without regard to events subsequent to the years for which the assessments appealed against were made. The evidence is clear that it was Mr. McLaughlin's intention to build up as fine a herd of pure bred Holstein cattle as he could. The accomplishment of such a purpose takes a long time but it was established that he had made rapid progress towards his goal. Mr. G. M. Clemens, the secretary-manager of the Holstein Friesian Association of Canada, said that when he first knew Mr. McLaughlin's herd of Holsteins it was a good herd without being an outstanding one, but that it had become one of the top ten for the breed in Canada. Mr. Clemens' view was that if Mr. McLaughlin had relied only on good bulls it would have taken him 25 years to build up his herd, at which time he would have a profitable herd, but he had bought outstanding females in 1942 and this made for more rapid progress in the development of a top grade herd. The evidence of Mr. E. A. Innes, who was the agricultural representative for Ontario County, was more specific. He said that when he first knew Mr. McLaughlin in 1936 he had a better than average herd and that in the next 5 or 6 years it had become one of the best herds in Canada. It was his opinion that at any time during the last few years, Mr. McLaughlin could, if he had seen fit, have sold his animals and shown a profit. He thought that he could expect a profit from his herd in 1945 or 1946 or thereabouts.

I have given as careful consideration as I can to this question which is not free from difficulty and have come to the conclusion that it would not be fair to decide that Mr.

McLaughlin was not maintaining his farms with a reasonable expectation of a profit. On the contrary, I think that the better inference to draw from all the facts, notwithstanding the long list of reported losses, is that in 1944 and 1945 he did have a reasonable expectation of a profit and I so find. This finding takes his farm operating expenses out of the ambit of personal and living expenses within the meaning of section 2(*r*) (i). They were, therefore, properly deductible from his income from other sources. The result is that the appeals from the assessments herein must be allowed.

The Court cannot, of course, make any decision on the subject of Mr. McLaughlin's claims for depreciation allowances for this matter is exclusively within the jurisdiction of the Minister. All that the Court can do is to refer the assessments back to the Minister for the exercise of his discretion in respect of such claims.

The appellant should have its costs of these appeals including those of the hearing before O'Connor J. prior to his decease.

There will, therefore, be judgment allowing the appeals from the assessments, referring them back to the Minister for the purpose indicated and for costs as directed.

Judgment accordingly.

1952

May 30, June 2,3 & 26

June 26

BETWEEN:

EARL ANGLIN JAMES .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Revenue—Reference under the Customs Act—Seizure—Forfeiture—Customs Act R.S.C. 1927, c. 42, ss. 190, 193(1), 245 and 262—"Subsequent transportation" of goods liable to forfeiture—Vehicle used in transportation of goods liable to forfeiture is itself liable to forfeiture though it had no direct connection with the importation or landing of such goods.

Held: That s. 193 of the Customs Act R.S.C. 1927, c. 42, renders liable to forfeiture all vehicles used in the transportation of goods liable to forfeiture although such vehicle had no direct connection with the importation or landing of such goods. The "subsequent transportation" of such goods as set forth in s. 193 of the Act need not be directly associated with the importation and unshipping or landing or removal of the goods.

REFERENCE by the Crown under Section 176 of the Customs Act.

The action was heard before the Honourable Mr. Justice Cameron at Toronto.

F. A. Brewin, Q.C. for the suppliant.

Geo. B. Bagwell, Q.C. for the respondent.

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

CAMERON J. now (June 26, 1952) delivered the following judgment:

This is a claim referred to the Court by the Minister of National Revenue under the provisions of s. 176 of the Customs Act, c. 42, R.S.C. 1927, as amended. On November 14, 1950, the Minister gave his decision under s. 174 that certain cameras, photographic equipment and other goods, and a motor car, all owned by the claimant, were forfeited. Following service thereof upon the claimant, the latter, under s. 175, gave notice in writing that such decision would not be accepted and the matter was then referred to this Court.

All the goods in question were seized by the Royal Canadian Mounted Police on July 3 and July 5, 1950. Subsequently, a charge was preferred against the claimant:

That he, between the 1st day of November, 1949, and the 3rd day of July, 1950, at the city of Toronto, in the county of York, unlawfully did, whether the owner thereof or not, without lawful excuse have in his

possession certain goods unlawfully imported into Canada, namely movie cameras, films, camera supplies, radios, typewriters, pen and pencil sets, on which the duties lawfully payable had not been paid, the said goods being of a value for duty of $200 or over, contrary to the provisions of section 217 of the Customs Act, being chapter 42 of the Revised Statutes of Canada and amendments thereto.

To that charge the claimant pleaded guilty and was fined $700.

In the proceedings now before the Court the claimant asks for the return of the following goods as itemized in para. 2 of the Statement of Claim:

(*a*) 1949 Chrysler Car, Serial No. 7102970,
(*b*) One Ampro Projector,
(*c*) One Leica Camera, F.2 lens.
(*d*) Photographic equipment including Photo Meter.
(*e*) One Silent Typewriter, 77 Noiseless.
(*f*) One pocket radio.
(*g*) 16 Millimeter Films.

It will be observed that the claim does not include a demand for the return of some of the articles which the minister had declared to be forfeited, namely, 6 movie cameras and certain pen-and-pencil sets.

As to the articles mentioned in subparagraphs (*b*) to (*g*) of para. 2 of the Statement of Claim, the respondent alleges that they were smuggled or otherwise unlawfully imported into Canada contrary to the Customs Act and were therefore liable to seizure and forfeiture and were, in fact, seized and forfeited. In his evidence, the claimant vigorously denied that such goods were smuggled or otherwise unlawfully imported into Canada. However, when all the evidence was in, his counsel stated that without conceding that there had been any breach of the law in respect to the importation of the said goods, he was withdrawing any claim to the return thereof. Upon the conclusion of the argument, I stated that the goods mentioned in Items (*b*) to (*g*) inclusive, of para. 2 of the Statement of Claim, had been forfeited to the respondent, that the claim herein for the return of such goods would be dismissed, and I now so declare.

The one matter remaining for consideration is Item (*a*)—a 1949 Chrysler car. The ground of forfeiture alleged by the Crown is that it was used in the illegal transportation of goods liable to forfeiture under the Customs Act.

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Cameron J.

The car was purchased by the claimant, an American citizen, on June 29, 1949 (Ex. 2) in Chicago, Illinois, and was lawfully brought into Canada on March 15, 1950, the claimant being in possession of a Traveller's Vehicle Permit in respect thereof (Ex. 1). That permit, subject to certain conditions, allowed the claimant to keep the car in Canada for a period of six months.

The respondent relies on a number of the provisions of the Customs Act, but I think that for the purposes of this case it is sufficient to refer only to the following:

190.

(a) Any vehicle containing goods, other than a railway carriage, arriving by land at any place in Canada, whether any duty is payable on such goods or not; and

(b) Any such vehicle on arriving, if the vehicle or its fittings, furnishings or appurtenances, or the animals drawing the same, or their harness or tackle, is or are liable to duty; and

(c) Any goods brought into Canada in the charge or custody of any person arriving in Canada on foot or otherwise;

shall be forfeited and may be seized and dealt with accordingly, if before unloading or in any manner disposing of any such vehicle or goods, the person in charge thereof does not

(a) come to the Custom-house nearest to the point at which he crossed the frontier line, or to the station of the officer nearest to such point, if such station is nearer thereto than any Custom-house, and there make a report in writing to the collector or proper officer, stating the contents of each and every package and parcel of such goods and the quantities and values of the same; and

(b) then truly answer all such questions respecting such goods or packages, and the vehicle, fittings, furnishings and appurtenances appertaining thereto, as to the said collector or proper officer requires of him; and

(c) then and there make due entry of the same in accordance with the law in that behalf.

193. (1) All vessels, with the guns, tackle, apparel and furniture thereof, and all vehicles, harness, tackle, horses and cattle made use of in the importation or unshipping or landing or removal or subsequent transportation of any goods liable to forfeiture under this Act, shall be seized and forfeited.

245. All goods shipped or unshipped, imported or exported, carried or conveyed, contrary to this Act, or to any regulation made by the Governor in Council, and all goods or vehicles, and all vessels under the value of four hundred dollars, with regard to which the requirements of this Act or any such regulation have not been complied with, shall be forfeited and may be seized.

The contention of the respondent briefly is that the car in question was used in the importation into Canada of goods which were not lawfully entered (namely, the goods which were seized on behalf of the respondent) and/or that under s. 193(1) the car was made use of in the subsequent transportation of goods liable to forfeiture under the Act.

The first question is whether the goods said to have been imported into Canada in the car, or subsequently transported in the car, were liable to be seized and forfeited. On that point I entertain no doubt whatever. Practically all the goods seized, with the exception of the Leica camera, were manufactured in the United States, and included therein were the 6 movie cameras and the unexposed movie camera films to which special reference will later be made. All the goods seized, with the possible exception of the Leica camera and a camera tripod, were admittedly brought into Canada by the claimant. It is fully established that he did not make due entry of the same or make a report in writing to the collector at the time of entry. Each article was subject to the payment of customs duty and in most cases to the payment of sales tax and excise tax, but no duties of any sort were paid by the claimant in respect thereof. He stated in evidence that when bringing them into Canada at various times he had carried them in his hand, that he was wearing clerical garb, and that he produced to the customs examiner a badge indicating that he was a deputy sheriff of Cook county, Illinois (a purely honorary post), that the examiners made no inspection of the goods but merely waved him through the barrier. For reasons to be stated later, I do not believe his evidence.

In view of the evidence and the law applicable thereto, and considering also that the claimant has previously pleaded guilty to a breach of s. 217 of the Act in respect of such goods, I find no difficulty in deciding that all of the goods seized (except the motor car) were unlawfully imported into Canada, and under ss. 190 and 195 of the Act, as well as under other sections, were liable to forfeiture under the Customs Act.

The remaining question is whether the motor car is liable to forfeiture. For the purposes of this case, I think it is necessary to refer only to the provisions of s. 193(1) (*supra*). As I have stated above, the contention of the

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respondent is that the motor car was used in the importation or subsequent transportation of the goods seized, and which goods I have now found to have been unlawfully imported into Canada and liable to forfeiture under the Act.

S. 262 of the Customs Act provides:

> 262. (1) In any proceedings instituted for any penalty, punishment or forfeiture or for the recovery of any duty under this Act, or any other law relating to the Customs or to trade and navigation, in case of any question of, or relating to the identity, origin, importation, lading or exportation of any goods or the payment of duties on any goods, or the compliance with the requirements of this Act with regard to the entry of any goods, or the doing or omission of anything by which such penalty, punishment, forfeiture or liability for duty would be incurred or avoided, the burden of proof shall lie upon the owner or claimant of the goods or the person whose duty it was to comply with this Act or in whose possession the goods were found, and not upon His Majesty or upon the person representing His Majesty.
>
> (2) Similarly, in any proceedings instituted against His Majesty or any officer for the recovery of any goods seized or money deposited under this Act or any other such law, if any such question arises the burden of proof shall lie upon the claimant of the goods seized or money deposited, and not upon His Majesty or upon the person representing His Majesty.

The onus of proof, therefore, rests upon the claimant, it being established not only that some of the goods were found in his possession, but that he had failed in his duty to comply with the provisions of the Act in regard to all the goods (other than the motor car so seized). The claimant gave evidence to support his claim, but called no other witnesses. He flatly denies that the car was used at any time in the importation or subsequent transportation of the goods liable to forfeiture and that he ever stated that it was so used.

To establish that the car was so used in the *importation* of goods liable to forfeiture, the respondent called two witnesses, Sgt. Birkett and Constable Munro, both of the Royal Canadian Mounted Police. On July 3, 1950—the date when the goods and car were seized—Sgt. Birkett interviewed the claimant in Toronto, Constable Munro being present throughout but taking no part in the conversation or having any part in the preparation of the report of the interview made by Sgt. Birkett. Birkett referred to his notes and report which make no mention of the car or of any statement by James that the car was used in the importation of the goods. Birkett explained that at the time he was concerned only with the smuggled goods and

that the use of the car was not important in his investigation. He says, however, that James then told him that he was an American citizen, that he frequently came to Canada in his car and that the goods seized came in his car as part of his baggage and were passed through without declaration or inspection. He made no mention of entering Canada except by motor car. In cross-examination, Birkett was somewhat reluctant to pledge his oath that James had said that he used the car in importing the goods into Canada, but felt reasonably certain that he had. Constable Munro, however, was most clear in his recollection that James had stated to them that the goods were brought in by him openly exposed in the back seat of his car. James denied, however, having made any such statement, insisted that the car was never so used, and that all the goods brought in from the United States were at times when he crossed the border by train, bus or on foot.

In view of the conflicting evidence, it becomes necessary to determine what weight is to be given to the claimant's evidence. Having observed his demeanour in the witness box and having listened to his evidence and the explanations furnished by him, my opinion is that his evidence is not to be believed and I accept unhesitatingly the evidence of the Crown's witnesses in preference to his.

James claims that he is the Bishop of Chicago and the Archbishop of Canada for the Western Orthodox Church—sometimes called also the Catholic Apostolic Church—having received his appointment from the Patriarch of Glastonbury (England)—Georgius I, but in cross-examination admitted that he knew of no other member of the organization, at least in Canada if not in the United States as well. Apparently, the only pastoral work he has done was in connection with the inmates of a prison in Chicago. He is unduly impressed with his own importance as will be seen by reference to his biographical sketch (Ex. A)—prepared by himself and which credits him with being the holder of fourteen degrees. His explanation of the purposes for which he brought the six movie cameras into Canada and the manner in which the Leica camera was imported into Canada borders on the fantastic and I disbelieve it entirely. He refers to himself as "H.R.H. Prince James, Duke of Palma," as a Count and as a Viscount, claiming

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that these are titles conferred on him by various lodges. A business letter written by him (Ex. E) is headed, "The Right Honourable Dr. Earl Anglin James, General of the Legion of Honour" and bearer of a number of degrees. I am quite satisfied that in his effort to avoid forfeiture of his car he would not hesitate to deviate from the truth. It is significant to note, moreover, that he did not attempt to deny the evidence of William Woroschuck that shortly before the trial when he knew that Woroschuck would be giving evidence as a Crown witness, he requested Woroschuck to ignore or overlook the use made of his car, if that question came up at the trial.

Accepting, therefore, the evidence of Birkett and Munro in preference to that of the claimant, I find that James did state to them that use had been made of the car in importing the forfeited goods into Canada. The claimant therefore has failed to establish that the car was not used in the importation of goods liable to seizure and the onus of so doing lies upon him.

There is evidence, also, which I accept, that the car was used in the subsequent transportation of goods liable to forfeiture. The witness Woroschuck is the proprietor of a restaurant on Danforth Avenue in Toronto. In the spring of 1950, James was in the habit of visiting that restaurant and became friendly with the proprietor who displayed an interest in photography. Woroschuck says that James visited his restaurant on twelve or more occasions and that on all but two or three such occasions, he came in the car which he clearly recognized and identified as the car in question. On many of these occasions he brought in cameras and photographic material, some of which he loaned to Woroschuck, and others he sold or endeavoured to sell to him; and on only one occasion when such goods were brought did Woroschuck not see the car which at that time might have been parked out of his view.

Woroschuck states that he saw James remove from that car and bring into the restaurant an "exposure-meter, a camera tripod, and two rolls of 8 mm. films (exposed)," all of which are among the goods forfeited. He further says that on most occasions when James brought goods to the restaurant, he took a shopping bag containing such goods out of the car; that he is fairly certain that a Keystone

movie camera and a Bell & Howell movie camera were so brought in the car. He identified the Keystone camera as one of the articles which had been seized. He stated further that he had bought from James nine rolls of undeveloped films similar to those seized and which were manufactured in the United States.

James, while admitting that on a few occasions he drove his motor car to the restaurant, denies that any of the forfeited goods were at any time in the car. He admits that he took Keystone and Bell & Howell cameras to the restaurant but says that they were not the ones seized, but were similar ones for which he had an entry permit and which he later returned to the United States.

I was greatly impressed by the frank manner in which Woroschuck gave his evidence and I am quite satisfied of the truth of his statements. I find on his evidence, therefore, that the claimant did, in fact, use the car in the subsequent transportation of goods which had been unlawfully imported into Canada and which were liable to seizure.

I am unable to agree with the argument of counsel for the claimant that on a proper interpretation of s. 193(1), the "subsequent transportation" of goods must be directly associated with the importation and unshipping or landing or removal of the goods, all forming part of the one series of events. My opinion is that while hardships might perhaps occur in cases where a vehicle is innocently used only in the subsequent transportation of goods liable to forfeiture, the clear intention of s. 193 is to make such vehicle liable to forfeiture although it has no direct connection with the importation or landing of the goods.

On the whole of the evidence, I have no doubt whatever that the claimant intended to avoid payment of duties on the goods which he brought into Canada. On his own evidence, he had on other occasions obtained entry permits on similar articles which he had brought in for his own personal use while in Canada, and he therefore had full knowledge that goods of this type must be declared. It is established, also, that he had placed the Leica camera and six movie cameras in the hands of dealers in Toronto for sale. The inference is clear, namely, that he had brought them into Canada for resale.

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The penalty of forfeiture is a very severe one, particularly in a case where a claimant has already been fined for the offence of smuggling. But as pointed out in *The King* v. *Krakowec et al.* (1), the Court has no discretion in the matter but must decide according to the law and release or condemn the vehicles as the case requires, and as they come or do not come within the provisions of the Act.

On these findings, therefore, there will be judgment dismissing the claim, with costs, and a declaration that all of the goods and articles mentioned in para. 2 of the Statement of Claim have been and remain forfeited to the Crown.

Judgment accordingly.

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(1) (1932) S.C.R. 134 at 143.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1952

June 23 & 24

July 4

BETWEEN:

PRINCE RUPERT FISHERMEN'S CO-OPERATIVE ASSOCIATION } PLAINTIFF;

AND

THE SHIP *CAPILANO* ..... DEFENDANT.

Shipping—Collision—Inexperienced deckhand on watch alone—Negligence on part of Master and watchman—Damages.

Held: That it was negligence on the part of the Master of a ship to leave an inexperienced deckhand on watch alone at night without definite instructions to call the Master if he saw the lights of another ship at all close or if in any doubt whatever, and it was also negligence on the part of the deckhand not to call the Master in such circumstances.

ACTION for damages resulting from collision between two ships.

The action was tried before the Honourable Mr. Justice Sidney Smith, Deputy Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

F. H. H. Parkes and G. F. McMaster for plaintiff.

John I. Bird and W. D. C. Tuck for defendant.

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

SMITH D.J.A. now (July 4, 1952) delivered the following judgment:

This is an action of damage by collision between the plaintiffs' Motor Fishpacker *Kanawaka,* 76 feet long, 18 feet beam, 91 tons gross tonnage, and the defendant Motorship *Capilano,* 145 feet long, 27 feet beam, 539 tons gross tonnage, owned by the Union Steamships Ltd. Vancouver, which occurred about 10.45 p.m. on 24th May of this year, about three miles off Gower Point, in the Strait of Georgia.

The M.V. *Kanawaka* manned by 6 men all told and laden with some drums of oil, had left Vancouver at 8.15 p.m. that evening and was proceeding northward to Prince Rupert, while the M.V. *Capilano,* with 15 of a crew and with some general cargo, was proceeding from Billings Bay to Vancouver. The two vessels, at the material times, were on converging courses of ten degrees. The weather

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was fine, the atmosphere clear and not particularly dark. In these conditions they should not have collided; that they did so was due, I think, to the fault of both.

Only one man in each ship was keeping a look-out; Ketill Nerheim, deckhand, in the *Kanawaka* and Cecil R. Marshall, 2nd officer, in the *Capilano*. The case for the *Kanawaka* was that while proceeding towards Gower Point on a course of 265° magnetic she saw the two white mast-head lights and later the green light of the *Capilano* on her starboard bow; that the two vessels would have passed green to green had not the *Capilano* when about to pass, suddenly altered her course to starboard and collided with the *Kanawaka* resulting, shortly thereafter, in the total loss of that vessel and her cargo. No lives were lost. The case for the *Capilano* was that when on a course 95° magnetic she saw the red light of the *Kanawaka* on her port bow, that the two vessels would have passed port to port had not the *Kanawaka* suddenly and without warning, sharply ported her wheel and crossed the bows of the *Capilano,* thereby making collision inevitable.

I have decided that the story of the *Kanawaka* is the more acceptable. The *Kanawaka* left Vancouver in Nerheim's watch, but the Master took her out of harbour and as far as Point Atkinson. Then he turned her over to Nerheim with instructions to keep her off the land one mile at least, to alter his course at Cape Roger Curtis to 265° compass (which was also the magnetic course) and to call him at 10 p.m. to listen to the Fishermen's "conference" on the radio. It was customary at this time for the plaintiffs' vessels to receive orders and exchange news. The Master then retired to his room immediately abaft the wheel-house leaving the door open, lay down in his bunk and went to sleep.

I was impressed by the manner in which Nerheim gave his evidence. He is a Norwegian, 27 years of age, and quite plainly a man of education, intelligence and integrity. He holds a Bachelor of Science degree from the University at Oslo. He was at this time taking a medical course at the University of Southern California, and had come to Canada to make some money to continue his studies. He had only been in this country two months. This was his

first job and he had been employed only one month prior to the collision. He had no previous experience of the sea except as a boy in sail-boats on the Norwegian Coast. Some may say this is the best of sea-training, and it may be so. But it was not of much use in the events of this night. He had also done a trip as 2nd cook in a freighter in the course of which, as I understood, he had visited Vancouver. No doubt this is what drew him back to this Coast. He was not shaken in cross-examination. His positions, times, distances and the amount of his course alteration were all approximations; so little is gained by plotting his courses on the chart.

Nerheim unfortunately did not call the Master at 10 o'clock, because the radio reception was not good and he could not get the "conference". He altered course as instructed at Roger Curtis and, as he thought, about ten minutes later and ten miles away saw a white light and shortly after two white lights about half-a-point on his starboard bow. He thought correctly that this was a power vessel on much the same course as his own, and hauled out some five to ten degrees to give her more sea room. About five minutes later he returned to his course of 265°. At that time he saw the other vessel's green light about the same bearing on his starboard bow and judged they would pass starboard to starboard. He watched her carefully and found that when about 300 yards off she showed her red light, gave one short blast, and altered her course suddenly to starboard. He concluded that the only chance to avoid a collision was to alter his to port, and so he did. This almost succeeded but not quite. The *Capilano* (for it was she) struck him on the starboard quarter, six to seven feet from the stern, with the resultant sinking.

I think that the initial fault here lay with the Master. He should have given more specific instructions to Nerheim. He should have told him most emphatically to call him if and when he saw the lights of another vessel at all close, or if he were in any doubt whatever. To leave him there, with his little pertinent experience, not even knowing, as I gathered, how to signal below to stop the engines, was in the circumstances inexcusable. Then I think Nerheim should have called the Master, regardless of instructions, when he saw the lights of the *Capilano* bearing down on him. The

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question of lights here is extremely difficult and confusing. As I have said, Nerheim saw the *Capilano's* masthead lights and green light close on his starboard bow. But his chief engineer, who was on deck from time to time, said he saw the *Capilano's* white lights and red light (not the green) on much the same bearing. I have puzzled a great deal over this. The only conclusion I can reach, and that a not very satisfactory one, is that both her red and green lights were then visible, and that for some reason the engineer saw the former and the deckhand the latter.

The *Capilano's* account is just as difficult to understand. Marshall said he saw the *Kanawaka's* red light about 1 to 1½ points on his port bow, and about 1½ miles away. He was unable to say why he did not see the *Kanawaka's* white masthead light. This was electric, was burning brightly, and by the regulations was visible five miles. Yet he did not see it then or at any time. With respect to the red light he gives different accoutns in his pleadings and in his evidence at the trial. In the former he says that he carefully watched the red light and saw it suddenly change to green as if the wheel had been sharply ported. Before me the effect of his evidence was that he saw the red light four or five (perhaps six) minutes before the collision; that he watched it for three or four minutes; that its bearing did not substantially change; that he then withdrew his attention from it for a minute or more, being satisfied that the two ships would pass clear red to red; that he then noticed the red had changed to green. He immediately starboarded, gave one blast, and went full astern; but he struck the *Kanawaka* very soon afterwards on her starboard quarter. I have no doubt that the *Capilano* was the first to alter course; in other words, that the *Capilano* starboarded and that this caused the *Kanawaka* to port and not the other way round, as claimed by the *Capilano*. It may be of some significance that the quartermaster at the *Capilano's* wheel saw the green light of the *Kanawaka* but saw nothing of her red light.

I did not form any unfavourable opinion of Marshall. I thought he gave his testimony truthfully as he saw it. I appreciated that he was the holder of a passenger mate's certificate and had had some twenty-six years' experience as an officer on this Coast. But I could not associate his

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evidence with an efficient look-out or with the dictates of good seamanship. It seemed to me quite evident no proper look-out was being kept on the *Capilano* that Marshall failed to appreciate the significance of what he did observe, and so failed to take proper measures in due time to avoid the collision.

Mr. Parkes referred me to the well-known passage from the speech of Lord Sumner in *The Peter Benoit* (1) dealing with apportionment of liability. I have had that passage in mind; and have considered at length every relevant circumstance in the navigation of both vessels; and in the end I think I must distinguish between the degrees of fault. I hold the *Kanawaka* two-thirds, the *Capilano* one-third to blame, with corresponding costs.

Each vessel conceded that if the other were held in fault she would be entitled to limit her liability. I therefore hold that both are so entitled. If necessary, a reference will be held by the learned Deputy Registrar to determine the respective damages. Should any question arise in the working out of this judgment, either side may apply.

Judgment accordingly.

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(1) (1915) 13 Asp. 203 at 208.

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June 25 & 26

July 2

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

PACIFIC SALVAGE LTD. .....PLAINTIFF;

AND

CANADIAN PACIFIC RAILWAY CO., WESTMINSTER PAPER CO. LTD., and AMERICAN VISCOSE CORPN. ..... DEFENDANTS.

Shipping—Salvage—Subsidy not considered in making an award for salvage—Amount of award.

Held: That an award for salvage should be liberal and consideration should be given to every relevant factor such as the danger involved in performing the service, the value of the property salved and the availability of other vessels, but not to a subsidy paid by the Dominion Government to one vessel employed in performing such service.

ACTION for salvage.

The action was tried before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

John L. Farris, Q.C. and Donald Pool for plaintiff.

J. A. Wright and *J. G. Alley* for defendant Canadian Pacific Railway.

Alfred Bull, Q.C. and *C. C. I. Merritt* for other defendants.

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

SIDNEY SMITH, D.J.A. now (July 2, 1952) delivered the following judgment:

In this action the plaintiff asks the Court to award salvage remuneration for services rendered to the ss. *Nootka* and her cargo on March 15, 1950, and subsequent days, in the following circumstances:

The plaintiff company is the owner of two vessels specially equipped for salvage operations. They are the *Salvage King* stationed at Victoria, and the *Salvage Queen* at Vancouver. With respect to the former the plaintiff receives a subsidy at the present time of $25,000 a year from the Dominion Government. These vessels are kept available day and night in readiness to go to the assistance

of any ship in distress. For this purpose they are, generally speaking, fully equipped to carry out any kind of salvage operation. The evidence shows that the *Salvage Queen* is valued at $97,000 on the books of the company, and has a replacement value of $200,000. She costs for maintenance $3,000 per month lying alongside her dock awaiting a call. It will be convenient to mention here that the salved value of the cargo is agreed at $200,000, and that on the evidence I place the salved value of the *Nootka* at $15,000, making a total salved value of $215,000.

On the aforesaid date the ss. *Nootka* (owned by Canadian Pacific Railway Company) was on a voyage from Port Alice, B.C. to Vancouver, B.C., loaded with a full cargo of some 1,700 tons of processed wood pulp (owned by the other two defendants), and about 8 p.m. was proceeding in a southeasterly direction through Johnstone Strait, at that point about 1 mile wide. The weather was bad: there was blowing a S.E. gale with wind velocity of 40 miles per hour and with heavy rain squalls which much impaired the visibility but, in these narrow waters, with no sea. What happened then is described in the ship's log thus:

WEDNESDAY, March 15th, 1950.

8.16 p.m.—Steering E. & S. ship stranded on southern tip of Walkem Islands. Engines stopped immediately. Engine room time 8.17 p.m. Bilge pumps started immediately. Fish oil pump from fore peak at 9 p.m.

Soundings were taken around the ship and we were found to be resting on a rocky ledge with least depth of water 2 fathoms at break of forecastle head starboard side and 2½ fathoms opposite foremast. From that point the water deepened to 25 fathoms at the stern.

On the port side least depth found was 3 fathoms at forecastle head, 4 fathoms opposite foremast and then deepening to 25 fathoms at stern. Capt. Gillison, Vancouver, was notified by telephone. Tank soundings were taken and four feet of water was found in fore peak with no change in other tanks. A call was sent out to any tow boats in the vicinity to which the *Skeena Beaver* and *Sekani* answered. Tank soundings at 9 p.m. showed the fore peak rising and water coming in slowly in No. 1 D.B. (double bottom) fuel oil tank.

Tank soundings at 10 p.m. showed the fore peak tank at sea level. No 1 D.B. rising slowly and No. 2 hold 1 foot 6 inches.

At 10.18 p.m. ship's head swung quickly to port. Believing the ship to be afloat, as the tide was rising, the engines were put half astern, then full astern and stopped. Engine room times were half astern 10.19½, full astern 10.20 and stopped at 10.22½. Ship was still held fast on reef with her head N.N.W. 10.30 p.m. lifeboats swung out. Soundings were again taken on the starboard side where at low water a depth of 30 feet

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was found at stem, 19 feet abreast No. 1 hatch, 15 feet at foremast, 17 feet at No. 2 hatch, 19 feet at forward end of bridge deck, 36 feet at after end of bridge deck and then deepening rapidly.

On the port side 21 feet at forecastle head, 24 feet at foremast, 24 feet at forward end of bridge deck then deepening rapidly.

At 10.45 p.m. *Skeena Beaver* arrived and tied up alongside.

THURSDAY, March 16th, 1950.

At 1.15 a.m. *Sekani* arrived. At 3.40 a.m. had *Sekani* placed on port quarter to hold ship steady as she started to swing in current.

8.45 a.m. *Salvage Queen* alongside with salvage crew and pumps.

10.10 a.m. Barge *V.T. 28* put alongside, port side, and discharging of pulp from No. 2 hatch commenced.

10.30 a.m. commenced discharging pulp from No. 1 hatch.

Noon—Quit for lunch.

12.30 p.m.—Resumed discharging pulp from Nos. 1 and 2.

5 p.m.—Quit for dinner.

6 p.m.—Resumed discharging at No. 2.

7 p.m.—Longshore gang resumed discharging No. 1.

11 to 11.30 p.m.—Crew quit No. 2 for night lunch.

Midnight—Longshore gang quit No. 1 for night lunch.

FRIDAY, March 17th.

1 a.m.—Longshore gang resumed discharging No. 1.

2 a.m.—Stopped discharging both hatches.

2.01 a.m.—Full astern. Ship backed off reef, with assistance of tug *Sekani* on port quarter.

2.03—Stopped engines, ship afloat.

2.05—Half astern; 2.06 Half ahead; 3.33 Ripple Pt. abeam;

3.49—Edith Point abeam; 3.54 a.m. stop; 4.22 a.m. anchored in Mayne Passage; Port Anchor, 18 fathoms water, 45 fathoms cable.

6 a.m.—Longshoremen finished covering pulp with tarpaulins and left for Rock Bay on *Skeena Beaver*.

6.15 a.m.—*Sekani* departed.

6.30 a.m.—Tug *La Force* left with barge *V.T. 29*.

FRIDAY, March 17th, 1950.

2.08 p.m. Departed Mayne Passage.

(Details omitted here as not material)

SATURDAY, March 18th, 1950.

6.35 a.m. Arrived Vancouver.

I have set out the foregoing log entries in full, because they describe the events that happened succinctly and accurately, and also because they seem to me to be the correct and seamanlike way to enter up the log-book on occasions such as these.

The entries (and the evidence supports them) indicate a routine salvage service with no special difficulties or complications. The gale moderated next morning and blew itself out during the day. It did not affect the salvage operations. These proceeded smoothly due largely to the co-operation of all concerned; and in particular of Capt. Robson, Master of the *Nootka;* Capt. Clarke, Chief Surveyor at Vancouver of the Board of Marine Underwriters of San Francisco; Captain Gillison, Marine Superintendent at Vancouver of the Canadian Pacific Railway Company; and Mr. George H. Unwin, Salvage Superintendent of the plaintiff company. Of these four gentlemen Capt. Clarke and Capt. Gillison at Vancouver were the controlling minds. Their word was final. On board, at the scene of operations, Mr. Unwin and the Master of the vessel worked in the closest harmony.

The first vessel to arrive was the *Skeena Beaver* at 10.45 p.m. This tug-boat acted as a messenger and general runabout throughout the operations. She has nothing to do with the plaintiff company and makes no claim in these proceedings. The *Sekani* (valued at $90,000) arrived at 1.15 a.m. on Thursday. She was on charter to the plaintiff company. She performed one single duty, viz., to keep the *Nootka* steady across the Strait on her NW heading. The whole purpose of this was to prevent further damage to the forward bottom plating of the *Nootka* by such plating crunching on the rocks were the *Nootka's* stern allowed to swing freely in the current. The *Sekani* performed this duty under direction of Capt. Robson, who shifted her from one quarter to the other as the current changed. Her job was therefore one of a less exacting nature—simply pushing with her nose against the side of the *Nootka* with a force just sufficient to keep the *Nootka* steady. She commenced this duty at 3.40 a.m. on Thursday and continued it until 2.01 a.m. on Friday when the *Nootka* got free. This is the "assistance" referred to in the log.

The next vessel to arrive was the *Salvage Queen* at 8.45 a.m. on Thursday. Her service consisted of supplying pumps and of standing-by. Her crew assisted in the discharge of the cargo (500 tons in all were unloaded into Barge *V.T. 28*). Longshoremen arrived at 4.15 p.m. on Thursday, as arranged by Mr. Unwin and the Master.

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They had previously arranged for the use of Barge *V.T. 28* towed thither by the tug *La Force*. At Mayne Passage Unwin (who was also a master-diver) examined the ship's bottom. He found her seaworthy to proceed to Vancouver. This she did under her own steam accompanied by the *Salvage Queen* whose pumps and pump crews were kept on board until her arrival at Vancouver on the morning of the 18th, and until she docked at Pacific Drydock, North Vancouver, two days later.

I think all witnesses gave their evidence with frankness. But the testimony of Capt. Robson particularly appealed to me. I judged him to be an able ship-master who gave his account of the happenings with forthright accuracy. Nor had I any difficulty in accepting the evidence of Mr. Unwin, save as to this: I have a note in my bench-book of his saying that if the *Sekani* had not been there the *Nootka* and cargo would have become a total loss. I am not able to accept this. I think in this event the *Skeena Beaver* would have been available to steady the *Nootka* and there is nothing to show her incapable of so doing. Failing this, other tugs would have been sent thither by Clarke and Gillison. And even failing these tugs being forthcoming, I am satisfied on the evidence that (within any reasonable time) there might have been some further damage to hull and cargo, but nothing more. This is the view of the Master, and I see no reason to question its validity. One must remember, as Mr. Bull pointed out, that all this happened in the narrow sea highway between Vancouver Island and the mainland.

In these circumstances I have to determine the appropriate award. In *The M.V. Florence No. 2* (1), I referred to the factors which go to the making of a salvage award, and I need not repeat them here. The award should be liberal. Salvors should be encouraged: particularly those with a special type of vessel such as we have here. (See *The Glengyle*, infra). Reference was made by counsel to Sutton on the Assessing of Salvage Awards (1949). Defendants submit that under the system elaborated

(1) (1948) Ex. C.R. 426 at p. 434.

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therein, in the light of the author's careful analyses of recent cases, the award would not exceed at the utmost 6 per cent of the salved value. This would seem to be so.

The nearest comparable case referred to was *The Glengyle* (1), and in the Lords. In that case two specially equipped salvage vessels, owned by separate companies and kept ready at Gibraltar, went to the assistance of a passenger vessel the *Glengyle* which had been in collision and whose passengers and crew had been transferred to the colliding vessel. The salvors made fast one on each side of the *Glengyle,* admittedly in a sinking condition. They succeeded in beaching her, at considerable danger to themselves and their crews, for had the *Glengyle* sunk on the way, there was "not a certainty but a great probability" that salving vessels and their crews would have been lost too. They were awarded £19,000 which was 25 per cent of the salved value. They each received one-half of this award. But there the circumstances were very different from those here. There, there was danger: here there was none. There the service was performed by two very specially equipped salvage vessels, with none others available that would have been of the slightest use; here there was on such vessel and a tug, with other vessels and tugs, which could have done the job just as efficiently, readily available. There the service was on a "no cure, no pay" basis; here had the service utterly failed the plaintiff would still have received all expenses and some margin of profit as well.

Comparing that service with this, and taking into consideration every relevant factor (but not the subsidy) it may be said that there is no justification here for an award greater than 10 per cent of the salved value, viz., $21,500. Nevertheless, I think a more adequate award would be the good round sum of $27,500. In this regard I have particularly in mind the rather large items paid by the plaintiff and set out in its statement of claim, as a guide; and also the fact that while, no doubt, the higher cost of everything today is reflected in plaintiff's favour by the higher salved value,

(1) (1898) P. 97. (1898) A.C. 519.

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yet I am not sure that this would afford complete compensation in the present case. And I think it was conceded that the costs generally of such operations in Western Canada today differ widely from those prevailing on the Continent of Europe half a century ago.

The plaintiff will therefore have judgment for $27,500 and costs.

Judgment accordingly.

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May 19, 20 & 21

July 31

BETWEEN:

MR. W.....APPELLANT;

AND

MINISTER OF NATIONAL REVENUE RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 2(1)(n), 30, 31(1)—Application of partnership law to the provisions of the Income War Tax Act—The Partnership Act of Ontario, R.S.O. 1950, c. 270, ss. 2, 3, r. 3(3)—Deed of partnership does not necessarily of itself constitute partnership for income tax purposes but all circumstances to be considered to ascertain whether partnership exists in fact —Partners if they are shown partners in fact entitled to pay tax only on their individual shares in the partnership income—No distinction drawn under s. 30 of the Income War Tax Act between a trading partnership and one of professional men—Appeals from the Income Tax Appeal Board allowed.

The appellant is a barrister, solicitor, patent attorney and a member of a legal firm entered by him as a partner some few years ago. His admission raised the number of partners to three. The firm also controlled the business of a firm of patent attorneys. In 1943 the three partners agreed to carry on separately the two businesses, their respective interests being identical in each of the two firms. It was also provided that on the death of any partner in the firm of patent attorneys the surviving partners would admit his widow and adult daughters as partners in the said firm if they then survived and so desired. The shares in the said firm to which the widow and daughters were entitled while they continue to survive were set at . . . . a year subject to minor variations. One of the senior partners died on May 18, 1944, and the other senior member on September 4, 1948, and, in both cases, their widows and daughters declared their willingness to become partners in the firm of patent attorneys. In the meantime, on January 1, 1945, another lawyer and patent attorney became a member of the legal firm and also of the patent attorney firm. The situation on and after September 4, 1948, thus was that there were two active partners and six women who had been admitted as partners in the firm of patent attorneys. From January 1, 1946, to September 4, 1948, the net income of that firm was divided between the three active members and the widow and three daughters of

the senior member who died on May 18, 1944, and from September 5, 1948, to December 31, 1948, between those persons and the widow and daughter of the other senior member who died on September 4, 1948, and in the proportions agreed upon by them. The Minister contending that only three men were partners in the firm from January 1, 1946, to September 4, 1948, and only two from September 5, 1948, to December 31, 1948, disallowed the payments made to the wives and daughters and apportioned the whole of the income from January 1, 1946, to September 4, 1948, between the three partners, and from September 5, 1948, to December 31, 1948, between the two partners in the same proportion as they were respectively entitled to in each of the said years, and assessed the appellant accordingly. From these assessments the appellant appealed to the Income Tax Appeal Board which dismissed the appeal.

Held: That a deed of partnership does not necessarily of itself constitute a partnership for income tax purposes but regard may be had to what was done thereunder to ascertain whether there was a partnership in fact.

2. That in the absence of any provisions in the Income War Tax Act restricting the ordinary meaning of the words "partner" and "partnership" or conferring on the Minister the right to allocate the income of the partnership in any special way between the partners (as for example between "husband and wife" partnerships as in s. 31), the partners thereunder have the right to determine who will be their partners and the share to which each is entitled in the income therefrom; and if, under all the circumstances of the case, they are shown to be partners in fact, the members of the partnership are entitled to the benefit of s. 30 and to pay tax only on their individual shares in the partnership income.

3. That under s. 30 of the Income War Tax Act no distinction is drawn between a trading partnership and a partnership of professional men. The sole requirement is that "two or more persons are carrying on business in partnership" and if that requirement is met, then the respective shares in the income of the partnership shall be the taxable income of the partners.

4. That, although the wives and daughters were neither barristers, solicitors or patent attorneys and none of them participated in any way in the conduct of the business of the firm of patent attorneys, under all the circumstances of the case, they were in fact partners with the active partners in carrying on the business for the several periods in question and that the appellant in respect of his income derived from that firm was liable only to the extent of his share therein as agreed upon by all the partners.

APPEALS from the decision of the Income Tax Appeal Board dismissing the appellant's appeals against his 1946, 1947 and 1948 assessments.

The appeals were heard before the Honourable Mr. Justice Cameron at Ottawa.

R. A. Bell, Q.C. for appellant.

W. R. Jackett, Q.C. and *E. S. MacLatchy* for respondent.

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

CAMERON J. now (July 31, 1952) delivered the following judgment:

By its decision dated February 5, 1952, the Income Tax Appeal Board disallowed the appellant's appeal from assessments to income tax for the years 1946, 1947 and 1948 (5 T.A.B.C. 375). From that decision an appeal is now taken to this Court. As both appeals were heard in camera, the name of all parties concerned will be omitted. No oral evidence was given on this appeal, it being agreed that that given before the Tax Appeal Board should be the evidence before me.

There is no dispute as to the facts, the sole matter in issue being the application of partnership law to the provisions of the Income War Tax Act, and the same principles apply to each of the taxation years in question. The appellant is a barrister, solicitor and a patent attorney and will hereinafter be referred to as "W"; for the three years he was a member of a legal firm, which I shall call "X and Y," and also of a firm of patent attorneys which I shall refer to as "Q and Co." The basic documents and agreements on which the appeal is founded are contained in Ex. A-2 and will be individually referred to by their tab numbers.

The legal firm of "X and Y" was founded in 1926 by Mr. "X" and Mr. "Y" (Tab. 4), and until January 1, 1940, when "W" became a partner (Tab. 6), they were the only members. For many years "X" had an interest in "Q and Co." which had branches in Canada and the United States, and by his agreement with "Y", the net income which "X" derived from "Q and Co." was added to the income of the legal firm of "X and Y" and divided in certain agreed proportions between "X" and "Y", and after "W" became a partner of "X and Y," between "X," "Y" and "W". As a result of certain proceedings, "X" became the sole member of the firm of "Q and Co." in September, 1940. Subsequently, the agreements between "X", "Y" and "W" were modified by an agreement dated November 18, 1943 (Tab. 7). Thereby, the three partners agreed to carry on separately the two businesses formerly carried on by "X" as "Q and Co.," and by "X", "Y" and "W" as "X and Y," the

respective interests of the three parties being identical in each of the two firms. It provided that all interest of a partner in the assets and goodwill of each firm should cease and determine upon his death; and that the provisions of all prior agreements relating to the interest of a deceased partner and to the benefits to be enjoyed by his widow and/or daughter, or daughters, were cancelled.

The following special provisions related solely to the firm of "Q and Co." and these are of particular importance inasmuch as the appeals herein relate entirely to the income derived from that firm.

3. Upon the death of any partner in the firm of "Q and Co." the surviving partners will admit the present wife of the deceased partner as a partner in the said firm if she so desires and then survives.

4. The share in the firm of "Q and Co." to which the widow of either "X" or "Y" shall be entitled while she continues to survive shall be the proportion which $8,000 bears to the total income of the firm in any year provided that the profits at least equal $12,000 and shall abate proportionately to the amount by which the said profits fall below that sum.

5. The interest of the widow of "W" shall be the proportion which $1,500 bears to the total income of the firm in any year provided that the profits at least equal $12,000 and shall abate proportionately to the amount by which the said profits fall below that sum.

6. In no circumstances shall the total interests of all the widows admitted to the partnership hereunder exceed 66 2/3 per cent of the total income of the firm in any year and if in any year 66 2/3 per cent of the income is insufficient to provide the amounts hereinbefore specified in full the interests of each of the several widows shall abate proportionately to the deficiency.

7. In addition, but only when and to the extent that the interests of any widow or widows who become partners in the firm by virtue of this agreement are together less than 66 2/3 per cent of the profits of the business in any year, the adult daughters of any of the parties hereto who desire to do so shall be admitted as partners in the firm of "Q and Co." and while they respectively survive their respective interests shall be the proportion which $1,200 bears to the total profits of the business in any year and shall abate proportionately to any deficiency below 66 2/3 per cent of the said profits after the interests of all widows have been satisfied.

8. Forthwith upon the death of any widow or daughter who becomes a partner in the firm of "Q and Co." pursuant to this agreement, her interest in the assets and goodwill of the firm shall cease and determine.

Then Clause 9 provided that the figures of $8,000, $1,500 and $1,200 should be varied from time to time by reference to the variations of the monthly index figure of wholesale prices published annually by the Bureau of

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Statistics, the index figure of December, 1941, being taken as the base, certain other details thereof also being provided but which are not here of importance.

"X" died May 18, 1944, at the age of fifty-eight years. His widow declared her willingness to become a partner in "Q and Co." and by an agreement dated October 2, 1944 (Tab 8) executed by her and by "W" and "Y", it was agreed that the said business should thereafter be carried on by these three parties as partners. Thereby it was agreed that the net income—as therein defined—should be divided as follows: (*a*) To the widow of "X"—$8,475, such amount being subject to certain stated variations and to the condition that her share should not exceed two-thirds of such profits; (*b*) to "W" and "Y" one-half each of the balance.

It was further provided:

4. "Y" and "W" or the survivor of them shall be exclusively entitled to the management and control of the business of the firm and may admit such other partners in the said firm and business as they shall see fit or exclude any partners so admitted.

5. The share of the profits receivable by Mrs. "X" shall not be reduced by the admission of any additional partner other than the present wives of "Y" and "W" who may be severally admitted as partners after the death of their respective present husbands on the same footing as Mrs. "X", in which event the sums payable to Mrs. "X" and to the wife or wives so admitted shall not together exceed two-thirds of the profits.

6. "Y" and "W" or the survivor of them shall have the right to designate which of the persons who at the time of such designation are partners in the firm shall after the death of the survivor of "Y" and "W" be exclusively entitled to the management and control of the business of the firm, and the partner or partners so designated shall be entitled to such management and control accordingly shall have the same power as hereby given to "Y" and "W" to designate their successors to manage and control the firm.

8. Mrs. "X" may give three months' notice at any time to determine her interest in the partnership and shall not be responsible for the liabilities thereof incurred after the date upon which the notice takes effect.

10. All interest of any partner in the firm or its then assets shall determine forthwith upon his or her death, and the personal representative of any deceased partner shall not have any claim against the surviving partners in respect of the goodwill or any other asset of the firm existing at the date of the death of such partner.

The agreement was to have effect from May 19, 1944, the day following the death of "X".

By a further agreement also dated October 2, 1944 (Tab 9), the three daughters of "X" were taken into the firm of "Q and Co." and it was agreed that the business should thereafter be carried on by "W", "Y", Mrs. "X" and the said three daughters (who were called the parties of the second part). Then Clauses 2 and 3 provided:

2. Each of the parties of the second part shall be entitled to receive $1,271 yearly out of the profits of the said business ascertained as set out in the principal agreement subject to variation upwards or downwards as set out in the schedule hereto and subject to the conditions that there remains of the said profits for distribution under the principal agreement between the partners other than Mrs. "X" and the present wives of the said "Y" and "W" (if either or both the said wives is or are admitted to the partnership under the terms of the principal agreement) an amount at least equal to one-third of the profits ascertained as aforesaid, and that if such remainder is insufficient to pay the parties of the second part in full, the sums payable to them shall be reduced equally and proportionately.

3 The amounts payable to the parties of the second part shall be subject to further reduction if after the death of "Y" and/or "W" any daughter of either is admitted to the partnership on the same footing as the parties of the second part, in which event that part of the profits, if any, out of which the shares of the said parties of the second part are payable shall, if insufficient to provide for payment in full to each of the parties of the second part and to each of the daughters so admitted, be distributable equally among the said parties of the second part and the said daughters.

On January 1, 1945, Mr. "T", a lawyer and patent attorney, became a member of the legal firm of "X and Y" and also of "Q and Co.," the agreement in regard to the latter firm being reduced to writing on August 8, 1947 (Tab 10). By that agreement, certain provisions of the first agreement of October 2, 1944 (Tab 8) were incorporated therein, and it was provided that upon the death of "Y" and "W", "T", if then a partner, should be exclusively entitled to the management and control of "Q and Co." Similar provisions were made for the admission as partners of "T's" wife and daughters upon his death and the payment of specified shares of the income to them, that of the wife being limited to $4,200 and that of any daughter to $1,200, subject to certain variations.

"Y" died on September 4, 1948. Thereafter, and pursuant to the terms of the agreement of November 18, 1943, his widow and unmarried daughter declared their willingness to become partners in the firm of "Q and Co.," and

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while no written agreement was filed, the evidence establishes that similar arrangements were entered into with them as had been made with Mrs. "X" and the three daughters of "X" respectively, such arrangements being effective September 5, 1948.

From January 1, 1946, to September 4, 1948, the net income of "Q and Co." was divided in accordance with these arrangements between "Y", "W", "T", Mrs. "X" and the three daughters of "X". From September 5, 1948, to December 31, 1948, it was so divided between those persons (except "Y") and Mrs. "Y" and Miss "Y". The amounts received by all except "Y", "W" and "T" are shown in para. 28 of the Statement of Claim. Para. 10 shows the proportions thereof received respectively by "Y", "W" and "T" in each year, their shares being paid into the firm of "X and Y," and thereafter their shares in the two firms were payable to them individually, those of the appellant being shown in para. 17 of the Statement of Claim.

Income tax is not levied against the income of a partnership as such. In this case, the income of "Q and Co." was divided between the various persons who were considered to be partners, and in the proportions agreed upon by them. The full amount received by the appellant in each case was included in his annual returns and there is evidence that some, if not all, of the others (including Mrs. "X") completed their individual returns and were taxed accordingly. The Minister being of the opinion that only "Y", "W" and "T" were partners in the firm from January 1, 1946, to September 4, 1948, and only "W" and "T" from September 5, 1948, to December 31, 1948, declined to permit the deduction of any payments made to the wives and daughters of "X" and "Y" and apportioned the whole of the income from January 1, 1946, to September 4, 1948, between "Y", "W" and "T", and from September 5, 1948, to December 31, 1948, between "W" and "T", in the same proportion as they were respectively entitled to in each of the said years, and assessed the appellant accordingly. As I have stated, the Income Tax Appeal Board affirmed the assessments made upon the appellant.

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The appellant relies upon s. 30 of the Income War Tax Act, which is as follows:

> 30. Where two or more persons are carrying on business in partnership, the partnership as such shall not be liable to taxation but the shares of the partners in the income of the partnership, whether withdrawn or not during the taxation year shall, in addition to all other income, be income of the partners and taxed accordingly.

The appellant submits that the wives and daughters of "X" and "Y" were, in fact, partners in "Q and Co." for the respective periods mentioned and that the payments received by them were received as partners and not otherwise. "Partnership" is not defined in the Act and I am therefore in agreement with the submission of appellant's counsel that the question as to whether the wives and daughters were or were not partners must be determined under the general law. As far as I am aware, the Income War Tax Act contains only two provisions relating to partnership, other than s. 30. By s. 2(1) (*m*), the income of a partner actively engaged in the conduct of the business of a partnership is declared to be "earned income," and it would follow from s. 2(1) (*n*) that the income of a partner not actively engaged in the conduct of such business would be "investment income." This, it seems to me, is a clear recognition that even under the Act a person can be a partner in a partnership although not actively engaged in the conduct thereof. Then by s. 31(1), the Minister is given a discretion in allocating the total income of a partnership to either husband or wife, where they are in partnership; but neither that subsection or the remaining portions of s. 31 have here any application.

It is common ground that the wives and daughters of "X" and "Y" were neither barristers, solicitors or patent attorneys; that none of them had any experience or training in any of these professions; that none of them participated to the slightest degree in the conduct of the business of "Q and Co." at any time or did anything whatever in relation thereto after they became "partners," except to receive their regular proportions of the income therefrom. Mrs. "X" has re-married and the three daughters of "X" have married, one or more of them now residing out of Canada. Further, I find that as each entered into the "partnership" agreement she brought nothing into the firm by way of capital or otherwise. Upon the death of

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"X" and "Y", their respective interests in the assets and goodwill of the firm ceased forthwith. What the rights of the wives and daughters would have been had they been refused entry into the firm, or what they would have taken out in the event of a dissolution is here of no importance and need not be considered. The assets of the firm were not enhanced in any way when they respectively became members and there is no evidence that any of them at any later period brought in any capital. No change was made in the firm name which has always been known as "Q and Co.," and there was no change in the conduct of the business after the wives and daughters became "partners."

Partnership, though often referred to as a contract, is a relation resulting from a contract. By the Partnership Act of Ontario (in which province the head office of "Q and Co." was located) now found in R.S.O. 1950, c. 270, it is defined by s. 2:

2. Partnership is the relation which subsists between persons carrying on a business with a view of profit—.

Then by s. 3 thereof there shall be taken into consideration, in determining whether a partnership does or does not exist, certain rules, including 3(3).

3. (3) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but the receipt of such a share or payment, contingent on or varying with the profits of a business, does not of itself make him a partner in the business, and in particular,

The interpretation to be placed on the latter provision is stated in Lindley on Partnership, 11th Ed., at p. 44 as follows:

The effect of sharing profits as prima facie evidence of partnership was considered by the Court of Appeal in the case of *Badeley* v *Consolidated Bank*, 38 Ch. D. 238, pp. 250-258, and was there explained to be that if all that is known is that two persons are participating in the profits of a business, this, unless explained, leads to the conclusion that the business is the joint business of the two and that they are partners. But if the participation in profits is only one among other circumstances to be considered, it is wrong then to say that the participation in profits raises a presumption of partnership which has to be rebutted by something else; in such a case all the circumstances must be considered in order to ascertain the real intention of the parties before any conclusion is drawn.

In this case there are circumstances other than the mere participation in profits and therefore it is necessary to consider all the circumstances in order to ascertain the real

intention of the parties before reaching my conclusion. One of such circumstances, and I think a very important one (although not by itself conclusive), is the fact that in the agreement of November 18, 1943, and in all the subsequent agreements, the word "partners" is used not only in regard to "X", "Y" "W" and "T", but also in regard to their respective wives and daughters. The agreements were prepared by counsel of very great experience and it must be assumed that in using that term they understood the full legal effect of designating their wives and daughters as "partners," and the liabilities which, as partners, they would incur for partnership debts under R.S.O. 1937, c. 187, s. 10. In the agreement of October 2, 1944, by which Mrs. "X" entered the firm, there is a recital in which she stated her willingness to become a partner "and render herself responsible for the liabilities (of the firm) in consideration of a share in the profits thereof." Then, by s. 8 thereof, she could determine her interest in the partnership by three months' notice, "and shall not be responsible for the liabilities thereof incurred after the date upon which the notice takes effect." Similar provisions are found in the other agreement of October 2, 1944, by which the daughters of "X" entered the firm, and while in neither agreement is there any express covenant by Mrs. "X" or the daughters of "X" to be liable for such liability, I have no doubt that if losses did occur they would be liable therefor as partners and in view of the recitals I have mentioned. It follows, therefore, that not only are the wives and daughters of "X" and "Y" entitled to share in the profits, but they are also liable for the losses incurred in the operation of the business. It is of no consequence to suggest that in this type of business losses are not likely to occur; they might occur and if they did, the wives and daughters would be liable therefor.

One of the points urged on me for the respondent is that you do not as a rule constitute or create or prove a partnership by saying that there is one, or merely by production of a document called a partnership agreement and in which the parties are referred to as partners, and with that submission I am in general agreement (*C.I.R.* v. *Williamson* (1); *Dickinson* v. *Gross* (2)).

(1) (1928) 14 T.C. 335 at 340. (2) (1927) 11 T.C. 614.

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Then it is said that the wives and daughters *were not persons carrying on the business of* "Q and Co." and were therefore not partners. Counsel for the respondent stresses the fact that they contributed nothing in the way of services or capital and that by the agreements, the management and control of the business of the firm and the sole right to admit or to exclude other partners in the firm is reserved to the active partners, "X", "Y", "W" and "T". It must be conceded, I think, that one who contributes services but no capital, and one who contributes capital but renders no services, may be partners in a firm. In general, a partner does contribute something, either skill or property, but that is not necessarily so, and on the authorities which I shall mention, it appears that one may be a partner in fact without contributing anything.

In Halsbury's Laws of England, 2nd Ed., Vol. 24, p. 396, it is stated:

774. The above definition (i.e., the definition of partnership which is the same as found in the Partnership Act of Ontario, (*supra*) involves a contract between the partners to engage in a commercial business with a view to profit. As a rule each partner contributes either property, skill or labour, but this is not essential. A person who contributes property without labour, and has the rights of a partner, is usually termed a sleeping or dormant partner. A sleeping partner may, however, contribute nothing.

As authority he cites *Pooley* v. *Driver* (1). The following extracts are taken from the judgment of Jessel, M.R.:

p. 472—". . . . There could not be a partnership without there was a commercial business, to be carried on with a view to profit and for division of profits; and as a general rule, I take it, if it fulfils that definition, it is a partnership. I say, as a general rule, that simple definition appears, so far as it goes, to be an accurate definition.

Then whether or not the association requires that one or more of the partners shall contribute labour or skill, or what they shall contribute, is a question which may be considered as subsidiary; but I take it that the ordinary meaning of the word "partnership" is that, no doubt as a rule, each partner does contribute something either in the shape of property or skill. But it is not a universal rule, and therefore the definition of Chancellor KENT, which is given in the same page, is not quite correct. He says "Partnership is a contract of two or more competent persons to place their money, effects, labour, and skill, or some or all of them, in lawful commerce or business . . ."

P. 473. You can have, undoubtedly, according to English law, a dormant partner who puts nothing in—neither capital, nor skill, nor anything else. In fact, those who are familiar with partnerships know it is by no means uncommon to give a share to the widow or relative of some former partner who contributes nothing at all, neither name, nor

(1) (1877) 5 Ch. D. 458.

skill, nor anything else. Therefore it is not quite accurate, as Chancellor KENT puts it, that they must contribute labour, skill, or money, or some or all of them . . . .

Then Pothier says they must have "something in common (en commun quelque chose)," but, as I said before, that is not necessary according to the English notion of partnership. The dormant partner may put in nothing whatever, as in the case of the widow or child of a deceased partner; therefore that shows again the enormous difficulty of giving a definition which shall be applicable to all cases . . . .

p. 475-6—(After quoting passage on pp. 306-7 from Lord Cranworth in *Cox* v. *Hickman*) "Now what Lord CRANWORTH means there is quite plain. He says in fact that the participating in the profits is sufficient proof of partnership if there is nothing to get rid of it. If you find an association, and a contract made by the members of the association that the trade is to be carried on, and that they are to share the profits in certain proportions, then that makes a partnership, unless you can show from the surrounding circumstances some other relation. It is not impossible to show some other relation, but, as he says, it is very difficult to do so. It is often conclusive by itself,—not always."

p. 476-7—"The question of course is whether a man is liable as a dormant partner. Now a dormant partner means a person who does not take an active part in the conduct of the business, and who may be, and often is, prohibited from taking such active part. Therefore, when the inquiry is whether a man is a dormant partner, it does not appear to me to aid that inquiry by saying that there are provisions preventing his taking an active part in the conduct of the business, or that there are provisions which make it optional for him to take an active part in the business or not. It only shows he is not an active partner. Upon that there is an observation of Lord CRANWORTH'S (8 H.L.C. 309): "I can find no case in which a person has been made liable as a dormant or sleeping partner, where the trade might not fairly be said to have been carried on for him, together with those ostensibly conducting it, and when, therefore, he would stand in the position of principal towards the ostensible members of the firm as his agents."

It is perfectly competent for parties to agree that the management of the partnership affairs shall be confided to one or more of their members exclusively of the others. (See Lindley, 11th Ed., p. 387; R.S.O. 1950, c. 270, s. 24(5)). Similarly, it is competent for partners to agree that the right to admit or exclude partners may be vested in one or more of their members (ss. 24, 25 of the Partnership Act of Ontario; Lindley on Partnership; p. 450; *Lovegrove* v. *Nelson & Cox* (1); *Byrne* v. *Reid* (2).

It is further submitted for the respondent that while there was an agreement which might be called a partnership agreement, so far as the wives and daughters were concerned it had never governed the relations of the parties, that it

(1) (1834) 3 M. & K. 1. (2) (1902) 2 Ch. 735.

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was put aside and disregarded, and that the business continued exactly as it had previously been. I was referred to *Dickinson* v. *Gross* (*Inspector of Taxes*) (1), the headnote to which is as follows:

> The appellant, a farmer, had entered into a Deed of Partnership with his three sons with the admitted intention of reducing the Income Tax liability in respect of the profits. The deed provided inter alia that two farms owned by the appellant should be let to the appellant and his sons at stated rentals, that accounts should be made up annually, that the net profits should be divided equally between the partners, and that each of the partners should have the right to sign and endorse cheques on behalf of the firm. It was shown in fact that no rent had been paid, that no accounts or books had been kept, or any distribution of profits made, that cheques had been signed only by the appellant, and that business receipts had been paid indiscriminately into the appellant's private bank account and into the firm's account. The General Commissioners decided that there had been no partnership in fact, and accordingly that there was no partnership for Income Tax purposes.
>
> Held, that as a partnership did not exist in fact, there was no partnership for the special purposes of the Income Tax Act.

Rowlatt, J., in holding that the partnership was non-existent, stated at p. 620:

> The partnership deed here, of course, was a deed perfectly good according to its tenor; and if it had been what really governed the relations of the parties it would have effected the object of those who entered into it or purported to enter into it, because it would have produced another legal position to which a tax attached differently from the legal position which existed before. As I pointed out in the case Mr. Bremner cited to me—and as has been often pointed out before—people can arrange their affairs, if they do really arrange them, so as to produce a state of facts in which the taxation is different, and it is no answer—it is perfectly immaterial—to say that they have done it for that purpose. But in this case the facts show that in very many ways the deed was simply set on one side and disregarded, and when you find the deed is disregarded, and also that it was entered into for the purpose of obtaining relief from taxation one is apt, perhaps naturally and quite properly upon the question of fact, to pay a little more attention to those circumstances and those points in which it was disregarded. Now Mr. Bremner, I think, has very truly said that if these young men had come forward and pointed to this deed and said: "Here, Father, you have signed this deed; kindly carry it out", he would have been in a very great difficulty, as King Lear was, in getting out of it, and they probably would have held him to it; and if they had held him to it the Commissioners would have had no justification for finding as they have. But they did not. On the contrary they let the deed slide and proceeded in the ordinary patriarchal way which everybody who is the least familiar with the habits of the countryside, as I have no doubt these three Commissioners were, knows very well.

(1) (1927) 11 T C 614.

Now what the Commissioners have done is that they have found that there was no partnership in fact. Mr. Bremner says that looks as if they were splitting some hair and saying there was no partnership in fact, although there was a partnership in law. I do not think that is the way to look at the finding at all. A partnership, of course, is a legal position and a legal result, but like every other legal position it depends on facts, and what the Commissioners are saying here is: "The facts are not those from which a legal partnership results, because although there was the deed they are not acting on it; it is not governing their transactions; they are not paying the slightest attention to it. They are going on just as before." They have not used the word "fictitious," and they have not used the word "sham," but I think they have put it even more clearly. They say: "The facts here were not a partnership although there was a bit of paper in the drawer, which if the facts had been according to it, would have shown there was a "partnership."

The only general principle which can be deduced from that decision is that a deed of partnership does not necessarily of itself constitute a partnership for income tax purposes but that regard may be had to what was done thereunder to ascertain whether there was a partnership, in fact. In that case it was found that the terms of the partnership were never carried out but were completely disregarded even to the extent that no distribution of profits was made. The facts in the instant case are quite different; it is not shown that any parts of the several agreements were disregarded and it is apparent that the books of the firm were set up on the basis that the inactive as well as the active partners were "partners" and regular monthly distribution of the profits was made to all in accordance with the agreements. The partnership agreements governed the relations of the parties thereto throughout the three years in question.

Further, it is submitted that as the wives and daughters of "X" and "Y" were paid fixed amounts (subject to minor variations), such amounts did not represent a share in the profits in the sense that "share" usually means a proportion or percentage of the profits. The point was considered in *Re Young ex. Parte Jones* (1), where Vaughan, Williams, J. stated at p. 490:

It was suggested that a person did not receive a share of the profits unless he obtained a right to a certain rate of profits out of the whole of the profits earned. I do not see why I should so hold. The fund is distinctly fixed out of which the weekly payments were to come. It seems to me, therefore, that an agreement for the receipt of a sum out of the profits is an agreement for the receipt of a share of the profits.

(1) (1896) 2 Q.B. 484.

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Reference may also be made to Lindley on Partnership, 11th Ed., p. 65.

It is also submitted that the provisions made by the agreements for the wives and daughters, notwithstanding the fact that they are called "partners," amounted to nothing more than the provision of fixed annuities for them, and again stress is laid on the fact that they were not required to and did not perform any duties, but merely had the right to receive payment of their fixed shares in the income. That submission was upheld by the Income Tax Appeal Board. It was pointed out that by the agreement of November 18, 1943 (Tab 7), the widows of "X" and "Y" were entitled to benefit while they lived, and not merely while they remained partners. That provision, however, does not appear in the actual partnership agreements of October 2, 1944.

It is in evidence that prior to the agreement of November 18, 1943, between "X", "Y" and "W", provision had been made by which the ascertained interest of a deceased partner in the firm of "X and Y" would be discharged by the payment to his widow and, in certain events also, to his daughters, of life annuities payable by the surviving partner or partners, out of and to be a charge upon the profits of the firm of "X and Y." Insofar as "X" and "Y" were concerned, somewhat similar provisions had existed since their original agreement of November 11, 1926 (Tab 4). In the meantime, however, "X" had become the sole proprietor of "Q and Co.," and as stated in the agreement of November 18, 1943, "It is now possible to modify the principal agreement and the "W" agreement so as to simplify their operations and more effectively to carry out the intentions of the party." By Clause 2 thereof, the provisions of the said agreements in regard to the interest of a deceased partner and in regard to the benefits to be enjoyed by his widow and/or daughter or daughters were cancelled "and all interest in the assets and goodwill of each of the firms of any deceased partner shall cease and determine forthwith upon his death." Then followed the provisions regarding the admission of the wives and daughters of a deceased partner as "partners" in "Q and Co." and the payment of fixed sums to them out of the profits, as I have mentioned above.

It is manifest that had the wives and daughters of "X" and "Y" been the recipients of the payments under the agreements existing prior to November 28, 1943, such payments would have been annuities and the then partners in "X" and "Y" would not have been entitled to deduct any portion thereof, before ascertaining their own shares of the income liable to taxation. But it is not under those agreements that the appellant is now claiming, but rather under the agreements of October 2, 1944, and upon similar arrangements entered into with Mrs. "Y" and Miss "Y" in 1948. It was perfectly open to the active partners to arrange their affairs in such a manner as to escape tax burdens, provided they did it legally. I have already cited the opinion of Rowlatt, J. in *Dickinson* v. *Gross* (*supra*) on that point and reference may also be made to *Hawker* v. *Compton* (1), where at p. 313 Sankey, J. said:

> I quite agree with what the learned Attorney General said, which is this—I have said it already twice this morning—that it is perfectly open for persons to evade this particular tax if they can do so legally. I again say I do not use the word "evade" with any dishonourable suggestion about it. If certain documents are drawn up, and the result of those documents is that persons are not liable to a particular duty, so much the better for them.

Reference may also be made to *Ayrshire Pullman Motor Services* v. *The Commissioners of Inland Revenue* (2), and to *Commissioners of Inland Revenue* v. *Fishers Executors* (3).

Now there is no direct evidence as to why the previous arrangements for valuing the interest of a deceased partner and the discharge thereof by the payment of annuities to his wife and daughters were changed to new provisions under which all the interest of such deceased partner in the assets and goodwill of the firm should terminate upon his death, and the widow and daughters should then have the right to become partners. One of the reasons recited is "to more effectively carry out the intention of the parties." The active partners probably had in mind the benefits to be gained by making the wives and daughters "partners" rather than annuitants and the possible saving in succession duty and the undoubted saving in income tax under the provisions of s. 30. I can see nothing illegal in their attempting to do so. Supposing for the moment that on the death of

(1) (1922) 8 T.C. 306. (2) (1929) 14 T.C. 754 at 763.
(3) (1926) A.C. 395 at 412.

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"X" he had left his wife destitute and there was no agreement by which she had the right to become a partner; but that the surviving partners out of a sense of moral obligation had agreed to take in Mrs. "X" as a partner; that she was brought in on terms which required her to render purely nominal services or provide a very small amount of capital, or even perform no services and bring in no capital. In any such case, and under the existing law, I do not think it could be said that she was not a partner in the firm or that the active partner would have to pay income tax on that part of the firm's income to which under their agreement she was entitled. If that is so, I see no reason why the situation should be different in this case, merely because she came in as a partner under the terms of the pre-existing agreement which entitled her to do so, or because under prior agreements which had been cancelled, she was to be provided with an annuity.

It is my opinion that in the absence of any provisions in the Income War Tax Act restricting the ordinary meaning of the words "partner" and "partnership," or conferring on the Minister the right to allocate the income of the partnership in any special way between the partners (as for example between "husband and wife" partnerships as in s. 31), the partners thereunder have the right to determine who will be their partners and the share to which each is entitled in the income therefrom; and if, under all the circumstances of the case, they are shown to be partners in fact, the members of the partnership are entitled to the benefit of s. 30 and to pay tax only on their individual shares in the partnership income.

As I have stated above, the wives and daughters by the terms of the agreement not only shared in the income, but were liable for losses incurred. That finding, together with the other circumstances, is sufficient in my opinion to constitute them partners, in fact.

In Lindley on Partnership, 11th Ed., p. 47, it is stated:

> An agreement to share profits and losses, in the sense of making good the losses if any are sustained, may be said to be the type of a partnership contract. Whatever differencce of opinion there may be as to other matters, persons engaged in any trade, business, or adventure upon the terms of sharing the profits *and* making good all losses arising therefrom, are necessarily to some extent partners in that trade, business or adventure; nor is the writer aware of any case (unless it be *Re Jane*) in which persons who have agreed to share profits and losses in this sense have been held not to be partners . . . .

But it does not follow that each of several persons who share profits and losses has all the rights which partners usually have. For example, a person may share profits and losses and yet have no right actively to interfere with the management of the business; or he may have no such right to dissolve as an ordinary partner has; or he may have no right to share the goodwill of the business on a dissolution; and other instances of restricted rights may be suggested. What in any given case the rights of a particular partner are depends on the agreement into which he has entered; but unless the word *partner* is to be deprived of all definite meaning its proper application to persons who share profits and losses in the sense referred to can hardly be questioned.

The obvious intention of the agreement was to make the wives and daughters partners, in fact, and to avoid conferring annuities upon them. That was done very deliberately and no doubt with the tax position in mind. While the agreements are substantially different from the usual partnership agreements, such differences in my opinion are not either severally or collectively sufficient to prevent their being agreements of partnership in fact.

Moreover, in the year in question, it was not illegal for a firm of patent agents to have in its firm partners who were not qualified patent agents. Even under the Register of Patent Agent Rules, 1948, enacted pursuant to s. 15 of the Patent Act, 1935, as amended, any firm could be registered if at least one member was qualified and entered on the Register.

There remains one further contention made on behalf of the respondent. It is submitted that a distinction must be drawn between a trading partnership in which the income is earned by the entering into of a series of contracts such as buying and selling, and a partnership of professional men, the income of which is earned by the services rendered by the individual partners. It is contended that under s. 3 of the Income War Tax Act, the income earned by a professional man is in fact his income and taxable as such. It is pointed out that in this case the whole income of "Q and Co." was earned by the active partners and it is submitted, therefore, that the assessments as made were correct.

I think that the answer to that submission is found in s. 30 (*supra*). No distinction whatever is drawn between a trading partnership and a partnership of professional men. The sole requirement is that "two or more persons

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are carrying on business in partnership" and if that requirement is met, then it is provided that the respective shares in the income of the partnership—not, be it noted, the share which each partner has earned—shall be the taxable income of the partners. It would be indeed a difficult matter in the case of a partnership to endeavour to apportion the total income between active and dormant partners, between those who contributed services or skill in varying degrees, and between those who contributed services and those who contributed capital, except on the basis of distribution as agreed on by the parties themselves; and I think that was the method intended by s. 30, except in cases such as those included in s. 31(1), which is as follows:

> 31(1). Where a husband and wife are partners in any business the total income from the business may in the discretion of the Minister be treated as the income of the husband or wife and taxed accordingly.

It seems to me that that subsection was enacted as an exception to the general provisions of s. 30 relating to the taxation of partnership income, and as a means of preventing the avoidance of tax by a person who brought his wife into a business as a partner, although such wife did not contribute anything to the partnership, or, at most, nominal capital or services only. The power conferred on the Minister to treat the whole of the income as that of the husband or wife is discretionary and no doubt in exercising that discretion he would take into consideration the contributions made in services and capital by the partners. The subsection appears to recognize the fact that there may be partners carrying on business in partnership who contribute little or nothing to the earning of the income, as in the present case, but inasmuch as its provisions extend only to partnerships comprised of husband and wife, it cannot directly or by implication reach the appellant.

For these reasons, I have reached the conclusion that the appellant is entitled to succeed. I think it was agreed that there was no substantial difference between the written agreements in relation to the wife and daughters of "X" and the somewhat informal agreements made with the wife and daughter of "Y", and my decision, therefore, will be applicable throughout the three years in question.

I find that the wives and daughters of "X" and "Y" were in fact partners with the active partners in carrying on the business of the firm of "Q and Co." for the several periods mentioned above, and that the appellant in respect of his income derived from that firm was liable to income tax only to the extent of his share therein as agreed upon by all the partners. My recollection is that it was agreed that the returns made by the appellant were accurately made on that basis, but if there is any difficulty in the matter it may be spoken to.

My opinion has not been reached without considerable hesitation, particularly because the precise point has not previously been raised in Canada. I am not unaware of the difficulties which may follow in other cases and for that reason I desire to emphasize the fact that my opinion was arrived at because of the particular facts of this case and inasmuch as the good faith of the appellant was not in any way challenged.

The appeal, therefore, will be allowed, the decision of the Board and the assessments made upon the appellant for the years 1946, 1947 and 1948 will be set aside and the matter referred back to the Minister to reassess the appellant upon the basis of this decision.

The appellant will be entitled to his costs after taxation.

Judgment accordingly.

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Oct. 20-24, 31, Nov. 1, 4

BETWEEN:

HER MAJESTY THE QUEEN, on the Information of the Deputy Attorney General of Canada ..... } PLAINTIFF;

AND

VICTOR LOUIS POTVIN ..... DEFENDANT.

Expropriation—Expropriation Act, R.S.C. 1927, c. 64, s. 9—Exchequer Court Act, R.S.C. 1927, c. 34, s. 47—Value to be estimated on basis of most advantageous use—Evidence of sales made after date of expropriation inadmissible—Value of farm measurable by productivity—Claim for severance although remaining lands not contiguous to expropriated property—Allowance for compulsory taking denied.

The plaintiff expropriated property near Uplands Air Port on which the owner had operated a farm. The action was taken to have the amount of compensation payable to the owner determined by the Court.

Held: That the most advantageous use that could be made of the property was its use as a farm.

2. That in proceedings to determine the amount of compensation to which the owner of expropriated property is entitled evidence of sales made after the date of expropriation is inadmissible.

3. That it is a sound approach to the determination of the value of an expropriated farm to its former owner to ascertain its productivity by computing the average annual gross revenues from its crop yields and deducting therefrom the appropriate costs of their production and to capitalize the net value of the production so ascertained at the appropriate rate.

4. That the defendant had a claim for damages because of severance although some of his remaining lands were not contiguous to the expropriated property.

5. That there are no uncertainties in the present case within the meaning of *The King* v. *Lavoie*, unreported, and the defendant is not entitled to an additional allowance for compulsory taking.

INFORMATION by the Crown to have the amount of compensation money payable to the owner of expropriated property determined by the Court.

The action was tried before the President of the Court at Ottawa.

J. J. McKenna and *K. E. Eaton* for plaintiff.

R. A. Hughes Q.C. and *J. P. M. Kelly* for defendant.

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

THE PRESIDENT, on the conclusion of the trial (November 4, 1952), delivered the following judgment:

The Information exhibited herein shows that the lands described in paragraph 2 thereof, belonging to the defendant, were taken by His late Majesty under the Expropriation Act, R.S.C. 1927, chapter 64, for the purposes of the public works of Canada and that the expropriation was completed by filing a plan and description of the said lands and other lands in the office of the Registrar of Deeds for the Registry Division of the County of Carleton in Ontario, in which the lands are situate, on September 7, 1950, pursuant to Section 9 of the Act. Thereupon the lands became vested in His Majesty and the defendant ceased to have any right, title or interest therein or thereto.

The parties have not been able to agree upon the amount of compensation money to which the defendant is entitled and these proceedings are brought for an adjudication thereof. The plaintiff by the amended Information offers the sum of $40,000, but the defendant by his statement of defence claims $100,000. There is thus a wide spread between the parties.

The expropriated property is the major portion of the farm formerly operated by the defendant, consisting of approximately 109 acres in Lot 15, Concession II, Rideau Front, in the Township of Gloucester, and 37 acres about 1½ miles away. The land taken on the expropriation has an area of 105 acres, leaving the defendant with 4 acres of low land at the southwest corner of his main farm and the 37 acres. The defendant thus has two claims for compensation, one for the value of the lands taken and the other for injurious affection of his remaining lands through their depreciation in value as the result of the severance.

The buildings on the expropriated property consisted of a substantial dwelling house, a large barn, a granary with a root house underneath and a lean-to implement shed, a machinery and wood shed, a hen house and a chicken coop.

The property is conveniently located about one and a half miles from the new limits of the City of Ottawa and about 8 miles from the By-ward market. It had a frontage of over 2,900 feet on a good road and had telephone, electricity and daily mail services.

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There was a variety of soils on the property, the high land being of sandy gravelly loam suitable for potatoes and corn and the low land of clay loam suitable for grain and hay. There were also from 20 to 25 acres of bush. In addition to growing potatoes, sweet corn, oats and hay the defendant kept from 20 to 35 head of Holstein cattle, a few hogs and some chickens.

The Court took a view of the expropriated property and the surrounding vicinity in the presence of counsel for the parties.

Opinion evidence of the value of the expropriated property or portions of it was given for the defendant by the defendant himself, Mr. A. Genier, Mr. B. Flood, Mr. A. M. Scarfe, and Mr. M. Quinn and for the plaintiff by Mr. J. A. Marois, Mr. E. R. Petry, Mr. A. Gagnon and Mr. L. H. Newman.

The defendant put the value of his high land at $600 per acre for 80 acres, his low land at from $200 to $300 per acre for 8 acres and his bush at $300 per acre for from 20 to 25 acres, but did not attempt a valuation of his buildings. Mr. Genier valued the high land at $400 per acre for 80 acres, the low land at $200 per acre for 4 acres and the bush at $300 per acre for 25 acres, making a valuation of $40,300 for the land, to which he added $24,000 for the buildings, making a total valuation of $64,300. But when he was asked what, in his opinion, a willing purchaser in a position similar to that of the defendant would have been willing to pay for the property in order to obtain it he said that such a person might have been willing to pay from $50,000 to $55,000 and a person wanting it as a farm would have been willing to pay about $40,000 for it. Mr. Scarfe valued the land at $500 per acre for 80 acres of high land, $150 per acre for 4 acres of low land near the bush and $300 per acre for 25 acres of bush. Mr. Flood considered the defendant's bush a very good one and said that $250 per acre would have been a good price for the right to cut it. Mr. Quinn also considered the defendant's bush a good one.

For the plaintiff, Mr. J. A. Marois put a valuation of $23,099.57 on the buildings. Mr. Petry appraised the buildings at $21,647.47 and the land at $14,700, being $140 per acre for 105 acres, making a total valuation of $36,347.47.

And Mr. Gagnon valued the defendant's farm at $170 per acre for 72 acres of high land and $110 per acre for 33 acres of low land and bush, making a total of $15,870 for the land, to which he added $20,700 as his estimate of the value of the buildings, making a total valuation of $36,570. Mr. Newman considered that Mr. Gagnon's figures for the value of the land were pretty close to the mark.

There was little difference of opinion about the value of the buildings. The most careful appraisal of them was that made by Mr. Marois, the particulars of which appear in his report, Exhibit 18. He took off the actual quantities in each building and applied the costs of material and labour that were current in Montreal in 1950, with an addition of the increase in prices of materials in Ottawa over those prevailing in Montreal but without any deduction in labour costs although these were lower in Ottawa than in Montreal. This gave him the reconstruction cost of the buildings as at the date of the expropriation. He then, after a careful consideration of the condition of the buildings, deducted what he considered an appropriate percentage of depreciation and arrived at his estimate of the actual value of the buildings as at the date of the expropriation. I am satisfied that Mr. Marois did his work carefully and that his valuation is very nearly correct.

The real dispute in this case is as to the value of the land and here there was a sharp divergence among the experts partly due to differing opinions as to the best use to which the property could have been put. It is well established that the value of expropriated property should be estimated on the basis of the most advantageous use that could have been made of it, whether present or future. This principle, frequently enunciated in this Court, is correctly stated in Nichols on Eminent Domain, 2nd edition, at page 665, where the author says:

> Market value is based on the most advantageous use of the property.
>
> In determining the market value of a piece of real estate for the purposes of a taking by eminent domain, it is not merely the value of the property for the use to which it has been applied by the owner that should be taken into consideration, but the possibility of its use for all purposes present and prospective, for which it is adapted and to which it might in reason be applied, must be considered, and its value for the use to which men of prudence and wisdom and having adequate means would devote the property if owned by them must be taken as the ultimate test.

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But it must be remembered that, while consideration must be given to the future advantages and potentialities of the property, it is only the present value as at the date of the expropriation of such advantages and possibilities that falls to be determined: *The King* v. *Elgin Realty Company Limited* (1).

Mr. Genier and Mr. Scarfe based their valuations on two possible uses of the property, one as a farm and the other as a site for subdivision into small holdings. Mr. Genier thought that the property could have been subdivided into 5-acre or 3-acre lots. He put his valuation of $400 per acre for the high land on the assumption that such a subdivision was feasible, but was led on cross-examination to reduce his valuation to around $300 per acre if there was no subdivision possibility. Mr. Scarfe also put his valuation of the high land at $500 per acre on a similar basis. He said that he would have advised the defendant to break up his 80 acres into lots of from 2 to 10 acres each and stated that these could have been sold at from $500 to $1,000 per acre. On the other hand, Mr. Petry did not agree with the view that the property was suitable for subdivision purposes. He did not think that it would have been saleable in small lots at anywhere near $500 per acre. In his view, it could not have been developed with success for such purposes for there were many other properties in the Ottawa area available for subdivision that were better located than the expropriated property. Mr. Petry's opinion on this point is preferable to the assumptions of Mr. Genier and Mr. Scarfe.

Counsel for the defendant suggested that in estimating the value of the property consideration should be given to the possibility of it being required for airport extension but there was no evidence to support this. Mr. Petry said that he had not taken this possibility into account in his valuation. It should be noted, of course, that if the property was to be subdivided or its value assessed on the basis of the possibility of its being required for extension of the Uplands Air Port, which was the reason for its expropriation, the value of the buildings could not be added to the value of the land.

(1) (1943) S.C.R. 49.

The weight of evidence supports the view that the most advantageous use that could be made of the property was that which the defendant actually made of it, namely, as a farm and I so find. The Court must, therefore, estimate its value to the defendant on that basis.

The defendant acquired the farm, including the 37 acres, from his father on November 19, 1943, for $3,000, which is a far cry from the $100,000 claimed by him in 1952 for the expropriated portion of it, but explained that this consideration was paid pursuant to an agreement for sale made in 1933 and that prior thereto he had been working for his father for a long time. The amount of the purchase price is thus no test of the value of the property as at the date of the expropriation.

The defendant did not attempt to support his claim of $100,000 for his property and could not point to any sale of other property as a basis of his valuation of his high land at $600 per acre and his low land at from $200 to $300 per acre but sought to justify it by giving particulars of his returns from his crops of potatoes, corn, oats and hay and his sales of cream, cattle and chickens. His figures are subject to serious question by reason of the fact that he kept no records of his receipts or expenditures. Moreover, even if he could have verified his figures they would not have supported his valuations and I reject them.

Two approaches to the valuation of the expropriated property as a farm were made by the experts. One was an attempt to ascertain its market value by reference to the sales of farms and other property in the vicinity. There was a good deal of evidence of such sales. Many of these were at low prices due to special circumstances and give no aid in the establishment of market value. Other sales were of property that was not comparable with the expropriated property. There were no sales of comparable property that afforded any justification for the valuations of the defendant's experts. But some of the sales were used by Mr. Petry to support his valuation. He considered that there were three farms that were comparable to the defendant's and relied on the prices paid for them as tending to establish market value. The first was a sale on January 27, 1949, of 100 acres without any buildings by L. N. Potvin,

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the defendant's uncle, to S. Froman for $9,500, or $95 per acre; the second a sale on September 15, 1949, of 100 acres with buildings on it by J. E. Moodie to K. C. Moodie for $9,500 and the third a sale made subsequently to the date of the expropriation. I excluded evidence of this sale. I ruled that in proceedings to determine the amount of compensation to which the owner of expropriated property is entitled evidence of sales made after the date of expropriation is inadmissible. After careful consideration I have reached the conclusion that this view is preferable to that expressed in *The King* v. *Edwards* (1). There I referred to the serious doubts expressed by Taschereau J. of the Supreme Court of Canada in *The King* v. *Halin* (2) as to the legality of proof of sales made after the date of expropriation. In expressing these doubts Taschereau J. spoke also for Rinfret J., as he then was, and Rand J. I am now of the view that these doubts were well founded and that effect should be given to them, notwithstanding the opinion expressed by Anglin J. in *Toronto Suburban Railway Company* v. *Everson* (3). Section 47 of the Exchequer Court Act, R.S.C. 1927, chapter 34, directs the Court to estimate the value of the expropriated property as at the date of the expropriation. If the Court is to obey this statutory direction it must focus its attention on the situation as it stood on the date of expropriation and put itself in the same position as if it were trying the action immediately thereafter. In that case there could not be any evidence of subsequent sales. Why should the fact that the trial is held later let in evidence that did not then exist? Surely the determination of the market value of the property as at the date of its expropriation ought not to be made on differing sets of facts depending on when the trial is held. It should be made on the same set of facts regardless of when it is held. The contrary view invites the introduction of a dangerous element of confusion into what is a sufficiently difficult task without it. Moreover, it is, in my opinion, more consistent with principle to exclude evidence of sales made after the date of the expropriation than to admit it.

(1) (1946) Ex. C.R. 311.
(2) (1944) S.C.R. 119 at 125.
(3) (1917) 54 Can. S C.R. 395 at 411.

Mr. Petry was therefore left with only the Froman and Moodie sales. The latter is of little help because the property was 3 miles away. As to the Froman farm the defendant explained that his uncle had sold it because of family reasons. The evidence establishes that while the soil on this farm was similar to that on the defendant's it had not been worked as well and was consequently not as fertile. This was Mr. Petry's reason for appraising the defendant's land at $140 per acre as compared with the $95 per acre which Mr. Froman had paid. Mr. Petry's valuation is open to criticism on the ground that there is no sound basis for measuring the amount of the additional allowance of $45 per acre for the greater fertility of the soil other than his own opinion. His valuation is thus, to some extent, a guess.

The other approach to the valuation of the defendant's farm was to measure its value by its productivity. This was the approach made by Mr. Gagnon, head of the Economic Science Department of the Agricultural College at Oka in Quebec. He has been on the staff of this college for approximately 30 years and has had wide experience in appraising farm lands. He inspected the expropriated property in June, 1951, while the defendant was still in possession of it and made his valuation subsequently. His view was that the farm was worth what it produced. He therefore sought to ascertain the gross receipts from its crop yields and then deduct the appropriate expenses. The net balance was regarded as the return on the capital involved as if it were interest. This was then capitalized at the appropriate rate. Mr. Gagnon explained in detail what he did. On his inspection of the farm there were no crops on the expropriated property but oats and hay were growing on the 27 acres. He ascertained that the high land of the expropriated property contained 72 or 73 acres, which figure of acreage I accept, and that then there was a slope to the west to the bush and that in addition to the bush there was low land to the extent of about 10 or 12 acres. He ascertained that the crops on the high land had consisted of potatoes, sweet corn, oats and hay in a four-crop rotation. He examined the soil, which he described in his report as sandy with a gravelly sub-soil, and found it well suited to the production on it having

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regard to the nearness of the Ottawa market. He then referred to information as to the yields of potatoes, grain and hay published by the Experimental Farm operated by the Department of Agriculture at Ottawa. He could not find any information there as to the yield of sweet corn and therefore referred to a study on corn production made in the west section of Quebec. Mr. Gagnon then estimated the average annual returns from the crops of potatoes, sweet corn, hay and oats with the appropriate prices and reached a gross return of $147.50 per acre. He then set out in detail the various items of cost of this production based on a bulletin called "Cost of Producing Crops in Eastern Canada" published by the Department of Agriculture, using the figures established for the Experimental Farm at Ottawa. These came to a total of $139 per acre, leaving a net return of $8.50 per acre. This amount represented a return of 5 per cent on a capital of $170 per acre and Mr. Gagnon valued the high land accordingly. He followed a similar course in arriving at his valuation of the lowland at $110 per acre and attributed a similar value per acre to the bush.

Mr. Gagnon's valuation is preferable to Mr. Petry's in that it does not depend on individual opinion but rests on the scientific basis that the value of a farm to its owner depends on its earning power, measured by its actual crop production, a fact that lends itself to reasonably precise ascertainment in cases where there is reliable information as to crop yields, prices of produce and costs of production.

This is the first case before me in which the valuation of an expropriated farm has been made on the basis used by Mr. Gagnon. While this method of appraising the value of farm property is comparatively new it is gaining acceptance: vide McMichael's Appraising Manual, 3rd edition, page 281. It is easy to appreciate why this should be so. It is, in my opinion, a sound approach to the determination of the value of an expropriated farm to its former owner to ascertain its productivity by computing the average annual gross revenues from its crop yields and

deducting therefrom the appropriate costs of their production and to capitalize the net value of the production so ascertained at the appropriate rate.

There must be many cases where the value of a farm can be more nearly accurately determined by this method of appraisal than by any other and I am of the view that the present case is one of them. I was favourably impressed with the manner in which Mr. Gagnon gave his evidence and am satisfied that he made a careful study of all the relevant factors. While there may be some criticism of a few items of his cost of production his estimates of the various crop yields were abundantly fair to the defendant. I accept his valuations of the high and low lands of the expropriated property as being very nearly correct. I am strengthened in this view by the fact that such an eminent person as Mr. Newman considered Mr. Gagnon's figures pretty close to the mark.

I am not, however, convinced that Mr. Gagnon was correct in attributing the same value to the bush as he did to the low land. Certainly the method that he used in appraising the latter is not applicable to the bush. There are conflicting statements as to the quality and size of the trees in the bush and its value per acre but the weight of evidence is strongly against Mr. Gagnon's valuation. In my opinion, his valuation of the bush, approximately 25 acres, should be substantially increased.

On the evidence, as I accept it, with some addition in favour of the defendant, I estimate the value of the expropriated property to the defendant as at the date of the expropriation at $42,000. This, in my judgment, amply covers all the factors of value to which the defendant is entitled for the land taken from him and I award this amount accordingly.

I now come to the defendant's claim for compensation for the injurious affection of his remaining lands by reason of their severance from the expropriated property. Although some of these lands, namely, the 37 acres, were not contiguous to the expropriated property I am satisfied that the

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defendant has a claim for damages because of severance on grounds similar to those discussed in *The King* v. *Consolidated Motors Limited* (1). There was, however, a dearth of evidence as to the depreciation in value of the remaining lands, which is the measure of the damages to which the owner is entitled, and I allowed the defendant to re-open his case for the necessary proof on this point. On the resumption of the trial counsel for the defendant had to rely mainly on the evidence of Mr. Petry whom he called as his own witness. Mr. Petry fairly agreed that there had been a 25 per cent depreciation in the value of the 37 acres and there was agreement also that the depreciation in the value of the 4 acres came to 75 per cent. I allow the defendant $1,500 as damages for this portion of his claim.

Counsel for the defendant made a strong plea that this was a case in which there should be an additional allowance of 10 per cent for compulsory taking. I am unable to agree. I dealt with the question of this allowance in *The Queen* v. *Sisters of Charity of Providence* (2) and expressed the view that the leading Canadian case on the subject was *The King* v. *Lavoie*, decided by the Supreme Court of Canada on December 18, 1950. Unfortunately, this case has not been reported. There Taschereau J., delivering the unanimous judgment of the Supreme Court of Canada, laid down the following rule:

> Ce montant additionel de 10% n'est pas accordé dans tous les cas d'expropriation, et ce n'est que dans les causes où il est difficile par suite de certaines incertitudes dans l'appréciation du montant de la compensation, qu'il y a lieu de l'ajouter à l'indemnité. (*Irving Oil Co.* v. *The King* 1946, S.C.R. 551; *Diggon-Hibben Ltd.* v. *The King* 1949, S.C.R. 712). Ici, on ne rencontre pas les circonstances qui existaient dans les deux causes que je viens de citer, et qui alors ont justifié l'application de la règle.

It seems clear to me that by the phrase "certaines incertitudes" Taschereau J. meant uncertainties of the kind found in the *Irving Oil* and *Diggon Hibben* cases, to which he referred. These do not exist in the present case and the defendant's plea for an additional allowance for compulsory taking must be denied.

(1) (1949) Ex. C.R. 254.

(2) (1952) Ex. C.R. 113.

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There remains only the question of interest. The defendant remained in undisturbed possession of his former property without payment of any rent up to September 2, 1951. Up to this date, in accordance with the settled practice of this Court, he is not entitled to any interest, but since that date he is entitled to interest at the rate of 5 per cent per annum on $43,500 to this date.

There will, therefore, be judgment declaring that the property described in paragraph 2 of the Information is vested in Her Majesty as from September 7, 1950; that the amount of compensation to which the defendant is entitled, subject to the usual conditions as to all necessary releases and discharges of claims, is the sum of $43,500, with interest thereon at the rate of 5 per cent per annum from September 2, 1951 to this date: and that the defendant is entitled to costs to be taxed in the usual way.

Judgment accordingly.

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May 26 & 27

Oct. 2

BETWEEN:

GAIRDNER SECURITIES LIMITED .. APPELLANT;

AND

MINISTER OF NATIONAL REVENUE RESPONDENT.

Revenue—Excess Profits Tax—Income—Excess Profits Tax Act, 1940, 4 Geo. VI, c. 32, s. 2(1) (f)—Income War Tax Act R.S.C. 1927, c. 97, s. 3(1)—Company incorporated for purpose of dealing in securities—Profit derived through exercise of power for which appellant incorporated is taxable—Appeal dismissed.

Appellant company incorporated as Gairdner & Company Ltd. in 1930 had for its purpose and object *inter alia* (1) "to underwrite, subscribe for, purchase or otherwise acquire . . . . and to sell, exchange, transfer or assign or otherwise dispose of and deal in the bonds or debentures, stocks, shares, notes or other securities or obligations of . . . . any incorporated or unincorporated company, corporation . . . ." (2) "to transact and carry on a general financial agency and brokerage business, and to act as brokers and agents . . . . for the purchase, sale, improvement, development and management of any property, business or undertaking . . . .".

From 1930 to 1938 it carried on business in a large way as an investment dealer, buying and selling securities for customers or its own account, and also underwriting securities of various sorts and selling them to the public and in 1938 had on hand a large number of securities which it had acquired in its ordinary business of trading and was also heavily indebted to its bankers.

In 1938 appellant sold to a new company its physical equipment, books and records and goodwill for certain shares in the new company, retaining its securities and remaining liable for its indebtedness to its bankers. In 1944 the appellant and two other parties obtained a large number of shares of the capital stock of Dominion Malting Company, thereby obtaining control of that company. They caused new shares to be issued, the appellant obtaining a large number of such shares, some of which it sold immediately. Later it sold the remaining shares for a large cash consideration realizing a very substantial profit and on that profit it was assessed for excess profits tax and from such assessment it appeals to this Court.

Held: That the true nature of the transaction is to be determined from the taxpayer's course of conduct viewed in the light of all the circumstances and it was in fact not an investment but a speculation essentially of the same character as appellant had previously engaged in and one which it was specifically empowered to do, since appellant was authorized to acquire and hold, and to sell and exchange stocks in other companies as principal as well as agent as one of the essential features of its business and as one of the appointed means by which it would carry on business for a profit and its action was the exercise of the very power for which the company was incorporated.

2. That the whole scheme was an ordinary commercial transaction entered into for the purpose of making a profit and when that profit was made in carrying out the very business which appellant was empowered to carry on such profit is taxable.

APPEAL under the Excess Profits Tax Act.

The appeal was heard before the Honourable Mr. Justice Cameron at Toronto.

H. H. Stikeman, Q.C., D. A. McIntosh, Q.C., S. E. Edwards and *A. L. Bissonette* for appellant.

J. W. Pickup, Q.C. and *F. J. Cross* for respondent.

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

CAMERON J. now (October 2, 1952) delivered the following judgment:

In 1946, the appellant company sold a large number of shares of Dominion Malting Company, realizing a substantial profit thereon. The respondent assessed the appellant under the Excess Profits Tax Act, Statutes of Canada, 1940, c. 32, as amended, in respect of such profits, and an appeal is now taken from that assessment.

By s. 2(*f*) of the Excess Profits Tax Act, the profits of a corporation for any taxation period are defined as the net taxable income of the said corporation as determined under the provisions of the Income War Tax Act in respect of the same taxation period. The question raised therefore is whether, as contended by the respondent, the sums in question fall within the definition of "income" in s. 3 of the latter Act, the applicable part of which is as follows:

s. 3(1) For the purposes of this Act "income" means the annual net profit or gain . . . . as being profits from a trade, or commercial or financial or other business or calling, directly or indirectly received . . . . from any trade, manufacture or business . . . .

For the appellant it is contended that the profit so realized was not "income," that the purchase of the shares was entered into as an investment, and that the realization of a profit when the shares were sold was merely the realization of an enhancement in value of that investment and therefore a capital gain not subject to tax.

The appellant was incorporated in 1930 under the Dominion Companies Act, as "Gairdner & Company, Ltd." Its purposes and objects included the following:

(*a*) 1. To underwrite, subscribe for, purchase or otherwise acquire and hold either as principal or agent, and absolutely as owner or by way of collateral security or otherwise, and to sell, exchange, transfer, assign or otherwise dispose of and deal in the bonds or debentures, stocks,

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shares, notes or other securities or obligations of any government or municipal or school corporation or of any bank or of any other incorporated or unincorporated company, corporation, commission, association, syndicate or individual and to exercise all the rights and privileges of ownership in respect thereof;

2. To transact and carry on a general financial agency and brokerage business, and to act as brokers and agents for the investment, loan, payment, transmission and collection of money and for the purchase, sale, improvement, development and management of any property, business or undertaking and the management, control or direction of corporations, syndicates, partnerships, commissions, associations and companies;

From 1930 to 1938, the appellant carried on business in a large way as an investment dealer, buying and selling securities for customers and on its own account, and also underwriting securities of various sorts and selling them to the public. By 1938 it had encountered financial difficulties, having on hand a large number of securities which it had acquired in its ordinary business of trading, but which it could not readily dispose of, and also being heavily indebted to its bankers in amounts equal to or in excess of the then value of such securities.

The appellant in 1938 changed its name to "Gairdner Securities Limited" and dropped its membership in the Investment Dealers Association, but otherwise its legal and corporate structure has remained unchanged since its incorporation. A new company, "Gairdner & Company, Ltd.," was incorporated by provincial charter, became a member of the Investment Dealers Association, and carried on thereafter the business of an investment dealer. By an agreement dated April 30, 1938 (Ex. 5), the appellant sold to the new company its physical equipment, its books and records, and goodwill, for certain shares in the new company, retaining, however, its securities, and remaining liable for its indebtedness to its bankers.

For the moment, I shall pass over the operations of the appellant company from 1938 to 1944, and turn to the transaction which resulted in the profits now in question.

In 1938, Mr. Gairdner had a conversation with a friend as to the possibility of acquiring Dominion Malting Company, but nothing materialized at that time. Some time in the early part of 1944 he again became interested in its purchase as he understood that the estate of the late president desired to liquidate its holdings. Before any

progress had been made he found that another financier, Mr. E. P. Taylor, also had in mind the acquisition of the company. Negotiations were entered into with Mr. Taylor and in the result it was decided that the appellant, Mr. Taylor and one Barnes should jointly offer to purchase the preferred and common shares of Dominion Malting, their respective interests in the stock to be in the proportion of forty per cent, forty per cent and twenty per cent. Arrangements were made by which the Montreal Trust Company was to submit an offer to all the shareholders of Dominion Malting to purchase the 6,180 preferred shares of a par value of $100 at par, and 6,680 common shares at $86.50 per share, those shares being the only shares issued and outstanding. Further arrangements were made with the Royal Bank to finance the purchase on behalf of all. The offer to purchase was duly made but owing to an offer made by another party, the bid for the common shares was increased to $100 per share. One of the conditions attached to the offer was that before any of the shares were taken up, Dominion Malting should take out supplementary Letters Patent converting it into a public company. That condition was complied with and by June 30, 1944, about 98 per cent of both preferred and common shares were acquired on the terms I have mentioned.

After securing control of the company, the new owners in August, 1944, caused to be issued and sold new five per cent preferred shares, and with the proceeds redeemed all the old seven per cent preferred shares, the appellant and its associates thereby being relieved of their liability to the Royal Bank in respect of the purchase price of the old preference shares. The new issue of preferred shares was underwritten by the appellant (Ex. C) and Dominion Malting was to pay to it or to whom it might direct, a commission of five per cent or $32,500, but the appellant turned its rights over to its associate—Gairdner & Company, Ltd.—which company marketed the shares and received the commission.

At the same time, the common shares were split ten for one so as to make them more readily marketable and they were placed on an annual dividend basis, commencing November 1, 1944.

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By arrangement with the appellant, Taylor and Barnes gave an option to Gairdner & Company, Ltd. to take up 19,780 and 12,030 of the new common shares at approximately $12 per share (Ex. 18), which company sold shares of Messrs. Taylor and Barnes and the appellant to the public at $13.25 per share (Ex. 19). Upon the conclusion of that operation, Taylor and Barnes together retained about fifteen per cent and the appellant twenty-two per cent of the common stock in Dominion Malting. It is admitted in the appellant's Reply that upon the sale of 11,460 common shares in 1944, it realized a profit of $13,509.53.

It was then decided to expand and improve the facilities of Dominion Malting, the cost of which was financed by the sale in March, 1945, of bonds in the sum of $850,000, and of additional preferred shares of a par value of $200,000, both such issues being marketed by Gairdner & Company, Ltd.

The appellant made no efforts to dispose of its remaining 15,844 common shares of Dominion Malting. Early in 1946, Mr. Taylor on behalf of a brewing company which he controlled, intimated to Mr. Gairdner that in order to secure a regular supply of malt he was prepared to negotiate the purchase of all the output of Dominion Malting. Mr. Gairdner was not in favour of the suggestion as he did not wish the appellant company to hold the largest block of stock in a one-customer company. At the same time he was apprehensive that the Taylor interests might be adding to their holdings, and that there might be a battle for control which he wished to avoid. In the result, Taylor made a further proposal that the appellant should sell its 15,844 common shares of Dominion Malting to Canadian Breweries for $514,930, or $32.50 per share, that price then being about $6 per share over the current market price of the stock. That offer was accepted and the terms of the sale embodied in an agreement dated February 11, 1946 (Ex. 21), and was carried out on February 22, 1946. From Ex. 10, however, it would appear that the actual number of shares transferred to Canadian Breweries was 15,493 and the consideration $502,902.73. It is the profit arising from that transaction that has given rise to this appeal.

It was a very substantial profit, the shares being sold at $22.50 per share in excess of the original cost of $10. It is apparent that to some extent at least the decision to sell was based on the profit to be made. In answer to a question by counsel for the appellant as to whether the size of the profit motivated the company in selling at that time, Mr. Gairdner stated, "Well, it always has a bearing."

I may note here that at the time the appellant and its associates were acquiring the controlling interest in Dominion Malting, the appellant on June 26, 1944, accepted the offer of Trafalgar Securities Ltd. (also controlled directly or indirectly by Mr. Gairdner) to purchase all (or practically all) the appellant's remaining securities other than the Dominion Malting Company shares. In the result, the appellant company was left without assets of any kind except the Dominion Malting Company stock which it was then in the process of acquiring, and without liabilities except the debt to its bankers which it had incurred in connection with the same matter.

From these facts alone it would appear that the buying and selling of Dominion Malting shares belonged to that class of profit-making operations provided for in the appellant's charter, and which it had previously carried on. *Prima facie,* therefore, the profits therefrom would constitute taxable income. In *Anderson Logging Company* v. *The King* (1), Duff J. (as he then was) stated at p. 56:

> the sole raison d'être of a public company is to have a business and to carry it on. If the transaction in question belongs to a class of profit-making operations contemplated by the memorandum of association. *prima facie,* at all events, the profit derived from it is a profit derived from the business of the company.

It is submitted by the appellant, however, that certain other facts in this case are sufficient to establish that the purchase of shares in Dominion Malting was not entered into as a profit-making scheme, but as an investment, and that the realization of profit when the shares were sold, under the circumstances mentioned, was merely the realization of an enhancement in value of that investment and therefore a capital gain not subject to tax.

(1) (1925) S.C.R. 45.

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In support of this contention, counsel for the appellant relies in the main on the evidence of Mr. Gairdner. He was one of the incorporators of the appellant company and was a shareholder and director until at least the end of June, 1944 (Ex. 1). On June 26 of that year he was appointed general manager of the company for a period of twenty years, retroactive to June 25, 1943, with complete authority to acquire and sell securities on its behalf. Shortly thereafter he ceased to be a director and shareholder, having sold his interest to his children. I have no doubt that at all material times he operated the affairs of the company as he thought fit and without the intervention of the shareholders or directors. Mr. Gairdner states that in 1938, when the new company, "Gairdner & Company, Ltd.," was formed, and certain assets turned over to it, it was the intention thereafter to operate the appellant company as an investment company only, that is to say, it would discontinue buying and selling on behalf of the public and confine its activities to the realization of the securities which it retained and the investment of the proceeds on behalf of the company itself; the business of an investment dealer would be carried on by "Gairdner & Company, Ltd."

Ex. 10 is a statement prepared by the appellant's auditors for the period April, 1938, to December 31, 1946, comprising, (*a*) a list of the securities purchased; (*b*) a list of the securities sold, and (*c*) a further list of securities sold, those marked "X" representing securities held by the appellant at December 31, 1937, and those marked "Y" representing securities exchanged for those held on the same date. From the evidence of Mr. Gairdner, it is apparent that from 1938 on, the appellant discontinued its former business of buying and selling securities for the public and that one of its operations, and perhaps its main one, was to hold and nurse the securities it held and to sell them at a profit when a convenient occasion presented itself. Ex. 10 establishes, however, that that was not its sole activity between 1938 and 1944 and that to some extent it was still engaged in buying and selling stocks, not as an investment, but as a dealer therein. As one instance of the latter, I refer to a purchase of 17,075 shares of National Breweries stock on June 14, 1943, for $495,175. On the same date

16,700 shares were sold for $553,400, and the remaining shares were disposed of later in the same month, the whole transaction resulting apparently in a gross profit of over $70,000. In all, there were approximately 100 purchases of securities between the dates mentioned, and so far as I can ascertain from the evidence, many of these purchases had nothing to do with the business of liquidation of the old securities.

Mr. Gairdner states that about 1943 or 1944, he decided that it would be in the best interests of his sons to be placed in executive positions in suitable industries rather than be engaged in the more precarious business of buying and selling securities; that he began to look around for companies with good prospects which could be bought outright or in which a controlling interest could be secured, and thereafter to place his sons in executive positions therein. He says that, having that in mind and realizing the possibility that Dominion Malting, if acquired, could be expanded substantially under new management, he decided to secure control thereof as a permanent investment, the purchase to be made through the appellant company.

Much is made of Mr. Gairdner's evidence that at the beginning of the negotiations he intended that the appellant should acquire the whole interest in Dominion Malting and that it was only when he found that Taylor was also interested that it was decided to make it a joint venture; that the marketing of the new preferred shares and of the common shares which were sold was not carried out by the appellant but by one of the affiliated companies; that the sale of the common shares in 1944 was part of the entire scheme of making the investment, it being necessary to do so in order to secure some profit thereon which would assist in paying in part or in whole for the remaining shares which were to be held. It is also stressed that between the time when the shares were acquired in 1944 and the final sale was made in 1946, Mr. Gairdner on behalf of the appellant became a member of the Board of Directors of Dominion Malting and through his efforts the plant was substantially improved and enlarged, thus indicating the intention to retain a permanent interest therein. Then it is pointed out that while the market for common shares

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was continually rising, no further effort was made to dispose of them and that, when finally sold to the Canadian Brewing Company in 1946, it was only under the pressure of the circumstances which I have outlined above; and that the proceeds of the sale to Canadian Breweries have been used in the purchase of blocks of securities which the appellant has retained as investments.

Mr. Gairdner also states that in furtherance of his desire to place his sons in industry, he pursued a similar policy through Trafalgar Securities Ltd. (of which company he was also general-manager), that company between 1944 and 1947 acquiring ownership or control of some three or four other industrial concerns, the shares in which after the necessary refinancing had been carried out, are still retained by Trafalgar, his sons having been given executive positions therein. Finally, he states that for a number of years prior to 1946, the appellant company, while engaged in liquidating its old securities, treated any profits realized thereon as a capital gain; that in its income tax returns for those years it claimed and was allowed the status of a personal corporation, no objection being taken to the allocation of such profits to capital rather than to revenue account. He points out, also, that under the Excess Profits Tax Act, no application was made to establish the standard profits of the appellant such as would have been the case had the appellant continued in the business of a dealer.

It is submitted that the cumulative effect of the evidence establishes that the appellant in 1938 ceased to be a dealer in securities, that after 1938 it was an investment company and that there was a clear intention in acquiring the Dominion Malting shares to make an investment therein of a permanent nature.

The principles to be followed in cases such as the present one were explained by the Lord Justice Clerk in *Californian Copper Syndicate* v. *Harris* (1), where at p. 165 he said:

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable, where what is done is not merely

(1) 5 T.C. 159.

a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realization, the gain they make is liable to be assessed for Income Tax.

What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realizing a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

It must be kept in mind, also, that even if it be admitted that certain transactions resulted in capital accretion, they may give rise to taxable income if they form part of a scheme for profit-making or trade. In *Collins* v. *The Firth Brearley Stainless Steel Syndicate* (1), Rowlatt, J. said:

Now the principle I think is very clear and has been established by many cases. The appreciation of an article, the subject of property, whether it is the property of an individual or whether it is the property of a company, is not taxed as such; but it is taxed if the realization of that appreciation forms part of a trade, because then the trade is taxed, and this is an item in the trade. That is all there is in the principle.

Notwithstanding the evidence of Mr. Gairdner as to the intention to make the transaction an investment in Dominion Malting shares, I am of the opinion that its true nature is to be determined from the taxpayer's whole course of conduct, viewed in the light of all the circumstances. Now on the facts which I have set out, it seems to me impossible to conclude that there was here any investment. Prior to the time when the appellant transferred its securities to the parent company—Trafalgar Securities—it was virtually bankrupt, and when the securities were sold it was left with no assets and no liabilities. At the time of the transaction in question, therefore, it had nothing with which to make any investment.

On the contrary, I think it was in fact a speculation essentially of the same character (although perhaps of a more complicated nature) as it had previously engaged in and one which it was specifically empowered to do. Reference may be made to *Scottish Investment Trust Co.* v. *Forbes* (2). In that case an investment trust company had

(1) 9 T.C. 564. (2) 3 T.C. 231.

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power to vary its investments and generally to sell or exchange any of its assets, and it was held that the net gain by realizing investments at larger prices than were paid for them constituted profits chargeable with income tax. The Lord President stated in part at p. 234:

> As its name indicates, this is an Investment Company. and the Memorandum makes it plain that its profits are to be derived from various operations relating to the investments. The third head of the Memorandum professes to state the objects of the Company, and in head (6) of this enumeration occur the words "to vary the investments of the Company, and generally to sell, exchange, or otherwise dispose of, deal with, or turn to account any of the assets of the Company."
>
> It is true that the doing of any of these things might be incidentally necessary in the conduct of the business of any Company. It is also true that this Memorandum states in the latter heads of the same article several things which are less properly described as objects of a Company than as incidental acts of administration. But from the structure of the Memorandum it appears that the varying the investments and turning them to account are not contemplated merely as proceedings incidentally necessary, for they take their place among what are the essential features of the business. In my view such speculations are among the appointed means of this Company's gains. Accordingly, I should consider it legitimate for the directors to divide profits so made, although in determining the amount divisible they would necessarily have regard, not alone to the individual transaction yielding profit, but to the general results of their changes of investments. It would be right that they should maintain as strictly as possible the relative rights of separation between capital and income, and make all apportionments necessary in that behalf.

Now in the present case, the appellant was empowered to acquire and hold, and to sell and exchange stocks in other securities as principal (as well as in the capacity of agent), as one of the essential features of its business and as one of the appointed means by which it would carry on business for profit. What was done here was not something merely incidental to the exercise of the powers conferred on the company, but exercise of the very powers for which the company was incorporated. It is admitted that the appellant at the time of the transaction was carrying on a business and it must follow that when it made profits in carrying out the very business which it was empowered to carry on, that such profits are chargeable to tax. It would be impossible to suppose that a company which for years had carried on the business of buying and selling

securities could enter upon a single similar transaction and escape taxation by saying, "In this case if the transaction turns out well the profits realized therefrom will be entered in my books as a capital profit and I will retain as many shares as I can as a permanent investment."

In my opinion, the whole scheme was an oridnary commercial transaction entered into for the purpose of making a profit. It was realized from the outset that some of the common shares purchased by the appellant would have to be sold at a profit if the plan were to succeed. Over 11,000 shares were actually sold at a substantial profit and with that profit, and in view of the fact that the shares were steadily rising in value, the appellant was able to pay off the bank loan by borrowing from the parent company and thereby retain its shares.

The joint purchase of the shares which enabled the appellant to embark upon the enterprise with somewhat less risk than would have been the case had it been the sole purchaser, the stipulation that the Dominion Malting Company must be turned into a public corporation, the redemption of the former 7 per cent preferred stock by the issue of new shares at 5 per cent (which would enhance the value of the common shares), the splitting of the common shares so as to make them more readily marketable, the agreement by which the appellant underwrote the new issues of preferred shares at a discount of the actual marketing thereof by an associate of the parent company, the expansion of the business, the marketing of the new issue of bonds and shares by the associated company—all these steps, arranged and carried out by Mr. Gairdner on behalf of the appellant, all point to the fact that what was planned for and what was achieved was an enhancement in the value of the shares to be purchased and the making of a profit thereby. It is the familiar case of a financial organization acquiring control of a privately owned corporation, reorganizing its financial structure so as to ensure a ready distribution of the shares, and selling those shares to the public at a profit. Under the circumstances of this case, I am unable to see that it is of any importance what-

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ever that the shares were retained for a period of eighteen months, or that Mr. Gairdner had in mind that if the venture were successful, the company would retain some of the shares for the purpose of advancing the interests of his sons.

An observation in the *Anderson Logging* case, to which I have referred above, seems to me to be applicable to the facts in this case. There it was stated at p. 49:

> The appellant company is a company incorporated for the purpose of making a profit by carrying on business in various ways including, as already mentioned, by buying timber lands and dealing in them. It is difficult to discover any reason derived from the history of the operations of the company for thinking that in buying these timber limits the company did not envisage the course it actually pursued for turning these limits to account for its profit as at least a possible contingency; and, assuming that the correct inference from the true facts is that the limits were purchased with the intention of turning them to account for profit in any way which might present itself as the most convenient, including the sale of them, the proper conclusion seems to be that the assessor was right in treating this profit as income.

In the instant case there is a clear inference that in purchasing the shares, it was with the intention of turning them to account for profit in any way which might present itself as the most convenient, including the sale of them. As I have pointed out, a very substantial number were sold in 1944, a sale which in my view was entirely a trading transaction. I do not think that the appellant can now be heard to say that the sales made in 1946 of the remaining shares acquired under precisely the same circumstances do not constitute an ordinary trading transaction.

For the year 1946 there was no provision in the Income War Tax Act exempting the profits of the business of an investment company. S. 4(*w*) as enacted by s. 3(7), Statutes of Canada, 1946, c. 55, provided for exemptions for certain limited types of investment corporations, but was first made applicable to the year 1947. In any event, the appellant would not have fallen within its provisions. For the taxation year 1946, however, s. 7(*f*) of the Excess Profits Tax Act did provide for an exemption from the tax

under that Act, not for the profits of all investment corporations, but only for those diversified investment corporations which came within the conditions therein mentioned. The appellant was clearly not within the provisions of that subsection. In exempting from tax only those investment companies which fell within the conditions of s. 7(*f*), I think it must be inferred that Parliament intended that the profits of all other investment corporations should fall to be taxed as "income" under s. 3(1) of the Income War Tax Act.

For these reasons, I am of the opinion that the profit realized by the appellant upon the sale of its shares in Dominion Malting in 1946, fell within the provisions of s. 2(1) (*f*) of the Excess Profits Tax Act, was "income" within the meaning of s. 3(1) of the Income War Tax Act, and that the appellant was therefore subject to assessment under the Excess Profits Tax Act in respect thereof. The appeal will therefore be dismissed with costs.

Judgment accordingly.

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Oct. 23
1952
Oct. 10

BETWEEN:

THE SHIP *PETERBOROUGH* ..... } DEFENDANT-APPELLANT;

AND

THE BELL TELEPHONE CO. OF CANADA ..... } PLAINTIFF-RESPONDENT.

Shipping—Damage to cable caused by ship dropping anchor in a No-Anchorage Area—Negligence or inevitable accident—Findings of trial judge—Damages—Appeal from judgment of District Judge in Admiralty dismissed.

Appellant ship damaged respondent's cable which was laid from the north to the south shore of the St. Lawrence River between the City of Quebec and the City of Levis. At the hearing of the appeal appellant did not dispute the finding of fact of the trial judge that the cable had been torn away and damaged by the anchor of appellant ship. The appeal to this Court is based on the contention that the respondent has not proven negligence on the part of appellant and that such damage as was caused was the result of inevitable accident. It was established that respondent's cable was laid in a no-anchorage area, that the charts showed its position and that the Port Regulations which were duly published and were known to all pilots prohibited anchoring in that area.

The ship had left Quebec for Miami and had proceeded a short distance downstream when its engines failed completely and it began to drift upstream. One anchor was dropped and after some further drifting of the vessel it caught and held and the vessel came to a stop. When the anchor was heaved it was learned that it had fouled a cable. While preparing to pass a light line under the cable to raise it and free the anchor the anchor turned and the cable slipped off it and disappeared.

Held: That appellant failed to establish its plea of inevitable accident as the reason for the failure of its engines and equipment, such failure having been the reason for appellant dropping its anchor.

2. That in not dropping the second anchor which the vessel carried as required by the regulations, and as the pilot ordered, the crew of the vessel did not use that prudence and care in the emergency which they were required to exercise in endeavoring to halt the vessel's drift in order to avoid damage to the respondent's property, the means for which were at hand but in part not resorted to; the crew left undone something it could and should reasonably have done.

3. That there is no evidence to support the contention that the cable was laid or maintained in such a way as to have contributed to the accident or the resulting damage.

4. That under the existing circumstances the respondent did all it could reasonably be expected to do to minimise its loss and recover the whole or the major part of the cable.

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APPEAL from the judgment of the District Judge in Admiralty for the Quebec Admiralty District.

The appeal was heard before the Honourable Mr. Justice Cameron at Montreal.

C. Russell McKenzie, Q.C. and *Brock F. Clarke* for appellant.

P. C. Venne, Q.C. for respondent.

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

CAMERON J. now (October 10, 1952) delivered the following judgment:

This is an appeal from a judgment of Mr. Justice Smith, Deputy Judge in Admiralty, dated January 17, 1951, by which the respondent was awarded the sum of $11,484.86, with interest and costs. The trial was commenced and all the evidence heard before Mr. Justice Cannon, D.J.A., who died before hearing argument. Subsequently, an order was made by consent that the case be argued and decided on the evidence previously taken, Smith, D.J.A. at such hearing being assisted by Capt. T. C. Bannerman, Master Mariner, as assessor.

The plaintiff-respondent instituted proceedings to recover damages in respect of the loss of its submarine cable under the St. Lawrence River between the City of Quebec and the City of Levis. It claimed that on the evening of November 22, 1945, the defendant vessel let go its anchor within the "No-Anchorage Area" in which the said cable was laid, and that the said anchor dragged or fouled the cable, tearing it from its moorings on the Quebec side of the river, with the result that the cable disappeared and has never been recovered.

The evidence was that at about 7:30 p.m. on November 22, 1945, the appellant vessel, with Pilot Drapeau on board, cleared from Princess Louise Basin in the Harbour of Quebec and proceeded downstream bound for Miami. The *Peterborough* is a vessel of the Corvette type with a length of 208 ft., a beam of 53 ft., and a moulded depth of 17 ft. Her gross tonnage is approximately 771 tons and she was built in Canada in 1943.

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As she cleared the Princess Louise Basin, the weather was cold and snowing with a strong, easterly wind. There was at the time a rising tide running about 6 knots, with a set towards the Quebec side of the channel.

The vessel had proceeded downstream a very short distance when her engines failed completely, and, according to the evidence of the Pilot, this occurred at a point about 2,400 feet below Princess Louise Basin; the Chief Engineer's Log fixes the time at 7:45 p.m. At the same time, the auxiliaries, including the dynamo, ceased to function and the lights of the vessel were extinguished.

Under instructions from the Pilot, the Master, Chief Officer, Second Mate and other members of the crew immediately proceeded to the forecastle and let go the starboard anchor. At the time, the ship was being carried upstream and towards the Quebec side of the river by the force of wind and tide. According to the testimony of the Pilot, he also immediately ordered that the port anchor be let go, but the answer to this order was that although this anchor was in place, there was not sufficient chain. In any case, the port anchor was never lowered and the vessel continued to drift upstream towards the Quebec shore until 90 fathoms of chain had been let out, when the anchor finally caught and held and the vessel was brought to a stop at a point from 200 to 300 feet off the Quebec Ferry pontoon. The testimony of the Second Mate Poitras is that, before the anchor finally held, it caught and came away twice. According to Poitras, from 20 to 30 minutes elapsed between the time that the order was given to let go the starboard anchor and the moment when the 90 fathoms of chain had run out.

The evidence is that after the 90 fathoms had been let go, the anchor held almost immediately and the vessel ceased to drift and remained in the same place during the hour or hour and a half required to get the engines into operation. When the repairs had been completed at about 9:15 o'clock, and the ship again had steam on her boilers, orders were given by the Master to weigh anchor. The evidence of the Pilot, who was operating the telegraph, is that when they started to heave the anchor it was found to be caught and that he, at that moment, remarked to the ship's officers that there was a cable located in that

immediate vicinity. He states that the vessel was manoeuvred for upwards of three-quarters of an hour at slow, stop, and half ahead in an effort to free the ship's anchor. There is some divergence between the testimony of the Pilot and that of the Second Officer as to when it was discovered that the anchor had fouled, and as to the steps which were taken in the matter of clearing the cable. According to the Second Officer when the Master gave the order to weigh anchor, the vessel was put slow ahead and the anchor heaved. It was only when the anchor came into view that it became known that it had fouled a submarine cable. The evidence of Poitras is that preparations were made to pass a light line under the cable so as to raise it and thus free the anchor, but that while these preparations were in progress, the anchor turned and the cable which had been lying loose across the flukes of the anchor, slipped off of its own accord and disappeared, whereupon the order "full ahead" was given and the ship proceeded on her voyage. It appears that it was approximately ten o'clock when the anchor was finally cleared.

At about 9:55 o'clock of the same evening, the telephone service between Quebec and Levis was interrupted. An automatic signal system in the office of the respondent company indicated trouble in Submarine Cable No. 1 and Mr. Jolicoeur, an employee of the company, called Mr. Boyer (the plaintiff's toll wire chief and supervisor in charge of cables) to report the interruption. Mr. Boyer and others immediately investigated and found that Submarine Cable No. 1 from Quebec to Levis had been completely torn from its terminal on the Quebec side of the river (its mooring chain being broken) and had disappeared. The proof is that plaintiff's said cable was a very heavy submarine cable with double steel armour, weighing twelve pounds to the foot, and that it must have required a very considerable force or strain to tear it away from its moorings. The said cable was anchored to the wharf at each terminal by means of a heavy chain with links $\frac{5}{8}$" or $\frac{3}{4}$" thick and three inches in length, said chain being attached to the cable and to an iron rail (railroad rail) bolted to the wharf. From the side of the wharf the cable passed through a chute to a manhole where it was spliced with Cable No. 2 and then proceeded to the central office.

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It is apparent that the damage to the plaintiff's cable coincided in point of time with the hooking of the cable above mentioned by the anchor of the defendant vessel. There can be no doubt that the vessel's said anchor had dragged a considerable distance before it finally caught and held. As above noted, the testimony of the Pilot is that the vessel had proceeded 2,400 feet down the river after leaving Princess Louise Basin. The evidence is that the entrance to Princess Louise Basin is 1,850 feet below the cable terminal and that the Quebec Ferry Pontoon is 550 feet above the said terminal (a distance which coincides approximately with the 90 fathoms of chain which had been let out before the vessel was brought up, since the ship had reached a point almost opposite the said Ferry Pontoon before its anchor finally held). It is apparent, therefore, that she had drifted upwards of 4,800 feet from the time the engines failed until she was finally held by her anchor.

The above findings of fact are taken directly from the judgment of Smith, D.J.A. I agree with them entirely, and in fact they were not seriously challenged at the hearing in any respect.

On this evidence, the trial Judge found that the cable was torn away and damaged by the anchor of the defendant ship, and that finding is not now disputed. He also considered and rejected the defendant's plea of inevitable accident as well as the other defences raised, and awarded the plaintiff damages in the sum of $11,484.46.

The appeal is based mainly on the submission that the respondent has not proven negligence on the part of the appellant, and that such damage as was occasioned to the respondent's cable was the result of inevitable accident.

I am in agreement with the learned trial Judge that the respondent had established a *prima facie* case of negligence and that the defendant had the burden of proving its defence of inevitable accident. In Marsden's Collisions at Sea, 9th Ed., p. 42, the principle is stated thus:

> If she (a ship) damages another ship in consequence of the giving way or insufficiency of her gear or equipment, a prima facie case of negligence arises.

In the instant case, the fact that the engines of the vessel failed within fifteen minutes after she left her berth, and that she drifted out of control for a distance of almost a mile before her anchor caught in the respondent's cable, is *prima facie* proof of negligence.

Reference may be made to *The Daphne,* (1) where at p. 56 Bateson, J. said:

> I do not think I need bother to refer to any of the cases that have been cited to me. I had better mention the case of the *Submarine Telegraph Company* v. *Dickson,* 15 C.B. (N.S.) 759, with regard to the law of the matter, which I thought was very simple. The learned Attorney-General tells me that it has already been well laid down in that case that if you pick up another man's cable you have got to explain yourself and if you show that you did not know that it was there it lies upon the plaintiff to show that you ought to have known or did know, and so on. Then he cited the case of the *Exeter City,* 12 Ll.L. Rep. 423, a decision of Mr. Justice Hill, to support the case that that if a vessel was allowed to drag it was negligence.

In the instant case it is established that the respondent's cable was laid in a no-anchorage area, that the charts showed its position and that the Port Regulations which were duly published and were known to all the pilots (including Pilot Drapeau) prohibited anchoring in that area.

The Privy Council in *The Marpesia* (2) adopted the language of Dr. Lushington in *The Europa* (3), and defined "inevitable accident" to be "that which a party charged with an offence could not possibly prevent by the exercise of ordinary care, caution and maritime skill," and this must now be regarded as an authoritative definition.

> To sustain the defence of inevitable accident, the defendant must either show what was the cause of the accident, and show that the result of the cause was inevitable; or it must show all the possible causes, one or other of which produced the effect, and must further show with regard to every one of those possible causes that the result could not have been avoided. (*The Merchant Prince,* (1892) p. 179).

At the trial, the only explanation of the failure of the ship's engines which the appellant attempted to make was that water got into the fuel oil as a result of condensation taking place in the fuel oil tanks, was carried through the fuel pipes and extinguished the fires.

(1) 50 Ll. L.L.R. 51.
(2) (1872) L.R. 4 P.C. 220.
(3) (1850) 14 Jur. 627, 629.

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The only members of the ship's crew to testify were the Second Officer, Poitras, and the Stoker, Marcotte, and the former had no knowledge as to why the engines failed. Marcotte stated that it was caused by water getting into the fuel line due to condensation in the tanks. In substance, his evidence was as follows:

D.—Et vous dites qu'à un moment donné de l'eau, par le fait de la pompe, s'est introduite dans les bouilloires?

R.—Voyez-vous la pompe, il y a une succion et on était supposé prendre l'huile, c'est divisé de chaque côté et il y a une succion là-dedans, et probablement c'est chauffé, cette huile-là, et le froid, c'était au mois de novembre, il faisait froid, et cela s'est condensé; il y a eu de l'eau qui s'est formée, qui est venue dans l'huile et quand on est parti ça marchait très bien. Tout à coup, la pompe a pris un peu d'eau peut-être, et cela a passé dans le "heater", et ensuite dans le feu.

D.—Est-ce que cette eau qui s'est introduite était en dehors ou en dedans de la pompe? Je ne comprends pas très bien comment l'eau puisse s'être introduite comme cela?

R.—Je ne suis pas ingénieur, je suis seulement chauffeur, mais mon idée à moi, toujours...

He also stated that it was not necessary to make any repairs to the oil pump, but simply to remove the water and relight the fires, and that he assisted in doing so. No other witness was able to give direct evidence as to the actual cause of the breakdown.

The theory put forward by the respondent was that the engine failure was caused by a break in the oil pump. In support of that contention, the respondent filed as Ex. P4 a photostatic copy of the Chief Officer's log book, signed by the Master, produced by the appellant at the trial, and to the admissibility of which the appellant's counsel raised no objection. It is now submitted that in the absence of any proof as to who made the entries therein, it is inadmissible as hearsay. An official log book is made admissible in evidence by s. 269 of the Canada Shipping Act, 1934. If Ex. P4 is not, in fact, the official log, it would appear to be the engineer's log and is, therefore, admissible evidence *against* the owner (*The Earl of Dumfries* (1)).

It contains the following entry:

7:30 p.m.—All clear of pier and full away towards Miami

7:45 p.m.—Had to anchor just off pier, lights of ship out *and oil pump broken*

8:30 p.m.—Repairs done started to away anchor

(1) (1885) 10 P.D. 31.

The entry that the oil pump was broken is in direct contradiction to that of Marcotte, and to some extent is supported by para. 13 of the Statement of Defence:

Para. 13. After the defendant ship had been underway for about an hour, it was reported to the bridge by the engine-room that the fuel oil pump was not functioning and that it would be necessary to stop the engines.

In addition, the pilot, who was called as a witness for the respondent, stated that when he noticed that the speed of the vessel was lessening, he asked the officer of the watch to ascertain the cause and was told almost immediately thereafter, by someone from the engine-room, that "Le couvert de la pompe est sauté." This evidence was admitted over the objection of counsel for the appellant. He now submits that it was inadmissible as hearsay. The general principle, I think, is that statements as to the cause of a collision when made by the ship's Master, are admissible on the ground that he is the agent of the owners; but that such statements made by others of the crew are inadmissible (*The Europa* (1); *The Actaeon* (2)). On the other hand, statements by seamen and others on board made at the moment of collision have in some cases been admitted as part of the *res gestae* (*The Schwalbe* (3); *The Mellona* (4)). Under the circumstances disclosed, I am of the opinion that this statement is part of the *res gestae* and is therefore admissible.

Mr. Falardeau, a marine engineer, gave evidence for the appellant as an expert. He had been employed as fireman at the shipyard of Davis & Son, Shipbuilders, where the appellant ship had been undergoing repairs just prior to the date in question under his immediate supervision. When the repairs were completed, the vessel was submitted to a "dock try" of 4½ hours, and he stated that all the equipment worked well. One of the items in the work sheet was "fuel pump, cleaned and in good working order," and Falardeau stated that at the test it worked well. Speaking as an expert, he testified that condensation resulting in the presence of water in the fuel line might be an explanation for the failure of the ship's engines; he admitted, of course, that he had no personal knowledge of what actually occurred.

(1) 13 Jur. 856.
(2) 1 Spinks, E. & A. 176.
(3) (1859) Swab. 521.
(4) (1846) 10 Jur. 992.

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I am in agreement with the opinion of the trial Judge that the weight of the evidence is that the failure of the ship's engines was caused by a defect in or the breakdown of the fuel pump rather than by the presence of water in the fuel line. That defect or breakdown, however, was not explained in any way and there is no evidence as to why it occurred or whether it could have been prevented by the exercise of ordinary care.

It is of importance to note, however, that Mr. Falardeau, after describing the manner in which condensation could occur and cause the fires to be extinguished, stated that he personally had knowledge of another ship in which precisely the same situation had developed; and that it was well known to engineers in oil-burning ships that such a condition was liable to occur unless it was guarded against, particularly in the autumn when it was frequently experienced. He further stated that the normal way to provide against such an occurrence was to make provision for extra tanks and the installation of taps at the bottom of the reservoirs where the presence of water could be detected and the water run off. He said that in the Merchant Marine it is common to make such provision, but in Naval vessels of the Corvette type—such as this—no such equipment was provided.

In view of this evidence, it seems to me of little importance to determine whether the pump was broken or whether water got into the fuel line. If it were the former, the appellant has given no explanation as to how it occurred. If it were the latter, it would be a case of proceeding to sea with inadequate equipment, inadequate, that is, in the sense that it was insufficient to meet conditions which were to be expected and which could be guarded against by well known and simple means. That, in my opinion, constitutes negligence.

If a vessel is negligently allowed to be at sea in a defective or inefficient state as regards her hull or equipment, and a collision occurs which probably would not have occurred but for her defective condition, the collision will be held to have been caused by the negligence of her owners (Marsden's Collisions at Sea, 9th Ed., 14). In this case, if the breakdown had not occurred, it would not have

been necessary to drop the anchor and the cable would not have been fouled. If, in fact, the pump were broken within a very short time after the commencement of the voyage, then in the absence of an explanation as to how the break occurred, there would seem to be an irresistible inference that it was defective at the outset. If condensation occurred, it was a happening which could and should have been prevented by the provision of suitable equipment.

I am therefore in agreement with Smith, D.J.A. that the appellant failed to establish its plea of inevitable accident as the reason for the failure of its engines and equipment. Even had it proved inevitable accident in that respect, the question still remains as to whether the hooking and tearing away of the cable could have been avoided by the exercise of reasonable care, or whether that also was inevitable.

There can be no doubt whatever that in the emergency, and because the wind and tide were carrying the vessel into an area where danger was likely to occur to itself, and possibly to shore installations and other shipping, it was necessary to let go its anchor whether within or without a no-anchorage area. In doing so, and with knowledge of the existence of the respondent's cable, it was its duty to take all reasonable measures to avoid damage to the cable, and failure to do so would render her liable for any damage so caused.

Under existing regulations, the ship was required to have, and in fact did have, two anchors. Notwithstanding the orders of the pilot that both anchors be lowered, only the starboard anchor was let go. The pilot states that the reason assigned for not lowering the port anchor was that it had not sufficient chain. Second Officer Poitras does not deny that the pilot ordered the dropping of the port anchor, but states that it was found unnecessary to do so as the starboard anchor was sufficient to hold the vessel. The evidence, however, is that the starboard anchor by itself was insufficient to immediately hold the vessel; it caught and came away twice and held only after the vessel had drifted from fifteen to twenty minutes—a distance of nearly one mile.

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In *The Pladda,* (1) Sir Robert Phillimore stated at p. 39:

> We are of the opinion that had an anchor been let go, the collision would probably have been avoided. At all events the Master would have done all that was possible in the circumstances and have rendered this accident, to use the words of Dr. Lushington, "less probable".

Reference may be made to Marsden's Collisions at Sea, p. 21 (and the cases therein referred to) where it is stated:

> But if there is negligence in not letting go an anchor, or in not having an anchor ready to let go when the vessel is adrift she cannot sustain a defence of inevitable accident.

Smith, D.J.A. adopted the opinion of the nautical assessor that, as a measure of reasonable prudence and ordinary good seamanship, the second anchor should have been let go as soon as it was ordered by the pilot, and that had it been let go at that time it would have been reasonable to expect that the vessel's drift would have been arrested sooner than it was. He was further of the opinion that if both anchors had been promptly lowered, it was reasonably possible that the vessel would have stopped before the anchors reached the cable. There is ample evidence to support that finding and it should not be disturbed. It must follow, therefore, that in the emergency the crew of the vessel did not use that prudence and care which they were required to exercise in endeavouring to halt the vessel's drift in order to avoid damage to the respondent's property, and the means for which were at hand, but in part were not resorted to. It left undone something which it could and should reasonably have done, something which if done would in all probability have avoided any possible damage. The vessel must therefore be held liable for the respondent's loss.

It is further contended that the respondent laid and maintained the cable at its own risk, that it was faultily laid in that it was too short, and that it constituted an obstruction to navigation. None of these contentions is established by the evidence.

The respondent, under the provisions of the Navigable Waters Protection Act, applied for and by P.C. 121, dated January 9, 1942 (Ex. P. 5), was granted permission to lay the cable, subject to the condition that an easement should be secured from the National Harbours Board to lay and

(1) (1876) 2 P.D. 34.

maintain the said cable. That easement was obtained from the Board (Ex. P. 6) and the cable was laid in accordance with the plans submitted and approved. Both in the Order in Council and the grant of the easement, it was provided that the respondent company should not be deprived of any legal recourse it might have against any vessel, person or persons damaging the said cable wilfully, *or through negligence.* Moreover, I am unable to find anything in the evidence which would indicate that the cable constituted an obstruction to navigation.

At the time of the accident, the cable had a length of 400-600 feet in excess of that required to reach from shore to shore, that length being sufficient to permit it to be raised to the surface when inspection or repairs were required. Originally, it had been somewhat longer, but on account of damages sustained it had been somewhat shortened. After the accident, the new cable was made still longer for the reason that it could be laid further from another cable between the same terminals.

In my opinion, there was no duty cast upon the respondent company when laying the cable in a no-anchorage area (where damage by ships' anchors would not normally be anticipated) to lay it at such length and in such a manner as to be able to withstand all strains and stresses to which it might be subjected by a ship's anchor which had fouled it, or in such a way that it could not be fouled by a ship's anchor. Here the cable was subjected to very great strain for perhaps three quarters of an hour while the vessel made attempts to release its anchor, and the further strain of raising it to the surface. In my opinion, the result would have been precisely the same had the cable been somewhat longer. Due to the fact that the anchor was hooked on the cable at a point very close to the Quebec terminal (the precise distance is not stated, but the vessel itself was about 150 feet from that shore), practically the whole of the resulting strain would be placed on that terminal. There is no evidence whatever that that terminal which was completely torn away, was improperly constructed or inefficiently maintained. I agree with the opinion of the trial Judge that it is impossible to find that the cable was laid or maintained in such a way as to have contributed to the accident or the resulting damage.

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The only other matter raised in the appeal was the question of damages. Smith, D.J.A., in computing the damages, found on the evidence that the cost of installing a new cable of similar length was $11,659.80; from that amount he deducted depreciation on the old cable of $1,961.98, and added the outlay of $1,787.04 made in attempting to recover the lost cable, awarding the respondent $11,484.86, with interest and costs. I am satisfied that this method of assessing the damages was a proper one and that on the evidence the amounts ascertained were computed on recognized accounting practices. The main objection raised was that certain overhead charges were included in the computation, but for the reasons stated by the learned trial Judge, I am of the opinion that they were properly included.

It is submitted, however, that there was the duty on the respondent to minimize its loss and that by proper diligence it could have recovered the whole or the major part of the cable. There is a possibility that the cost of repairing the cable, had it been recovered, would have been less than the cost of installing a new one. As has been stated, the cable was pulled from its moorings on the Quebec shore and disappeared and has not since been seen. No one is able to state with certainty the extent to which it has been broken and damaged.

Steps were taken to locate the cable and the same procedure was followed as had been used successfully on other occasions. Dragging operations were carried out on the following day in an effort to locate and raise the loose end on the Quebec side, and after sweeping the entire area where it was likely to be found, it could not be located and the search there was abandoned. On a subsequent day, further efforts were made to locate it by under-running the cable from the Levis side; but at a point about 1,000 feet from the shore, the cable was found to be snagged on the bottom and the line broke. Due to the nature of the bed of the river at that point, it was considered that it would be impossible to locate the cable at the other side of the snag.

Because of these conditions, the lateness of the year and the fact that navigation had closed, the extremely bad weather conditions existing at the time, and that it was

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considered that further efforts would be unsuccessful and additional expenses were unwarranted, it was decided to abandon the search. It was realized, also, that as the end of the cable had been exposed to the water and other parts of the cable had probably been damaged, the cost of necessary repairs in the event of the cable being found would be very great. It is true, as contended for the appellant, that the total time involved in searching for the cable was not very great; there is a possibility that under more ideal seasonal and weather conditions, more extensive efforts might have led to better results. But under the existing circumstances, I am satisfied that the respondent did all that it could reasonably be expected to do and that the decision to proceed no further—a decision arrived at in good faith—cannot now be condemned.

For these reasons, I am of the opinion that the judgment of Smith, D.J.A. must be affirmed. The appeal will therefore be dismissed with costs.

Judgment accordingly.

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Oct. 23

BETWEEN:

BOWMAN BROTHERS LIMITED .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .....RESPONDENT.

Revenue—Excess profits tax—The Excess Profits Tax Act, 1940, S.C. 1940, c. 32, as amended, ss. 5(1), 5(3), 5(5), 13—Presumption of validity of assessment—Presumption that Board of Referees acted on proper principles—Board of Referees to decide whether standard profits to be determined on basis of capital employed or on some other basis—No jurisdiction in Court to review Board of Referees' decision—Evidence of subsequent decisions by Board of Referees inadmissible—Hearing before two members of Board permissible—Decision by majority of Board valid—Effect of words "final and conclusive" not limited to section under which application made.

The appellant applied to the Minister for a reference to the Board of Referees to determine its standard profits under The Excess Profits Tax Act, 1940. The application was made under section 5 of the Act, and the Board determined the standard profits under section 5(1). Its decision was approved by the Minister. Subsequently, the appellant made a second application under section 5(3) of the Act. The Department considered that the decision of the Board when approved by the Minister was final and conclusive and that the appellant did not have a right to have its claim re-heard. The appellant appealed from the assessment for 1944 based on the Board's decision.

Held: That the assessment carries with it a statutory presumption of validity until it has been shown to be erroneous in fact or in law and the onus of showing that it is erroneous lies on the taxpayer who appeals against it.

2. That it is to be assumed, in the absence of proof to the contrary, that the Board of Referees acted on proper principles and the onus of showing that it did not lies on the person who so alleges. Mere surmise or conjecture is not enough.

3. That the Court cannot determine that the appellant's claim came within section 5(3) of the Act and refer the assessment back to the Minister with instructions to refer the application to the Board of Referees for consideration under section 5(3).

4. That it was for the Board of Referees to decide whether the appellant's standard profits should be determined on the basis of the capital employed or on some other basis and the Court has no jurisdiction to pass judgment on the question.

5. That the appellant cannot show that the Board's determination of the appellant's standard profits on the basis of the capital employed was wrong by evidence that later a differently constituted Board determined the standard profits of similar companies on a basis other than that of the capital employed.

6. That evidence of what the Board of Referees did subsequently to its decision on the appellant's application was inadmissible.

7. That the Board of Referees could properly hold hearings before a panel of two members.

8. That the decision of the Board of Referees might validly be made by a majority of its members.

9. That when the Board of Referees has determined a company's standard profits and its decision has been approved by the Minister the decision is final and conclusive of the company's rights to standard profits at the time of its application regardless of whether the application was made under section 5 of the Act generally or under subsections 1 or 3 and a company which has applied for standard profits under section 5 and has received an award under subsection 1 cannot, on the same facts and without any change in its status or capital, have a second application for standard profits under a different subsection considered by the Minister or by the Board.

APPEAL from an assessment under The Excess Profits Tax Act, 1940, as amended.

The appeal was heard before the President of the Court at Ottawa.

H. G. Stapells K.C., H. H. Stikeman, R. B. Stapells and *A. L. Bissonette* for appellant.

E. G. Gowling K.C. and *T. Z. Boles* for respondent.

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

The PRESIDENT now (October 23, 1952) delivered the following judgment:

This is an appeal against the appellant's income tax and excess profits tax assessment for 1944 of which notice was given to it on March 1, 1947. On the assessment the Minister disallowed part of the appellant's claim for depreciation and used the standard profits determined by the Board of Referees and approved by the Minister as the base for the assessment of excess profits tax. On the opening of the hearing the appellant dropped its appeal against the disallowance of part of its depreciation claim so that the appeal is now only against the excess profits tax assessment.

The appeal raises important questions relating to the determination of standard profits under section 5 of The Excess Profits Tax Act, 1940, Statutes of Canada, 1940, chapter 32, by the Board of Referees appointed under section 13 of the Act and the effect of such decisions when approved by the Minister. It is, therefore, desirable to set

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out the relevant provisions of the Act. Subsection 1 of section 5 as it stood originally read as follows:

5. (1) If on the application of a taxpayer the Minister is satisfied:—

(*a*) that there were no profits in the standard period because the taxpayer was carrying on business at a loss or that the profits of the standard period were so low that it would not be just to ascertain the standard profits of the taxpayer by reference to such profits because either the business is of a class which during the standard period was depressed or because the business of the taxpayer was for some reason peculiar to itself abnormally depressed during the standard period when compared with other businesses of the same class, or

(*b*) that there were no profits in the standard period because the taxpayer was not carrying on business during such period, or that the profits of the standard period were so low that it would not be just to ascertain the standard profits of the taxpayer by reference to such profits because the business of the taxpayer was not in operation prior to January first, one thousand nine hundred and thirty-eight;

he may direct that the standard profits shall be ascertained by the Board of Referees as if the profits of the standard period were of such greater amount or such amount as they think just; provided that the decision of the Board shall not be operative until approved by the Minister, whereupon the said decision shall be final and conclusive.

And subsection 2 provided a limitation on the amount that the Board could determine, as follows:

5. (2) The standard profits ascertained by the Board, as provided in subsection one, in the case of taxpayers mentioned in paragraph (*a*) thereof, shall not exceed an amount equal to interest at such rate as the Board shall determine, not being less than five nor more than ten per centum per annum, on the amount of capital of the taxpayer computed by the Board in its sole discretion in accordance with the First Schedule to this Act.

Subsection 1 was amended on June 14, 1941, by section 6 of chapter 15 of the Statutes of 1940-41 and further amended on August 1, 1942, by section 3 of chapter 26 of the Statutes of 1942-43 to read as follows:—

5. (1) If a taxpayer is convinced that his standard profits were so low that it would not be just to determine his liability to tax under this Act by reference thereto because the business is either of a class which during the standard period was depressed or was for some reason peculiar to itself abnormally depressed during the standard period when compared with other businesses of the same class he may, subject as hereinafter provided, compute his standard profits at such greater amount as he thinks just, but not exceeding an amount equal to interest at ten per centum per annum on the amount of capital employed in the business at the

commencement of the last year or fiscal period of the taxpayer in the standard period computed in accordance with the First Schedule to this Act:

Provided that if the Minister is not satisfied that the business of the taxpayer was depressed or that the standard profits as computed by the taxpayer are fair and reasonable, he may direct that the standard profits be ascertained by the Board of Referees and the Board shall thereupon, in its sole discretion, ascertain the standard profits at such an amount as the Board thinks just, being, however, an amount equal to the average yearly profits of the taxpayer during the standard period or to interest at the rate of not less than five nor more than ten per centum per annum on the amount of capital employed at the commencement of the last year or fiscal period of the taxpayer in the standard period as computed by the Board in its sole discretion in accordance with the First Schedule to this Act, or the Minister shall assess the taxpayer in accordance with the provisions of this Act other than as provided in this subsection.

Subsection 3 of section 5 dealing with standard profits for cases where a capital standard is inapplicable was first enacted on June 14, 1941, by section 6 of chapter 15 of the Statutes of 1940-41 and amended on August 1, 1942, by section 3 of chapter 26 of the Statutes of 1942-43 to its present form which reads as follows:—

5. (3)If on the application of a taxpayer the Minister is satisfied that the business either was depressed during the standard period or was not in operation prior to the first day of January, one thousand nine hundred and thirty-eight, and the Minister on the advice of the Board of Referees is satisfied that because,

(*a*) the business is of such a nature that capital is not an important factor in the earnings of profits, or

(*b*) the capital has become abnormally impaired or due to other extraordinary circumstances is abnormally low

standard profits ascertained by reference to capital employed would result in the imposition of excessive taxation amounting to unjustifiable hardship or extreme discrimination or would jeopardize the continuation of the business of the taxpayer, the Minister shall direct that the standard profits be ascertained by the Board of Referees and the Board shall in its sole discretion thereupon ascertain the standard profits on such basis as the Board thinks just having regard to the standard profits of taxpayers in similar circumstances engaged in the same or an analogous class of business.

Finally, subsection 5 of section 5, as enacted on August 15, 1944, by section 4 of chapter 38 of the Statutes of 1944-45, provides:

5. (5) Notwithstanding anything in this section a decision of the Board given under this section shall not be operative until approved by the Minister whereupon the said decision shall be final and conclusive; Provided that if a decision is not approved by the Minister it shall be submitted to the Treasury Board who shall thereupon determine the standard profits and the decision of the Treasury Board shall be final and conclusive.

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Previously, this subsection was subsection 4 of section 5, as enacted on June 1, 1941, by section 6 of chapter 15 of the Statutes of 1940-41, and read as follows:

5. (4) Notwithstanding anything contained in this section the decisions of the Board given under subsections one, two and three of this section shall not be operative until approved by the Minister whereupon the said decisions shall be final and conclusive.

Provided that if a decision is not approved by the Minister it shall be submitted to the Treasury Board who shall thereupon determine the standard profits and the decision of the Treasury Board shall be final and conclusive.

And section 13 provided for the appointment of a Board of Referees as follows:

13. The Minister may appoint a Board of Referees to advise him and aid him in exercising the powers conferred upon him under this Act, and such Board shall exercise the powers conferred on the Board by this Act and such other powers and duties as are assigned to it by the Governor in Council.

The facts on which the appeal is based are not in dispute. The appellant is a corporation with its head office in Saskatoon in Saskatchewan and several other branches in that province. It operates a wholesale jobbing business in automotive parts and supplies and also handles automobile tires on consignment. On April 7, 1941, it prepared a standard profits claim under The Excess Profits Tax Act, 1940, on Form S.P. 1, addressed to the Minister of National Revenue by which it made application, pursuant to section 5 of the Act, for a reference to the Board of Referees to determine its standard profits of the standard period on the ground that its business was one of a class which during the standard period was depressed. Attached to the appellant's claim was its calculation of standard profits showing its average net capital and surplus for the four years of the standard period at $507,709 and the following statement:

Standard Profits estimated at 10 per cent would be $50,770 so a fair base for earnings could be calculated at $50,500.

There was also the following statement:

If we had not been confronted with the depressed conditions in 1937 and 1938, due to crop failures in Saskatchewan, we estimate that our base for the four year average would have been $59,000.

The application was signed by Mr. R. H. Bowman, who was then the appellant's secretary-treasurer, and filed in the office of the Inspector of Income Tax at Saskatoon on

April 8, 1941. Later, on May 16, 1941, Mr. Bowman answered the questions on S.P. 1 Questionnaire and delivered this form at the Saskatoon Office. On July 31, 1941, the Saskatoon Inspector of Income Tax sent the application and supporting documents to the Commissioner of Income Tax at Ottawa with a statement that it was believed that the appellant was one of a class that during the standard period was depressed and that the claim should be referred to the Board of Referees under section 5 of the Act. On August 12, 1941, the Commissioner of Income Tax, in the purported exercise of his discretion, determined that the appellant's business was not depressed during the standard period and that its claim would not be referred to the Board of Referees and on the same date the Head Office Committee of Review notified the Saskatoon Inspector of Income Tax that it did not concur in the recommendation that the file should be referred to the Board of Referees. On August 25, 1941, the Saskatoon Inspector of Income Tax notified the appellant of this decision. Mr. Bowman then instructed Mr. Arthur Moxon of Saskatoon to write to the Department of National Revenue and request a hearing before the Board of Referees. On September 5, 1941, the appellant wrote to the Inspector of Income Tax at Saskatoon renewing its request for a base of $50,500, which was just under 10 per cent of its capital, and on September 16, 1941, the Saskatoon Inspector of Income Tax notified the Commissioner of Income Tax accordingly. On April 28, 1942, the appellant wrote to the Saskatoon Inspector of Income Tax with further information and argument in support of its claim and on May 12, 1942, the Inspector sent a copy of this letter and other information to the Commissioner of Income Tax. On October 2, 1942, the Commissioner of Income Tax, acting under powers delegated to him by the Minister, pursuant to section 5 of The Excess Profits Tax Act, 1940, referred the appellant's claim to the Board of Referees.

For advice under Order-in-Council P.C. 6479 as to whether the business of the taxpayer was or was not depressed during the standard period and if depressed, for a determination of the Standard Profits.

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Subsequently, the appellant was notified that the time and place of the hearing by the Board had been fixed for April 21, 1943, at Regina, in Saskatchewan. The hearing took place before only two members of the Board of Referees, Mr. K. W. Dalglish and Mr. C. P. Fell, and the appellant was represented by Mr. R. H. Bowman, Mr. W. W. Miller, its accountant, and Mr. C. P. DeRoche, its auditor. At the hearing Mr. Bowman filed with the Board a letter dated April 20, 1943, showing the operating results of the appellant since its incorporation in 1915, givng particulars of its sales and earnings as well as other information in support of its request for a base of $50,500. This letter was accompanied by a comparative statement showing, *inter alia,* its sales, its earnings, its capital, its surplus and its net worth for each of the years of its existence. On April 28, 1943, the Board of Referees reported to the Minister of National Revenue as follows:

To

The Minister of National Revenue,
Ottawa, Ontario

Re: Bowman Brothers Limited, Saskatoon, Sask.

The Standard Profits Claim of the above-mentioned taxpayer was referred to the Board of Referees under date of 2nd October, 1942, in accordance with the provisions of The Excess Profits Tax Act, 1940, as amended.

The Board of Referees having examined the claim reports as follows:

Under the provisions of subsection one of section five of The Excess Profits Tax Act, 1940, as amended, the Board of Referees

(*a*) Finds that the business of the taxpayer was depressed during the Standard Period.

(*b*) Computes the Capital Employed by the taxpayer at 1st January, 1939, at .....$ 516,337.58

(*c*) Ascertains the yearly Standard Profits of the taxpayer at .....$ 50,500.00
being an amount equal to interest at approximately 9¾ per cent per annum on the Capital Employed as above.

Dated at Ottawa this twenty-eighth day of April, 1943.

Board of Referees,
W. H. Harrison, Chairman
G. P. Fell, Member
K. W. Dalglish, Member.

The decision of the Board of Referees was approved by the Commissioner of Income Tax, acting under the powers of the Minister, and on May 13, 1943, the Commissioner notified the appellant as follows:

Department of National Revenue

Office of the
Commissioner of Income Tax
Ottawa

May 13, 1943

Sir:—

Re Excess Profits Tax Act, 1940
Standard Profits Claim
Decision of the Board of Referees

Your application, pursuant to Section 5 of the Excess Profits Tax Act, 1940, has been considered by the Board of Referees.

The decision of the Board has been received and a copy thereof is set forth below.

The decision of the Board has been approved and becomes operative accordingly.

Yours truly,

Sgd. C. F. ELLIOTT
Commissioner of Income Tax

On May 22, 1943, the appellant wrote to the Commissioner of Income Tax as follows:

Saskatoon,
May 22, 1943.

C. F. Elliott, Esq.,
Commissioner of Income Tax,
Ottawa, Ontario.

Dear Sir:

Re Standard Profits Claim

Your letter of May 13th telling us of our Standard Profits base of $50,500 is gratefully acknowledged.

Your approval of the recommendation of the Board of Referees is another testimony of the spirit of fairness that has always characterized our dealings with the Income Tax Department.

Thanks a lot.

Yours very truly,

BOWMAN BROTHERS LIMITED,
Sgd. R. H. Bowman
Secretary-Treasurer.

It will be noted that the Board of Referees determined the appellant's standard profits at exactly the amount which it had requested.

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The appellant continued to be satisfied with the standard profits determined by the Board of Referees and approved by the Minister until late in 1946 when Mr. Bowman discovered that under subsection 3 of section 5 the determination of standard profits need not be limited to 10 per cent of the capital employed, that other factors than that of capital employed could be taken into account and that claims could be submitted for a much larger base than that which had been awarded to the appellant. Mr. Bowman learned this when he sat in on the preparation of the applications for standard profits of four companies in Western Canada, who were in the same line of business as itself, namely, Motor Car Supply Company of Canada Limited of Alberta, Mackenzie, White & Dunsmuir Limited of British Columbia, Gillis & Warren Limited of Manitoba and Vancouver, Parts Company Limited of British Columbia. These companies all carried on the same kind of business as that of the appellant and the manner of their operation was similar in all important respects. They all applied for a determination of their standard profits under subsection 3 of section 5 and all requested and were awarded a larger or relatively larger base of standard profits than that which the appellant had received. For example, Motor Car Supply Company of Canada Limited applied for standard profits of $126,000 on November 25, 1946 and was awarded $70,000 on September 18, 1947; Mackenzie, White & Dunsmuir Limited requested $87,583 on May 22, 1947, and was awarded $75,000 on September 18, 1947; Gillis & Warren Limited requested $30,000 on August 27, 1947 and was awarded $22,500 on May 5, 1948; and Vancouver Parts Limited requested $58,281 on August 28, 1947 and received $45,000 on May 5, 1948. The appellant then decided to follow the same course as these four companies and on August 28, 1947, it made a second application for the determination of its standard profits, this time under subsection 3 of section 5, in which it asked for standard profits of $157,614. On October 29, 1947, the Director of Income Tax at Saskatoon sent this second application to the Committee of Review at Ottawa and on November 4, 1947, the Director General of the Corporation Assessments

Branch of the Department of National Revenue at Ottawa sent the following letter to the appellant:

Committee of Review
H.P.F.
4th November, 1947.

Bowman Bros. Limited,
3rd Avenue & 24th Street,
SASKATOON, Sask.

Dear Sirs:—

The standard profits claim filed by your company on 29th August, 1947, has been forwarded to this office. It is noted that on the 28th April, 1943, the Board of Referees awarded the company a standard profits of $50,500 effective as at 1st January, 1939. It would appear that the present application is a resubmission of this claim upon which the Board of Referees has already given a decision.

Under Subsection five of Section five of the Excess Profits Tax Act a decision of the Board of Referees, when approved by the Minister, is considered to be final and conclusive and therefore your company is not considered to have the right to have its claim re-heard.

Yours faithfully,

for Director General
Corporation Assessments Branch.

HPF/BB

Under the circumstances the appellant felt aggrieved. Mr. Bowman, who had so cordially thanked the Commissioner of Income Tax for the fairness of the Department, now thought that the appellant's award was much too low as compared with that of the four other companies and considered that it had been discriminated against. The present appeal was brought accordingly in an effort to have its claim for a larger base of standard profits re-considered.

Reference should also be made to some further facts regarding the constitution of the Board of Referees, its membership and its operations. On November 1, 1940, the Minister, acting under the authority of section 13 of the Act, appointed a Board of Referees of three members under the chairmanship of Mr. Justice W. H. Harrison of the Supreme Court of New Brunswick, the other members being Mr. K. W. Dalglish and Mr. C. P. Fell, to advise and aid him in exercising the powers conferred upon him under the Act. By Order-in-Council P.C. 6479, dated November 16, 1940, certain powers and duties were assigned to the Board so appointed including the power and duty to report to the Minister in furtherance of the advice and aid sought

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by him from it and to determine the standard profits of any taxpayer or group of taxpayers that might be referred to it for consideration by the Minister.

There were no rules or regulations governing the procedure of the Board. Nor was there any requirement that it should hold oral hearings but it generally adopted the practice of holding such hearings at places where it would be convenient for taxpayers having standard profits claims under section 5 of the Act to appear and make representations. By the fall of 1942 the volume of the Board's work had so increased that an addition to its membership was considered necessary. On August 12, 1942, the Commissioner of Income Tax reported to the Minister recommending the appointment of Mr. Courtland Elliott, who had been the Board's economic adviser, as a member of the Board so that it could have dual hearings with two members to each hearing and on the same date the Minister, concurring in this report, recommended this appointment. This was made by Order in Council P.C. 90/8097 dated September 9, 1942.

Subsequently, by Order in Council P.C. 107/7934, dated October 14, 1944, Mr. Justice J. D. Hyndman was appointed to the Board and became its chairman on the retirement of Mr. Justice Harrison. Later, the Board was further increased in size to six members. From time to time there were changes in its membership so that by the time the Board dealt with the applications of the four companies referred to its personnel had completely changed from that which had existed on April 28, 1943, when the Board made its decision in the present case. All the earlier members of the Board had retired and been replaced by others.

Mr. T. N. Kirby, a former secretary of the Board and later a temporary member of it, gave evidence that there were many cases in which hearings had been held without a full attendance of all the members of the Board. There had been over 4,000 of such cases. There had been hundreds of hearings where only two members of the Board had been present and many cases where there had been no oral hearings, all of these latter, however, in cases where the taxpayer had consented. Mr. Kirby doubted whether the Board had ever sat as a whole when it consisted of six members.

Counsel for the appellant made conflicting arguments in support of the appeal. Mr. Stapells' main argument was that the Minister in considering the appellant's claim under subsection 1 of section 5 and not considering it under subsection 3 had proceeded on a wrong principle. His contention was that the application was made generally under section 5, without any request for consideration under subsection 1, that both the Minister and the Board knew of the existence of subsection 3, although the appellant did not, and that the application which, on the face of it, was made generally under section 5 should have been considered under the relevant subsection, that the application showed facts which would have warranted a disposition under subsection 3 but these were not discussed or considered at the hearing, that the fact that the appellant did not apply specifically under subsection 3 does not bar it from saying that the Minister did not determine the application under the proper subsection of section 5. Mr. Stapells stressed that it was not necessary that the appellant should make an application specifically under subsection 3 if it showed facts that brought the claim within the subsection, that the application stated that prior to the standard period the appellant had earned profits that were more than 10 per cent of its capital and would have earned more than 10 per cent in 1937 and 1938 but for the depressed conditions in those years, that these facts were sufficient material on which to ground a claim under subsection 3, even although the number of the subsection was not mentioned, that the obligation of the Board arose under section 13 of the Act, that it was not bound by the application but had the right and duty to discover independently what the appellant was entitled to and that if the Board and the Minister had put a proper interpretation on the figures in the application it would have been realized that the appellant was not a company that fell within subsection 1 of section 5 but came under subsection 3. Mr. Stapells urged that if it was shown in an application that a taxpayer had made profits above 10 per cent of his capital, as was the case here, there must have been factors that were more important than that of the capital employed, and that the Board should have come to the proper conclusion on the facts of the case and made its award on a basis other than that of the capital

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employed and that by reason of the failure to do so both the Board and the Minister acted on a wrong principle. It followed, according to Mr. Stapells, that the appeal should be allowed and the assessment referred back to the Minister with a direction to refer the appellant's standard profits claim back to the Board of Referees for consideration under subsection 3 of section 5.

It must be remembered that the assessment carries with it a statutory presumption of validity until it has been shown to be erroneous in fact or in law and that the onus of showing that it is erroneous lies on the taxpayer who appeals against it. *Vide Anderson Logging Co. Ltd.* v. *The King* (1); *Dezura* v. *Minister of National Revenue* (2); *Johnston* v. *Minister of National Revenue* (3); *Bower* v. *Minister of National Revenue* (4); *Goldman* v. *Minister of National Revenue* (5).

Thus the appellant must show that the assessment appealed against was erroneous. The error complained of is that it was based on the Board's decision determining the appellant's standard profits dated April 28, 1943, and that this decision was based on a wrong principle, namely, that the Board had determined the standard profits under subsection 1 of the Act without considering subsection 3. It is not to be assumed that the Board acted on a wrong principle. Indeed, it is to be assumed, in the absence of proof to the contrary, that it acted on proper principles and the onus of showing that it did not lies on the person who so alleges. Mere surmise or conjecture is not enough.

It is true that the appellant's application was made generally under section 5 of the Act, without any request for consideration under subsection 1. There is also the fact that the appellant did not make an application specifically under subsection 3 of section 5, prior to August 29, 1947, but that it did so then on the advice of Mr. Stapells. It is difficult to reconcile this fact with his argument that the appellant's application, having been made generally under section 5, should have been considered as if it had been made under subsection 3 in view of the fact that it contained

(1) (1925) S.C.R. 50.
(2) (1948) Ex. C.R. 10 at 15.
(3) (1947) Ex. C.R. 483; (1948) S.C.R. 486.
(4) (1949) Ex. C.R. 61 and 63.
(5) (1951) Ex. C.R. 274.

sufficient material on which to ground a claim under that subsection. If this argument is sound the application of August 29, 1947, was unnecessary.

While Mr. Stapells put his argument on the narrow ground that the Board and the Minister had proceeded on a wrong principle in that neither it nor he had considered the application under subsection 3, the real complaint is that the Board determined the appellant's standard profits on the basis of capital employed instead of on a basis other than that of capital employed. In effect, this Court is asked to review the finding of the Board and to declare that because the appellant stated, *inter alia,* in its application that it had earned more than 10 per cent of its capital, which could have warranted a determination of its standard profits on a basis other than that of the capital employed, the Board should have determined the appellant's standard profits under subsection 3 of section 5 and that in determining them under subsection 3 it had acted on a wrong principle. While Mr. Stapells did not ask the Court to declare the quantum of standard profits to which the appellant is entitled, that being clearly a matter for the Board and the Minister, it is obvious that the purpose of the appeal is to obtain for the appellant, through a directed reconsideration by the Board, a much larger standard profits base than the one awarded to it.

Thus the declaration sought in this case is substantially of the same nature as that which was unsuccessfully sought in *J. R. Moodie Limited* v. *Minister of National Revenue* (1) where it was held, *inter alia,* that the Court could not determine that the case came within section 5(3) and refer the assessment back to the Minister with instructions to refer the appellant's application to the Board for determination of its standard profits under section 5(3). While there are obvious differences between the *Moodie* case (*supra*) and this one several of the differences disappear if effect is given to Mr. Stapells' argument. For example, in the *Moodie* case (*supra*) there was an application specifically under subsection 3 of section 5 whereas in this case there was not. But when Mr. Stapells argued that the appellant's application was made generally under section

(1) (1948) Ex. C.R. 483; (1950) C.T.C. 61.

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5, that it was not necessary to make an application specifically under subsection 3 but that the application should have been considered under that subsection as if it had been made under it in view of the allegation that it contained sufficient material to make it tantamount to an application under it he put the appellant in exactly the same position as if it had made an application specifically under subsection 3 and so far as the application was concerned he made this case similar in principle to the *Moodie* case (*supra*). Mr. Stapells sought to distinguish this case from the *Moodie case* (*supra*) by pointing out that the references to the Board in the two cases were different. That is true, but it will be noted that the reference to the Board in this case was made generally under section 5 of the Act without reference to any subsection. The Board was not restricted to a determination of the appellant's profits on the basis of the capital employed but was left free to determine the standard profits on any basis permitted by section 5 which it considered warranted. That being so, the difference in the terms of the reference between this case and the *Moodie* case largely loses its importance. Moreover, the reports made by the Board in the two cases, apart from the figures involved, are almost identical.

Under the circumstances, Mr. Stapells has by his own argument put the two cases on substantially the same footing so that what was decided in that case is really applicable to this one so far as this argument is concerned. In the *Moodie* case (*supra*) the Board determined the standard profits as a percentage of the capital employed, although the appellant in that case had applied specifically under subsection 3, and it was held by this Court and unanimously by the Supreme Court of Canada that its determination on that basis should not be disturbed. I am of the same view in the present case. If it was open to the Board in the *Moodie* case (*supra*) to determine the standard profits on the basis of the capital employed, notwithstanding that there was an application under subsection 3 before it, how can it be said that it was not open to the Board in the present case to use the same basis particularly when the application itself was put on that basis and there was no request by the appellant for the use of any other basis?

Nor is there any reason to assume, even if the application had been made specifically under subsection 3, that the decision of the Board would have been different. It was for the Board to decide in this case, as in the *Moodie* case (*supra*), whether the standard profits should, on the facts, be determined on the basis of the capital employed or on some other basis. The Court has no jurisdiction to pass judgment on the question. Even if it be conceded that the Board was not bound by the appellant's application or its request but had the right and duty to determine independently what it was entitled to there is no reason to assume that the Board did not consider the facts that were said to be sufficient material on which to ground a claim under subsection 3 or consider the application under that subsection. While it was stated by Mr. Harmer in his examination for discovery as an officer of the Crown that the Minister had not considered the claim under subsection 3 because there was no claim under that subsection there is no evidence that the Board did not do so. There is only surmise to that effect.

Moreover, how could it be said in 1943 when the Board determined the appellant's standard profits at exactly the amount which it had requested that it had proceeded on a wrong principle?

Indeed, the reality of the case is that the only justification that Mr. Stapells could put forward for his contention that the Board had acted on a wrong principle in failing to use a basis other than that of the capital employed in determining the appellant's standard profits is that more than four years later a Board of Referees differently constituted determined the standard profits of four companies whose business positions and conditions were similar to the appellant's on a basis other than that of the capital employed, from which fact the Court is, in effect, asked to declare that the Board's decision in this case was wrong.

While it was natural that the appellant should feel aggrieved on finding that its standard profits were relatively very much lower than those determined for the four companies mentioned it does not follow that the decisions of the Board in these cases were necessarily right and that of the Board in the present case, therefore, wrong. Even if the evidence of what the Board determined in these cases

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was admissible no deduction ought to be drawn from their decisions other than that they show that the later members of the Board arrived at a different conclusion on similar facts from that reached by the earlier members in the present case. There is nothing anomalous in this for it is possible for two persons each hearing similar facts to draw different conclusions from them without one being necessarily right and the other wrong. How can this Court possibly find that the decisions of the later members were right and so deduce that the decision of the earlier members was wrong? It is not within the competence of this Court to pass any judgment on the correctness or otherwise of the decisions referred to. Certainly, they cannot be relied on as proof that the decision of the Board in the present case was wrong.

Moreover, I have reached the conclusion that the evidence of these decisions was inadmissible. Counsel for the respondent objected to it on the ground of irrelevance and I received it subject to such objection. I now hold that the objection ought to have been sustained. If the appellant had any right of appeal on the ground that the Board should have considered its claim under subsection 3 and determined its standard profits on a basis other than that of capital employed such right accrued immediately after the decision of the Board on April 28, 1943. If the appeal had been heard then or at any time prior to the applications of the four companies referred to and the decisions made on them counsel for the appellant could not have pointed to them as proof that the decision of the Board in the present case was based on a wrong principle. The appellant's position cannot be improved by the lapse of time.

The correctness of the Board's decision in the present case cannot be tested by what the Board with different members did in similar cases four years afterward. The appellant cannot derive any assistance from these decisions and Mr. Stapells is left without any support in fact or in law for his main argument that the Board acted on a wrong principle in determining the appellant's standard profits.

Mr. Stapells' next argument was that the decision of the Board of April 28, 1943, was a nullity or improper. This was his conclusion from a number of criticisms which he swept up together. For example, he urged that since

only two members of the Board had been present at the hearing in Regina there had been no hearing by the Board and the Minister had had the benefit of the knowledge of only two members instead of that of four. Furthermore, according to the argument, the hearing before the two members of the Board had been improperly conducted in that when the appellant was told that it had twenty minutes in which to present its case an inadequate time had been allotted and also that the members had been delinquent in failing to discuss the importance or unimportance of the basis of capital employed or to make any comparison with other companies or mention the distinction between subsections 1 and 3 of section 5 or that the appellant might have a claim under the latter. Then it was submitted that since Mr. Justice Harrison, the Chairman of the Board, had concurred in the so-called decision without having heard the evidence at the hearing and that since the so-called report of the decision had been signed by only three members of the Board instead of four it must be presumed that Mr. Courtland Elliott, the member who had not signed, had not considered the application, it must follow that there had been no decision by the Board as such. There was also the criticism that the document, dated April 28, 1943, was not a report in the ordinary sense and that consequently there was nothing to justify the decision by the Minister.

Finally, it was urged that the Board did not give the Minister the advice which section 13 of the Act contemplated, that the Minister had asked the Board to report on the question of depression and determine standard profits under section 5, that all the Board had done was to find depression and determine standard profits under subsection 1 of section 5 and that, consequently, the Minister did not have sufficient information or knowledge on which to base the proper exercise of his discretion. Coupled with these criticisms of the Board it was urged that there had been a failure of duty on the part of the Minister, that he should have been put upon enquiry when he received only a letter from three members of the Board instead of a report and saw that Mr. Courtland Elliott

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had not signed and that in treating the appellant differently from the four companies referred to he had discriminated against it.

For these reasons Mr. Stapells urged that the Court should declare that the purported decision of the Board of April 28, 1943, was null and void and that the matter should be referred back to the Minister with a direction to present the case again to the Board of Referees for a new hearing.

There is no substance in these criticisms. Only one of them requires consideration. There is no validity in the argument that the decision of the Board was a nullity because only two members were present at the hearing. In the first place, the Board was not restricted to evidence presented at an oral hearing and there was no requirement that there should be any oral hearing. Moreover, it is clear that the increase in the size of the Board from three members to four was intended for the purpose of enabling the Board to hold hearings before two panels of two members each in order to cope with the increased volume of its work. The balance of the complaint against the conduct of the hearing is wholly without merit. The contention that there had been no decision by the Board as such since only three members of the four-man Board had signed the report of April 28, 1943, might have carried weight if the members of the Board had been in the position of arbitrators between the appellant and the Minister but they were not. The Board was appointed by the Minister under the authority of section 13 of the Act and directed to exercise the powers conferred on it by the Act and also such other powers and duties as were assigned to it by the Governor in Council. Under these circumstances it seems to me that section 31(*c*) of the Interpretation Act, R.S.C. 1927, chap. 1, applies. This provides as follows:

> 31. In every Act, unless the contrary intention appears,
>
> (*c*) where any act or thing is required to be done by more than two persons, a majority of them may do it;

That is the situation here. Section 13 of the Act requires the Board to do certain things and a majority of the Board may do it. Consequently, even if Mr. Courtland Elliott did not consider the appellant's application a majority of the Board did: *Vide* also the decision of the Supreme

Court of Canada in *Glasgow Underwriters* v. *Smith* (1). Moreover, even if section 31(*c*) of the Interpretation Act does not apply there is no evidence that Mr. Courtland Elliott did not consider the application. Indeed, three members of the Board reported that the Board had examined the claim and in the absence of evidence to the contrary, it ought to be assumed that the Board did what it was supposed to do. The remaining criticisms of the conduct of the Board and of the Minister I dismiss summarily.

The prayer in the appellant's statement of claim that the decision of the Board of Referees be declared null and void and that the matter be referred back to the Minister with a direction to him to present the case again to the Board of Referees for a new hearing is, therefore, denied. There is no case for any such declaration or direction.

I now come to the appellant's prayer in the alternative that it be declared that although there has been an award of standard profits under subsection 1 of section 5 of the Act the Minister is not precluded from referring the appellant's further application for standard profits to the Board of Referees for advice and ascertainment of standard profits under subsection 3 of section 5. The argument in support of this alternative prayer was outlined by Mr. Stapells and elaborated by Mr. Stikeman. Mr. Stikeman's submission, as I understood it, was that the subsections of section 5 must be considered as if they were separate sections, that each gave a right to the taxpayer who came within its ambit, that there was no prohibition against a taxpayer qualifying under more than one subsection, notwithstanding the words "final and conclusive", that consequently a taxpayer who had received an award under subsection 1 was not precluded from making an application under subsection 3 and that the Minister was not precluded from entertaining such an application. The essence of the argument was that the decision of the Board when approved by the Minister was final and conclusive only in respect of the application on which the decision was made so that no further application under the same subsection could be considered. But, it was urged, the words

(1) (1924) S.C.R. 531.

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had no bearing in respect of an application under a different subsection. Therefore, while the decision of the Board was final and conclusive in respect of the appellant's application under subsection 1 and it could not have its claim reconsidered under that subsection, the provision did not bar the appellant's second application and there was nothing to preclude the Minister from entertaining it and referring it to the Board for advice and ascertainment of standard profits under subsection 3. Under this argument the appellant's application under subsection 1 and the award made under it may be disregarded and only the second application need be considered.

While the language of subsection 4 of section 5, as it stood prior to the amendment of 1944, is not as precise as might be desired and lends itself to the possibility of the interpretation put forward by Mr. Stikeman I am unable to agree with his interpretation. While there may be circumstances under which the decision of the Board although approved by the Minister is not final and conclusive of a company's standard profits, as, for example, when it has been re-classified or there has been a change in its status or capital set-up, it seems unreasonable to attribute to Parliament an intention that a company which has applied for standard profits under section 5 and received an award under subsection 1 should, on the same set of facts and without any change of status or capital, be able, when dissatisfied with its award, to make a second application for standard profits under another subsection of section 5. The possibility of being thus able to shift from one subsection to another should not be read into the subsection. Moreover, if the subsection is read as a whole, including its proviso, it will appear that no such multiplicity of applications for standard profits was intended. It is clear from the proviso that if the Board's decision as to standard profits is not approved by the Minister and it is submitted to the Treasury Board the latter will determine the standard profits and its decision will be final and conclusive, no matter under what subsection of section 5 the application for standard profits was made. It would be an anomalous situation if there should be a different result in cases where the Board's decision has been approved by

the Minister. In my view, the words "final and conclusive" have the same width of applicability whether the decision of the Board is approved by the Minister or the decision is made by the Treasury Board. They are not limited in their effect to the subsection under which the application was made. When the Board of Referees has determined a company's standard profits and its decision has been approved by the Minister the decision is final and conclusive of the company's rights to standard profits at the time of its application regardless of whether the application was made under section 5 generally or under subsections 1 or 3 and a company which has applied for standard profits under section 5 and has received an award under subsection 1 cannot, on the same facts and without any change in its status or capital, have a second application for standard profits under a different subsection considered by the Minister or by the Board.

The applicant's alternative prayer is, therefore, denied.

For the reasons given the appeal herein must be dismissed with costs.

Judgment accordingly,

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Apr. 15 & 16
Oct. 20

BETWEEN:

SUTTON LUMBER AND TRADING CO. LTD., ... } APPELLANT;

AND

MINISTER OF NATIONAL REVENUE RESPONDENT.

Revenue—Income—Excess Profits Tax Act 1940—Capital or income—Sale of an asset a transaction in ordinary course of business—Appeal dismissed.

Appellant company was incorporated with the objects for which it was established set out in the Memorandum of Association and more particularly in s. 2(*i*) thereof as follows: "To purchase, take on lease or otherwise acquire and hold any lands, timber lands or leases . . . . and to sell, lease, sublet or otherwise dispose of the same . . . .".

Appellant sold for a considerable sum of money a large tract of timber land which it had held for a number of years. The appellant was assessed for income tax on the proceeds of this sale. An appeal from the confirmation of such assessment by respondent was taken to this Court.

Held: That the sale of the timber tract was a transaction in the ordinary course of appellant's business and not the sale of a capital asset for cash, and the profit thereon was one made in the operation of appellant's business.

APPEAL under the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Archibald at Vancouver.

C. K. Guild, Q.C. and *O. F. Lundell* for appellant.

C. C. I. Merritt and *J. D. C. Boland* for respondent.

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

ARCHIBALD J. now (October 20, 1952) delivered the following judgment:

This is an appeal by Sutton Lumber and Trading Company Limited from an assessment for excess profits tax for the year 1946, confirmed by the Minister of National Revenue. In the Statement of Claim, as well as in the "Opening Statement" made by counsel for the appellant, may be found in detail, information respecting the history of the appellant company and its holdings of timber land on the west and northern coasts of Vancouver Island.

It is not necessary, for the purposes of this decision, to repeat, in detail, the story of the various transactions and operations outlined at great length in the said "opening statement", but I wish to add in passing that the aforementioned "opening statement", when read in conjunction with the pleadings and the evidence, was of very great assistance to the Court.

Sutton Lumber and Trading Company Limited was incorporated in 1893, pursuant to the Companies Act of the Province of British Columbia, at that time in force.

The incorporators and directors of the Sutton Lumber and Trading Company Limited at that time were engaged in a relatively small way in operating a small mill in cutting lumber from approximately 5,000 acres, forming a portion of the lands and leases owned by the appellant company at the time of or subsequent to its "re-incorporation" pursuant to the provisions of the British Columbia Companies Act, (1897).

In or about the year 1902, the then directors and shareholders of the Sutton Lumber and Trading Company Limited, having first "re-incorporated" said appellant company, pursuant to said Companies Act of 1897, sold their holdings in Sutton Lumber and Trading Company Limited to Messrs. W. H. and A. F. McEwan of Seattle in the State of Washington, United States of America, who, at that time, operated the Seattle Cedar Company Limited, which was a company engaged in the manufacture and sale of cedar products. It should be noted also that the McEwans were interested in other companies trading in cedar and cedar lumber products.

About two years later, there came into the appellant company, V. W. Arnold of Albany, New York, and who, at that time, was an operator and a manufacturer of lumber, principally pine, in the eastern United States. The evidence also indicates that W. H. McEwan died in 1923, that A. F. McEwan died in 1947 and that V. W. Arnold died in 1932.

About, or shortly after the time when the McEwans became interested in the Sutton Lumber and Trading Company Limited, the appellant company acquired other lumber and timber lands in the west coast of British

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Columbia. These timber limits were acquired either by grant from the Government of British Columbia or by renewable leases, prior to 1905.

The lands also acquired by them, together with the lands purchased from the original holders of the appellant company, pursuant to its incorporation in 1893, were as follows:

(a) The Nootka Tract contiguous to Nootka Sound consisting principally of fir and estimated to contain approximately 300,000,000 feet board measure British Columbia Log Scale of timber, and covering an area of approximately 9,603 acres.

(b) The Clayoquot Tract contiguous to the various arms of Clayoquot Sound on the north and the Ucluelet Arm of Barclay Sound on the south, consisting principally of cedar estimated to contain approximately 2,250,000,000 feet board measure British Columbia Log Scale of timber, and covering an area of approximately 65,297·5 acres.

and the total acreage of the two tracts was approximately 70,000 acres.

A range of mountains separates the Nootka Sound tract from the Clayoquot tract. The Nootka tract is predominantly fir timber while the Clayoquot tract is predominantly cedar timber.

Subsequent to the acquisition of these timber limits, the appellant company erected a cedar mill at or near Mosquito Harbour in the Clayoquot tract and conducted an operation there in or about the year 1907. It manufactured three cargoes of cedar lumber which it despatched to the east coast of the United States, but owing to the great depression at that time, disposed of the lumber at a very heavy loss. No substantial operations were conducted on any of the holdings until the year 1937. The mill itself did not operate and in the year 1940, much of the machinery was requisitioned by the Dominion Government to be used in its wartime activities. It is worthy of note also, that after 1907, the appellant company did not maintain any business office in Canada and it should be noted that from 1926 to the date of the sale of the Nootka tract, the witnesses Schultheis and Fiskin were either individually or both directors of the appellant company.

In 1937 and 1938, the appellant company sold certain stumpage rights to a firm known as Gibson Brothers Limited and again in 1943 sold a large area of stumpage rights to the North Coast Timber Company Limited. Then

in 1946, and again it should be noted that the witnesses, Schultheis and Fiskin were still directors of the appellant company, the entire Nootka area was sold for cash to the British Columbia Forest Products Limited, the proceeds from the latter sale amounted to $315,000. An assessment, pursuant to the provisions of The Excess Profits Tax Act was made by the Department of National Revenue.

This assessment was appealed to the Minister of National Revenue and the said assessment was confirmed by him: thereupon an appeal was taken to this Court.

In its appeal, it is claimed on behalf of the appellant, that the sale to the British Columbia Forest Products Limited, was a sale of a capital asset and not a sale in the ordinary course of business of the appellant company and that the proceeds from the sale therefore, do not attract excess profits tax. In support of the appellant's contention, in addition to the evidence of the witnesses, there were submitted to the Court many exhibits and a large volume of evidence.

In the absence of any evidence from any of the shareholders or other responsible officers during the early years of the appellant company's existence, it becomes necessary to examine the acts and the conduct of the appellant company, to deduce, if possible, the actual intent of the appellant company during its early years.

To establish this intent, the appellant called a witness named Schultheis, who became an employee of the Seattle Cedar Company Limited, in 1896. He was employed by that company in a capacity sometimes described as "timber buyer" and sometimes referred to as "outside manager for the McEwans." As such, he had much to do with the Sutton Lumber and Trading Company Limited, in fact, he became vice-president of the appellant company in 1923 and in 1926, became a director as well.

On behalf of the appellant, an effort was made to indicate that during the time that he was associated with the McEwans and with the Sutton Lumber and Trading Company Limited, he had detailed knowledge respecting *all* the plans of the directors of the appellant company.

His evidence does not satisfy me that such was the case. Schultheis, notwithstanding his age, is still an alert, active gentleman, but his recollection of things that occurred forty

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or fifty years ago is not as clear nor as accurate as could be desired. I cannot accept his evidence as conclusive proof of the intent and purposes of the directors of the appellant company during the early years of its existence, in fact, I find his evidence entirely unsatisfactory in that regard.

I do not propose to analyse his evidence in detail in this regard. However, I must point out that with respect to this most striking incident that occurred in 1911, when the directors resolved at a meeting, and as so stated in the Minute Book, that they would proceed to sell the Nootka tract, Schultheis had no recollection of any such meeting of directors or of any such resolution made by them or of any purpose or decision to like effect proposed or purposed by the directors of the appellant company. Schultheis, at that time, was acting in the capacity of a lumber buyer or manager for the McEwans' interests in the outside activities of their companies, and it would be surprising indeed if he could, after all these years, recall sufficiently well incidents, which ordinarily, would not be part of his activities, to render his evidence helpful to the Court.

I should point out also, that his evidence respecting the cruises or other examinations of the timber limits as obtained by the appellant company, was far from satisfactory. He endeavoured to give the impression that the preponderance of the fir timber in the Nootka tract did not come to the knowledge of the appellant company until 1923. Any such suggestion I am unable to accept. There was an examination of the timber holdings made in the years 1903 and 1904 and again in 1911, and it is true there was a detailed cruise made in 1923, which indicated the kinds, qualities and quantities of timber on the lands, but I am satisfied that a man possessing the experience and knowledge of Mr. Schultheis, with regard to the Nootka area, would have known, in a general way, that there were there large holdings of fir lumber. In this regard, it should be noted also, that on his cross-examination, he finally admitted that at no time while he was a director of the appellant company or in fact, at any time prior thereto, had there been an opportunity to dispose of any of the lumber, either fir or cedar, to advantage. Neither was any of the evidence of the other witnesses helpful in determining this question of intent.

Witness Travelle impressed me as a very competent witness but he could speak only, and in fact attempted to speak only, respecting the impossibility, until very recent years, of conducting a joint fir and cedar operation in the same mill.

Witness Fiskin's evidence had to do with the period since 1938 when he became a director of the appellant company and since 1930 when he became associated with the Seattle Cedar Company Limited. He did not attempt to give any evidence as to the intent of the officers and directors of the appellant company in the earlier years. He did, however, it is true, make one very important and useful observation when he stated, on cross-examination, that normally a company holding timber lands would have three ways of realizing upon its holdings, namely, to log and cut those logs in the owner's mills, or log and sell the logs on the open market or the third, to sell the timber.

On behalf of the appellant it was argued, and argued with great force, that the Sutton Lumber and Trading Company Limited was established in 1893 and later in its "re-incorporation" for the purpose of manufacturing cedar and cedar products. While it is true that the McEwan interests had, through the years, been engaged to a large extent in manufacturing and trading in cedar in its Seattle and other operations, and while it is true that the handling of cedar products on Vancouver Island was one of its main interests, nevertheless it was by no means its sole interest. The evidence is clear that they knew that they had large holdings of fir timber, and while they considered disposing of same in 1911, the fact is that they did not do so, and could not profitably deal in lumber of any description on their holdings on Vancouver Island until 1937, in which year, and again in 1938 and in 1943, the appellant company made substantial sales of lumber on a stumpage basis. It is important to note that they treated these sales on a stumpage basis as sales made in the course of their business and did not use the cedar mill, or any cedar mill, in conjunction with any cedar logs cut pursuant to the contracts under which any logs were cut.

In fact, with the exception of the disastrous operations of the cedar mill in or about 1907, the sole operations of the appellant company in trading or "turning to account" its

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holdings in the Nootka and Clayoquot areas were concerned in the selling of timber on a stumpage basis and when those sales were made, the proceeds were treated as trading operations and subject to income tax.

Counsel for the appellant as well as counsel for the respondent, stressed that resort must be had to the Memorandum of Association, because as I have already indicated, the evidence of neither Schultheis nor Fiskin convinced me that the intent of the McEwans and other shareholders of the appellant company was restricted to operations and dealings in cedar lumber only. My finding is that the evidence does not establish any such contention. Therefore, the appellant has failed in its evidence to discharge the burden of proof—that the assessment is not correct. Such being the case, it becomes necessary to examine the appellant company's Memorandum of Association. This Memorandum of Association is dated November 17, 1902, and the main or primary objects for which the appellant company was established are to be found in section 2 of said Memorandum of Association. This section, together with the words of introduction, reads as follows:

THE COMPANIES ACT, 1897

Section 5.

MEMORANDUM OF ASSOCIATION
OF THE
SUTTON LUMBER AND TRADING COMPANY
LIMITED.

1. The name of the Company is the "Sutton Lumber and Trading Company, Limited."

2. The objects for which the Company is established are:

(*i*) To purchase, take on lease, or otherwise acquire and hold any lands, timber lands or leases, timber claims, licences to cut timber, rights of way, water rights and privileges, forshore rights, wharves, saw mills, factories, buildings, machinery, plant, stock-in-trade, or other real and personal property, and equip, operate and turn the same to account, and to sell, lease, sublet or otherwise dispose of the same, or any part thereof, or any interest therein.

In my opinion, it is of great importance that this power "to sell" is to be found in paragraph 2(i) and it forms an important portion of that subsection dealing with the main and primary objects of the appellant company. This power is equally as important as any of the other powers enumerated in that subsection. This power "to sell" moreover,

is not limited nor restricted by provisions in any other subsections of the said Memorandum of Association. I again emphasize that the proof is wanting either by direct or by inescapable inference to justify any conclusion to the contrary.

Counsel for the appellant argued that this was a sale of a capital asset for cash, not the sale of an asset in a manner based on production or use.

On the other hand, counsel for the respondent, after having again emphasized that the burden of proof is on the appellant to show the assessment is wrong, argued with force that this was a transaction in the ordinary course of this appellant company's business. With this argument I agree, and I am firmly of opinion that this was a transaction which was in the minds of the incorporators of the appellant company, and its directors throughout, certainly one thought of as a remote possibility.

Moreover, I do not think that the mere fact that Sutton Lumber and Trading Company Limited, by having the power to carry on a saw mill and did in fact conduct a saw mill back in 1907, justifies the conclusion that the appellant thereby excluded itself from the use of any of the other powers capable of being exercised in the normal use of its powers.

It also must be remembered that the evidence of the witnesses was consistent with the willingness of the directors of the appellant company to exercise this power to sell part of its timber lands at a profit, consistent with it carrying on a saw mill business.

The suggestion that this is an isolated transaction and therefore not taxable, does not apply to an incorporated company in all the circumstances of this case. As has been frequently stated, the question is "was the profit in question a profit made in the operation of appellant company's business? If it was, it is taxable." In turning these timber lands to account for a profit, it is reasonable to think that a sale of part of the lands must have been envisaged, as in fact the Minutes for 1911 clearly indicate.

Counsel for both appellant and respondent directed my attention to numerous authorities. Having regard to the facts as I find them in this case, it is necessary for me to

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discuss two of them only. The first one is the decision of Duff, J. (as he then was) in *Anderson Logging Company* v. *The King* (1). His remarks at pages 47 and 49 are particularly interesting in considering this appeal. He says at p. 47:

> it is sufficiently clear from the memorandum of association that one of the substantive objects of the company was to acquire timber lands and timber rights with a view to dealing in them and turning them to account to the profit of the company.

and again at p. 49 he says:

> The appellant company is a company incorporated for the purpose of making a profit by carrying on business in various ways including, as already mentioned, by buying timber lands and dealing in them. It is difficult to discover any reason derived from the history of the operations of the company for thinking that in buying these timber limits the company did not envisage the course it actually pursued for turning these limits to account for its profit as at least a possible contingency; and, assuming that the correct inference from the true facts is that the limits were purchased wih the intention of turning them to account for profit in any way which might present itself as the most convenient, including the sale of them, the proper conclusion seems to be that the assessor was right in treating this profit as income.

Counsel for both appellant and respondent quoted at length from his decision as reported. I do not think it necessary, for the purpose of my decision, to repeat the citations referred to me. *Anderson Logging Company* v. *The King* (*supra*) is a most important one and the decision in it, among other things, lays down the principle that:

> Where the powers of a company, incorporated to take over as a going concern a logging business, included the power to acquire timber lands with a view to dealing in them and turning them to account for the profit of the company, and it bought a tract of timber land and sold it at a profit the same is not a capital profit but one derived from the business of the company and as such assessable to income tax—

Counsel for the appellant argued before me that the decision in *Anderson Logging Company* v. *The King* (*supra*) resulted because of the lack of evidence submitted to the Court in that case, and counsel for both appellant and respondent referred to "the conspiracy of silence" in that case. It is apparent that the evidence adduced in that case was not considered sufficient, but, in my opinion, much the same, if not exactly the same situation prevails in the instant case.

(1) (1925) S C.R 45

The evidence, including all exhibits, is not sufficient to discharge the onus on the appellant, nor is that evidence sufficient to raise even a *prima facie* case that the assessment complained of is wrong.

In the other case urged on me by counsel for the appellant, namely, *Attorney General for British Columbia* v. *Standard Lumber Company Limited* (1), it was held on appeal from the Court of Revision, there were evidence and specific findings of fact, which entirely distinguish the case from the *Anderson Logging Company* v. *The King* (*supra*), and is entirely inapplicable in the instant case.

As already stated, I do not make any such finding or findings in the instant case.

My decision is that the appeal should be dismissed with costs.

Judgment accordingly.

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(1) (1936) B C.R. 481.

1952
Mar. 27 & 28
Oct. 17

BETWEEN:

MINISTER OF NATIONAL REVENUE APPELLANT;

AND

SINNOTT NEWS COMPANY LIMITED RESPONDENT.

Revenue—Income—Deduction—Income War Tax Act R.S.C. 1927, c. 97, s. 6(1) (d)—Reserve set up against future unascertained events is not deductible from income—Appeal from Income Tax Appeal Board allowed.

Respondent distributed magazines to retail sellers of the same and claimed the right to deduct from income for a particular year "a reserve for loss of returns" being the estimated loss of profits on magazines not sold by the retailers and liable to be returned to it the following year. The Income Tax Appeal Board allowed such a deduction and the Minister of National Revenue appealed to this Court. The respondent also appealed directly to this Court from the disallowance by the Minister of National Revenue of such a claim for deduction for another tax year.

The Court found that the transaction between respondent and its customers were sales and that the whole of the accounts receivable in respect thereof at the end of the fiscal year constituted part of the income of the respondent to be taken into account in computing its profit or gain.

Held: That every reserve set up out of profits or gains which seeks to provide against the happening of unascertained future events and claimed as a deduction from income is barred by s. 6(1) (*d*) of the Income War Tax Act.

APPEAL from the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Cameron at Toronto.

J. W. Pickup, Q.C. and *J. D. C. Boland* for appellant.

Mannie Brown for respondent.

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

CAMERON J. now (October 17, 1952) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Income Tax Appeal Board dated August 27, 1951 (4 T.A.B.C. 397) which allowed the appeal of the respondent from its assessment to income tax for its fiscal year ending January 31, 1946. The respondent company was incorporated on February 1, 1942, and has since carried on business as a wholesale distributor of

magazines, periodicals and books. For the fiscal year ending January 31, 1944, and in previous years, the company reported its income for tax purposes on an accrual basis, taking into account the accounts receivable in respect of magazines, periodicals and books which had been distributed to its customers. For the fiscal year ending January 31, 1945, the company for the first time set up a "reserve for loss on returns" of $11,574.69, that sum being the amount which the company estimated to be the profit on the periodicals, etc., which had been distributed to the retailer but which were unlikely to be sold and which, under their contracts, could be returned within certain specified periods. That reserve was disallowed by the Minister of National Revenue and from that disallowance the company has appealed direct to this Court.

For the fiscal year ending January 31, 1946, the company increased its "reserve for loss on returns" by $1,655.38, which was disallowed by the Minister; but an appeal to the Income Tax Appeal Board was allowed, the assessment vacated and the matter referred back to the Minister to deduct the said sum from its taxable income, and to re-assess the respondent accordingly. By consent, the appeal from that decision, and the appeal of the company direct to this Court in respect of its fiscal year ending January 31, 1945, were heard together, the point involved in the two cases being precisely the same.

For the Minister it is contended that the income of the company was properly determined under the provisions of s. 3 of the Income War Tax Act, and that the amount of $1,655.38 was an amount transferred or credited to a reserve or contingent account and was therefore barred by the provisions of s. 6(1) (*d*) of the Act, which is as follows:

> 6(1) In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> (*d*) amounts transferred or credited to a reserve, contingent account or sinking fund, except such amount for bad debts as the Minister may allow, and except as otherwise provided in this Act.

The respondent submits that the deduction was not an amount transferred or credited to a reserve or contingent account; that having taken into the current assets of its balance sheets as accounts receivable the value of all periodicals distributed to the trade, it was entitled to offset

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against that item the profit thereon which it would lose by reason of unsold periodicals which the retailers were likely to return within certain time limits under their contract with the company. It relies, also, on the finding of the Income Tax Appeal Board that there was no profit or gain to the company unless and until the goods were sold by the retailer.

The respondent publishes nothing itself but is a distributor to some 2,500 retailers in Toronto and throughout Ontario of about 450 different publications which it receives from either the publishers or distributing firms for the publishers. Its contracts with the publishers are in writing and the goods which it receives are on the basis of "fully on sale or return," or, as it is sometimes called, "fully returnable." That means that if the respondent returns unsold goods to the publisher within certain specified time limits, it receives full credit for such return. In the main, the contracts provide that the goods shipped to the respondent are "on consignment," the title to the goods remaining in the publishers until they are sold by the respondent; and in some cases it is provided also that the respondent shall hold the funds it receives on the sale of the goods as trustee for the publisher.

The respondent has no written contract with the retailers to whom it distributes the goods. It makes regular deliveries several times a week to each retailer, placing in the retailers' stores that number of each publication which it considers the retailer is likely to dispose of, and it is clearly understood that such goods are also delivered on the basis of "fully on sale or return." The retailer is notified by the respondent as to the date by which unsold goods are to be returned, and upon their return by that date full credit is given to the retailer for the amount he has paid or been charged. When regular deliveries are made, the retailer is supplied with a delivery slip such as Ex. 1. It contains a list of the publications so delivered, the number and price of each, and information as to when unsold previous issues are to be returned. At the top the words, "On Consignment," appear. For request and repeat orders, no such form is supplied.

The retailers' accounts are payable on a weekly basis, except in special cases such as that of the United Cigar Stores which pays the accounts on a monthly basis. On Wednesday of each week, the retailer is given a recap and payment of the amount shown as due is requested. It was agreed that Ex. B is a fair sample of such weekly recap. It is a statement debiting the retailer with the value of goods supplied him during the previous week and crediting him with any cash payments and all goods returned during that week. It states that "Accounts are payable weekly," and "Last amount in this column is now due."

Prior to its fiscal year 1945, the respondent had relatively few unsold publications returned to it by the retailers. In its income tax returns which were on an accrual basis, it carried into accounts receivable the full value of all goods delivered to the retailers and for which it had not received payment, apparently being content to claim as losses in the following fiscal year credits given to retailers for the few goods which were actually returned after the end of the fiscal year. However, in 1945, when the controls on paper were removed, it was supplied with a much larger number of each publication, with the result that the retailers' returns became very substantial and in some cases were as much as 30 to 40 per cent of the deliveries made.

In completing its income tax returns for the fiscal year ending January 31, 1945, the respondent realized that if it included in its accounts receivable the sale price of all goods previously delivered to the retailers for which payment had not been received, it would be assessed to income on that part thereof which it would later have to credit to the retailers in respect of goods returned after January 31. While continuing to file its returns on an accrual basis and to show in its accounts receivable the sale price of all goods delivered (and not yet paid for), it attempted to meet the difficulty I have referred to by introducing into its liabilities the item "reserve for loss on returns," and continued the same practice in subsequent years. For 1945 the "reserve" of $13,230.07 was arrived at by adding together the profit element which it had lost on all the goods which had been returned to it in the last three months of the 1945 fiscal period, it being considered that the same percentage of goods delivered in the fiscal year of 1945 would be returned

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after January 31, 1945, and that the precise number of such returns would not be accurately ascertained until three months of the new fiscal year had elapsed. It was purely an estimate based on actual experience, and while not precisely corresponding to the numbers actually returned, it was fairly accurate.

In view of the provisions of s. 6(1) (*d*) (*supra*), prohibiting the deduction of any such "reserve," the taxpayer took the position that the item claimed was not, in fact, a reserve at all, that the goods which it delivered to the retailers were "on consignment," that no profit arose until the retailer had actually sold the goods. Further, it alleges that it would have been a physical impossibility—or at least very expensive—to have taken an exact inventory on January 31 of their goods on hand in each of the 2,500 outlets, and that the estimate they made as to probable returns was the only reasonable way of ascertaining what sales had been made and what goods would be returned.

In my opinion, the sole question to be determined is whether or not there was a sale of the goods by the company to the retailers. If there was a sale, then, as the taxpayer was reporting on an accrual basis, all accounts receivable in respect thereof constituted income subject only to such allowances for bad debts as the Minister might allow.

Now the only suggestion that the goods were delivered "on consignment" is the use of those words on the delivery slips (ex. 1). The respondent's witnesses asserted that all goods were delivered "on consignment," but the evidence establishes that it did not treat them as such. It kept no running inventory account of goods in the hands of the dealers; at the end of the year in valuing its inventory it took into consideration only the goods on hand in its own warehouse. It carried no insurance on the goods in the hands of the retailers. Moreover, on proper accounting practices, goods on consignment in the hands of dealers would be shown as part of the inventory, and in respect thereof no element of profit would be shown in the owner's books unless and until the consignee had sold the goods. That was not done here, but on the contrary, when a bill such as Ex. B was rendered to the dealer, his account was

charged with the full amount of the price to him and whether or not the goods referred to in the bill had or had not then been sold by him.

On the other hand, the evidence of the respondent's own employees, and more particularly in regard to the use made of Ex. B would seem to establish that the whole transaction was intended to be and was, in fact, a sale. Ex. B is not a statement of specific goods held by the retailer for the respondent. It is a bill for goods sold and delivered during the previous week to the retailer for which payment is now due and is demanded. Ordinarily, it would be presented and paid on the Wednesday of the week following the delivery of the goods, but I observe from Ex. B that in that case goods actually delivered on March 14 were declared to be payable on the following day. Now, when it is kept in mind that many of the publications delivered to the dealers were weekly and monthly periodicals, and that as given in the evidence, returns in some cases were not made for a period of many weeks, it seems perfectly clear that when a retailer paid such an account as Ex. B, he was, in fact, paying for all goods received in the previous week, less such cash payments as he may have made and less, also, the sale price of any goods which he had received mainly, if not entirely, in prior weeks, but had returned as unsold in that week. For that reason, I am unable to concur in the finding of the Income Tax Appeal Board that the retailer pays only for the goods after he has returned the unsold portion of the goods delivered and pays only for the goods sold by him. Ex. 1, however was not in evidence before the Board and certain additional evidence on behalf of the appellant was given on the hearing of the appeal.

It is established, therefore, that in each case there was a delivery of the goods, that the account thereof was rendered for the whole of such goods on the Wednesday of the following week and was usually paid on that date, a date prior to the time by which in the main the unsold goods would be returned. If there was any doubt that there was a sale at the time of the delivery to the retailers, there can be no doubt that the sale was complete and that the property in the goods passed to the retailer when he adopted the transaction as a sale by paying for the goods.

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In addition, as I have stated, the respondent set up the accounts due from the retailers as accounts receivable and throughout has so treated them in its annual balance sheet. On these facts I find that the transactions in question were sales, and that the whole of the accounts receivable in respect thereof at the end of the fiscal year constituted part of the income of the respondent to be taken into account in computing its profit or gain. Moreover, it is clear that the respondent in seeking to deduct from its income the estimated amount of the profit which it might lose in the next fiscal year by reason of compensating the retailers for unsold goods then returned, was transferring or crediting to a reserve or contingent account a part of the income which it had earned, and that is forbidden by the terms of s. 6(1) (*d*) (*supra*).

In the Shorter Oxford English Dictionary, 2nd Ed., "contingent" is defined as "liable to happen or not . . . dependent on a probability; conditional, not absolute." In *Gardner* v. *Newton* (1), a contingent claim was stated to be one which may or may not ever ripen into a debt, according as some future event does or does not happen. In this case, there was no doubt a possibility, or perhaps even a very strong probability, that the respondent would be called upon to make some compensation to the retailers in the next fiscal year, but the event necessary to create that liability—the return of the unsold goods—did not occur in the taxation year in question.

In *Robertson Ltd.* v. *Minister of National Revenue* (2), the President of this Court held that every reserve set up out of profits or gains of whatever kind, which seeks to provide against the happening of unascertained future events is excluded as a deduction except insofar as the Act permits. In that case reference was made to *Edward Collins & Sons Ltd.* v. *Commissioners of Inland Revenue* (3), in which it was held that a deduction for an apprehended future loss was not permissible. There at p. 781 the Lord President (Clyde) stated the principle in these words:

> It is, however, quite consistent with this that a prudent commercial man may put part of the profits made in one year to reserve, and carry forward that reserve to the next year, in order to provide against an

(1) (1916) 2 D.L.R. 276.
(2) [1944] Ex. C.R. 170.
(3) (1924) 12 T.C. 773

expected, or (it may be) an inevitable, loss which he foresees will fall upon his business during the next year. The process is a familiar one. But its adoption has no effect on the true amount of the profits actually made, and does not prevent the whole of the profits, whereof a part is put to reserve, from being taken into computation in the year in question for purposes of assessment. On the contrary, the balance of profits and gains is determined independently altogether of the way in which the trader uses that balance when he has got it; and, if he puts part of it to reserve and carries it forward into the next year, that has no effect whatever upon his taxable income for the year in which he makes the profit.

In the *Robertson* case, reference was also made to the decison of the Supreme Court of the United States in *Brown* v. *Helvering* (1). In that case, the facts were as follows: "a general agent of fire insurance companies received 'over-riding commissions' on the business written each year, subject however to the contingent liability that when any of the policies was cancelled before its term had run, a part of the commission thereon, proportionate to the premium money repaid to the policy holder, must be charged against the agent in favour of the company. In his accounts and income tax returns involved in this case, he deducted from the accrued commissions of each year a sum entered in a reserve account to represent that part of them which, according to the experience of earlier years, would be returnable because of cancellation. It was held that he was not entitled to make any deduction for such purposes."

In rendering judgment, Mr. Justice Brandeis stated in part:

The overriding commissions were gross income of the year in which they were receivable. As to each such commission there arose the obligation—a contingent liability—to return a proportionate part in case of cancellation. But the mere fact that some portion of it might have to be refunded in some future year in the event of cancellation or reinsurance did not affect its quality as income . . . . When received, the general agent's right to it was absolute. It was under no restriction, contractual or otherwise, as to its disposition, use or enjoyment . . . . The refunds during the tax year of those portions of the overriding commissions which represented cancellations during the tax year had, prior to the tax return for 1923, always been claimed as deductions; and they were apparently allowed as necessary expenses paid or incurred during the taxable year. The right to such deductions is not now questioned. Those which the taxpayer claims now are of a very different character. They are obviously not expenses paid during the taxable year. They are bookkeeping charges representing credits to a reserve account . . . . But no liability accrues during the taxable year on account of cancellations which it is expected

(1) (1934) 291 U.S. 193.

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may occur in future years, since the events necessary to create the liability do not occur during the taxable year. Except as otherwise specifically provided by statute, a liability does not accrue as long as it remains contingent.

The taxing authorities have throughout permitted the respondent company to deduct as losses in any fiscal year the amounts paid out for returns in that year, including returns then made in respect of sales made in the previous year. The appeal was taken solely in an effort to have the deduction made from the income of the year in which the sales were made. At the end of that year, however, the loss had not occurred and there existed only the possibility that it might occur. Any loss resulting from necessary refunds due to the return of the goods must, however, be borne in the year in which the refunds were made.

For these reasons, the appeal from the decision of the Income Tax Appeal Board will be allowed, its decision will be set aside and the assessment made upon the appellant for the year 1946 will be affirmed. The appellant is entitled to be paid his costs after taxation.

Judgment accordingly.

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Mar. 19 & 20

Oct. 7

BETWEEN:

ST. CHARLES HOTEL LIMITED .....APPELLANT;

AND

MINISTER OF NATIONAL REVENUE RESPONDENT.

Revenue—Excess Profits Tax—Excess Profits Tax Act, 1940, 4 Geo. VI, c. 32, s. 15A—Controlling interest in company—Not necessary that controlling company engage in same business as controlled company—Proper notice by Minister of National Revenue—Appeal dismissed.

Held: That a company holding the majority stock in another company is a controlling company within the meaning of s. 15A of the Excess Profits Tax Act and it is not necessary that it be engaged in the same class of business as the controlled company.

2. That in the circumstances herein proper notice of the fixing of standard profits was given to the appellant by the respondent.

APPEAL under the Income War Tax Act and The Excess Profits Tax Act 1940.

The appeal was heard before the Honourable Mr. Justice Archibald at Winnipeg.

C. E. Finkelstein and *D. A. McCormick* for appellant.

Irving Keith, Q.C. and *D. K. Petapiece* for respondent.

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

ARCHIBALD J. now (October 7, 1952) delivered the following judgment:

This appeal is against an assessment for both income tax and excess profits tax made with respect to the taxable income for the period ending April 30, 1944, and confirmed by the Minister of National Revenue.

The principal ground taken in this appeal is directed to the refusal of the Minister to require the Board of Referees to fix standard profits for the appellant, pursuant to the provisions of The Excess Profits Tax Act.

In order that the objections taken by the appellant and in order that the relevant sections of The Excess Profits Tax Act may be followed more easily, there are certain questions of fact which I find either as stated in the plead-

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ings, in the admissions of counsel, in the exhibits or in other evidence submitted to me. These facts are:

(1) That the appellant was incorporated on the 18th day of April, 1945, it having acquired from the *St. Charles Hotel Company Limited* all the assets that company employed in the hotel business operated by it in Winnipeg.

(2) That the appellant has continued to occupy the hotel building which it so purchased and operated in said building a hotel business, pursuant to the Letters Patent granted to it by the province of Manitoba, and in which is specified its powers and objects.

(3) That at the time of its incorporation, the shareholders of the appellant consisted of four individuals, holding *one share each.* On the same date, a firm known as Rothlish Investments Limited acquired 246 shares of the capital stock of the appellant, in return for which it brought to the appellant a large sum of money by way of additional capital. There is no indication that, at the time of incorporation or at any other date material to this appeal, there were any other shareholders of the appellant.

(4) That the appellant, being a new company, subsequently made an application to have its standard profits fixed.

(5) That the Minister of National Revenue however, refused to refer the appellant's application to the Board of Referees contending that the appellant was a controlled company within the meaning of section 15A of The Excess Profits Tax Act.

(6) That on the 3rd day of December, 1949, the appellant received from the Department of National Revenue, an assessment indicating the amount assessed by it for both income tax and excess profits tax, in the sums of $7,908.11 and $27,515.35 respectively.

(7) That the appellant appealed from this Notice of Assessment, which said assessment was confirmed by the Minister of National Revenue on the 23rd day of March, 1950. Subsequently, an appeal was taken to this Court and a Statement of Claim was filed on behalf of the appellant on the 30th day of August, 1951, and in due course a reply, on behalf of the respondent, was filed at this Court.

The appellant contends:

(i) That in the circumstances applicable in this matter, the Minister could not refuse to refer to the Board of Referees the application to fix standard profits, and,

(ii) in any event, the Minister did not adopt the proper procedure in arriving at the standard profits pursuant to section 15A of The Excess Profits Tax Act. This section reads as follows:

> Notwithstanding anything in this Act contained, in any case where a company has a controlling interest in any other company or companies (hereinafter called controlled company or companies) incorporated in 1940 or thereafter (other than companies incorporated to carry out a contract or arrangement negotiated by the Minister of Munitions and Supply and in receipt thereunder of a management fee or other similar compensation), and the sum of the capital employed by such company and such controlled company or companies at the time of incorporation is not in the opinion of the Minister of National Revenue substantially greater than the capital employed by such first-mentioned company prior to the incorporation of such controlled company or companies, the standard profits of all such controlled companies taken together shall not exceed $5,000 in the aggregate, and shall be allocated to each of such controlled companies in such amounts as the Minister of National Revenue may direct.
>
> In any such case a reference to the Board of Referees shall not be made notwithstanding the provisions of section five of this Act. (1943, c. 13, s. 7).

On behalf of the appellant it was urged that standard profits could be ascertained and determined in the circumstances of this case only by a reference by the Minister to the Board of Referees, pursuant to section 15A of The Excess Profits Tax Act. On the other hand, counsel for the respondent argued that section 15A must apply and that the Minister under the Act *could not* refer the question to the Board of Referees. However, counsel for the appellant contends that the wording of section 15A is ambiguous in the use of the words "other company or companies" and that resort must be had to statements made by the Minister of Finance at the time the legislation was being considered in Parliament. In my opinion, the wording of section 15A is plain and unambiguous and free from all doubt. In such circumstances, it is not open to this Court to refer to statements and speeches in Parliament, because no construction or interpretation of this section is necessary or allowable.

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Archibald J.

It is then argued that Rothlish Investments Limited cannot be classed as a *controlling* company within the meaning of section 15A, because it is not engaged in a business similar to that engaged in by St. Charles Hotel Limited. I find that Rothlish Investments Limited actually did, within the meaning of section 15A of The Excess Profits Tax Act, exercise control of St. Charles Hotel Limited by reason of its ownership of the capital stock of that company. In this connection, see the decision of Cameron, J. in *Vancouver Towing Company Limited* v. *The Minister of National Revenue* (1).

On behalf of the appellant it is urged also that if section 15A governs, then the Minister did not follow the proper procedure because he did not afford any opportunity to the appellant to state its intention with respect to the employment of capital. In considering this contention, it must be remembered, however, that the Director of Income Tax did, on the 12th day of April, 1948, communicate with the appellant in writing as follows:

Attention Mr. Nathan Rothstein
St. Charles Hotel Limited,
Notre Dame Avenue at Albert Street,
Winnipeg, Manitoba.

Dear Sirs:

St. Charles Hotel Limited, Standard Profits Claim

In connection with the S. P. 1 Claim of St. Charles Hotel Limited it is noted that at incorporation of the Company, 18th April, 1945, all the capital stock of the Company, with the exception of four directors' qualifying shares, was owned by Rothlish Investment Limited. It is noted also that the capital employed by the two companies at the date of incorporation is not substantially greater than the capital employed by Rothlish Investment Limited at date of incorporaion of St. Charles Hotel Limited.

In view of the above it appears that, in the matter of Standard Profits, St. Charles Hotel Limited is subject to the provisions of Section 15A of the Excess Profits Tax Act.

You are requested, if you are not in agreement with the foregoing, to forward (in duplicate) any submission you may wish to make as to why Section 15A of the Excess Profits Tax Act should not apply.

If no submission is received within fifteen days from this date, assessment of the returns will be proceeded with on the above basis.

A reply to this letter was sent to the Director of Income Tax at Winnipeg by the appellant's auditor, in which letter the position of the appellant is stated.

(1) (1946) Ex. C.R. 623.

In my opinion, adequate notice, if any notice was required, was given by the respondent to the appellant, and there is no foundation for any claim made by the appellant, as stated in the pleadings or as stated in the hearing of this appeal, to justify any conclusion that the standard profits were determined by the Minister without adequate notice to the appellant or without providing the said appellant opportunity to submit reasons why the Minister should have sought from the Board of Referees the standard profits for St. Charles Hotel Limited. In this connection, it should be remembered that the Minister had before him on the files of the Department, the returns and statements filed by Rothlish Investments Limited as well as any filed by St. Charles Hotel Limited.

Counsel for the appellant also argues that the assessment as made would effect confiscation of a provincial company. I must point out, however, that without considering his argument in this regard or the authorities cited by him, it must be pointed out that there is no proof that any such result would follow. The Court has only his assertion to guide it, and, in my opinion, that is not sufficient. It is therefore unnecessary to deal with the cases and authorities cited by him in this connection.

The appeal will therefore be dismissed with costs.

Judgment accordingly.

1952

June 3, 4

June 5

BETWEEN:

MINISTER OF NATIONAL REVENUE..APPELLANT;

AND

THE LAKEVIEW GOLF CLUB LIMITED..... } RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, s. 4(h)—Income Tax Act, S. of C. 1948, c. 52, s. 57(1) (g)—Whether company operating a golf club a non-profit organization—Income derived from a golf club's operations inured to benefit of shareholders thereof although not paid—Estoppels cannot override the law of the land—Crown not bound by errors or omissions of its servants—Appeals from the Income Tax Appeal Board allowed.

Incorporated in 1941 the respondent operates a golf club, the members of which pay an annual fee but are not required to own or purchase shares of the company and have no share in the company or its management by reason of such membership. In the years 1946, 1947, 1948 and 1949 the company made a profit and at the end of the taxation year 1949 had an accumulated surplus of $22,538.62. A by-law of the company provided that the dividends, when earned and declared, shall be paid to the shareholders but no dividends were declared since the incorporation of the company. In 1944 an "understanding" was arrived at between the company and an officer of the Department of National Revenue for the taxation year 1941 and by which the company was exempt under the provisions of s. 4(*h*) of the Income War Tax Act to pay income tax. In 1950 the company was made aware that this "understanding" was no more in effect by receiving notices of assessment for the years 1946, 1947, 1948 and 1949. From these assessments the respondent company appealed to the Income Tax Appeal Board which allowed the appeals and from this decision the Minister now appeals.

The Court on the facts found that the respondent was not a club organized and operated exclusively for recreation or pleasure within the meaning of s. 4(*h*) of the Income War Tax Act and of s. 57(*g*) of the Income Tax Act but was organized and operated for the purpose of profit-making.

Held: That the income derived from the respondent company's operations inured to the benefit of the shareholders or was available for their personal benefit although not, in fact, paid to them. *Moosejaw Flying Club* v. *Minister of National Revenue* (1949) Ex. C.R. 370 referred to.

2. That an estoppel cannot override the law of the land and the Crown is not bound by the errors or omissions of its servants. *Woon* v. *Minister of National Revenue* (1951) Ex. C.R. 18 referred to.

APPEALS from a decision of the Income Tax Appeal Board.

The appeals were heard before the Honourable Mr. Justice Cameron at Toronto.

Geo. B. Bagwell, Q.C. and *I. G. Ross* for appellant.

J. F. Boland, Q.C. for respondent.

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

On the conclusion of the trial Cameron J. (June 5, 1952) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Income Tax Appeal Board, dated November 19, 1951, which allowed the appeals of the respondent herein from assessments to income tax made upon it for the taxation years 1946, 1947, 1948 and 1949.

The Income Tax Appeal Board upheld the contention of the company that it was totally exempt from taxation under the provisions of certain sections of The Income War Tax Act applicable in the years 1946, 1947, 1948 and of the Income Tax Act for the year 1949.

For the years 1946, 1947 and 1948, Section 4(*h*) of the Income War Tax Act provided as follows:

> 4. The following incomes shall not be liable to taxation hereunder:—
> (*h*) The income of clubs, societies and associations organized and operated solely for social welfare, civic improvement, pleasure, recreation or other non-profitable purposes, no part of the income of which inures to the benefit of any stockholder or member.

For the year 1949, Section 57, subsection (1) (*g*) of the Income Tax Act is as follows:

> No tax is payable under this Part upon the taxable income of a person for a period when that person was:—
> (*g*) A club, society or association organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit, no part of the income of which was payable to or was otherwise available for the personal benefit of any proprietor, member or shareholder thereof.

While wording of the two subsections is not precisely the same, I am unable to perceive any essential difference between them so far as this case is concerned.

The respondent was incorporated on March 5, 1941, by a provincial charter with an authorized capital of $100,000 divided into 4,000 shares of a par value of $25 each. At all relevant times the number of issued shares did not exceed 2,505 and the number of shareholders did not exceed 7.

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Following its incorporation the company immediately acquired the assets of The Lakeview Golf Club from five individuals all of whom were among the applicants for incorporation and who became directors of the company. One of such individuals was Harry W. Phelan, who from the time of its incorporation until his death in 1946, held a controlling interest in the company. Another of such directors was A. W. Purtle who, since the sale by the executors of Harry W. Phelan of his stock in 1946 to him, has had the controlling interest in the company, Mr. Purtle and members of his family owning all the issued shares except, perhaps, certain qualifying shares.

It is shown in each of the years 1946, 1947, 1948 and 1949 the company made a profit and that at the end of the taxation year 1949 had an accumulated surplus of $22,538.62.

Bylaw No. 35 of the General Bylaws of the company, which has been in effect throughout the taxation years in question, provided as follows:

> Dividends upon the capital stock of the company when earned and declared shall be paid according to the amount paid up on the shares.

Bylaw No. 33 is as follows:

> Certificates of stock shall be surrendered and cancelled at time of transfer. No transfer of stock shall be made within 10 days next preceding the day appointed for the payment of a dividend or for holding a general meeting of the shareholders of the company.

It is common ground that since the incorporation of the company no dividends have been declared.

Membership in and use of the facilities of the club are acquired by payment of an annual fee, but such members are not required to own or purchase shares of the company and have no share in the company or its management by reason of such membership.

The contention of the respondent is that it is a club organized for recreation or pleasure and is a non-profit organization. The purposes and objects of the company are set forth in the Charter, and are as follows:

> (a) To purchase or otherwise acquire and to hold lands and buildings or any interest therein for the purposes of golf, sport, recreation, amusement and entertainment or for any other purpose and to sell, lease, exchange, mortgage or otherwise dispose of the whole or any portion thereof or all or any buildings that are now or may hereafter be erected thereon;

(*b*) To erect buildings on such lands or any part thereof for golf, riding, polo, skating, curling, hockey and other amusements and for the purpose of entertainment or for occupation as dwellings or for any other purpose; to equip the same with all necessary apparatus and to use, convert, adapt and maintain all or any of such lands, buildings or premises for the purposes aforesaid or any of them with their usual and necessary adjuncts;

(*c*) To conduct, hold and promote golf, polo, horticultural, agricultural and other exhibitions; and to give and contribute towards prizes, cups, stakes and other awards;

(*d*) To serve refreshments of all kinds to its shareholders, members, patrons and their friends; and

(*e*) To take or hold mortgages for any unpaid balance of the purchase money on any of the lands or buildings sold by the Company and to sell, mortgage or otherwise dispose of such mortgages;

It is doubtless true that those who become members of the club upon payment of an annual fee do so for purposes of personal recreation and pleasure. So also do those who by payment of an annual fee acquire the right to bowl in a privately owned rollodrome operated for profit, or to skate in a privately owned skating rink operated for profit.

The question to be determined, however, is not whether those using the facilities of the club do so for recreation or pleasure, but whether, to use the words of Section 4, subsection (*h*) (*supra*), it is a club organized and operated solely for pleasure or recreation or other non-profitable purposes, no part of the income of which enures to the benefit of any stockholder or members, or in the words of Section 57, subsection (1) (*g*) (*supra*), it is a club organized and operated exclusively for pleasure or recreation or for any other purpose except profit, no part of the income of which was payable to or was otherwise available for the personal benefit of any proprietor, member or shareholder thereof.

Mr. Purtle, president and general manager of the respondent company was called as a witness on behalf of the appellant, and gave his evidence in a very frank manner. As general manager he receives an annual salary of $7,000. The incorporators had in mind the provision of golfing facilities for those who could not afford to belong to the more expensive clubs. About 100 members pay an annual fee of $90 and have the full use of the club facilities, arrange their own tournaments and the like, but are not required to acquire stock in the club, and in fact, do not

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do so, and consequently, have no voice in the election of the directors or control of company matters. Some 800 or 900 associate members pay a nominal annual fee of $5 plus a green fee on each occasion when playing golf, but have nothing to do with the conduct of the company's business. Casual visitors may play golf at any time on payment of a somewhat larger green fee than is paid by the associate members. Neither the Charter of the company nor its bylaws (as they were in effect in the years in question) contain any suggestion that the company was organized for non-profitable purposes. On the contrary, Bylaw No. 35, which I have quoted above, provides that the dividends, when earned and declared, *shall* be paid to the shareholders. That is the clearest possible evidence that the directors and shareholders contemplated the possibility of profits being earned and that in such a case they would be available, when declared, to the shareholders.

As I have stated above, the company, in each of the years in question earned profits which constituted taxable income unless the total exemptions now claimed are available to it. They are as follows:—

1946—$2,840.54
1947—$3,143.02
1948—$12,870.30
1949—$9,211.27.

At the end of the fiscal year in 1949 the company had a total surplus on hand and in cash of $22,538.62. While that amount was not distributed to the shareholders, it was at all times possible for the directors to declare dividends to the shareholders to such extent as they had profits on hand. The value of the shares increased to the extent of such income was earned and, therefore, in my opinion such income inured to the benefit of the shareholders or was available for the personal benefit of the shareholders although not, in fact, paid to them.

In this connection reference will be made to *Moose Jaw Flying Club* v. *The Minister of National Revenue* (1).

Mr. Purtle's statement that one of the purposes of building up and maintaining the surplus was to provide funds for improvements to the club property. He instanced his

(1) (1949) C.T.C. 281.

intention of constructing a fence around the property at a probable cost of $15,000. The property has had no such fence since the company came into existence, and Mr. Purtle frankly admitted that if constructed, it would undoubtedly enhance the value of the club, and thereby increase the value of the shares.

In my opinion, therefore, the facts established in evidence show:

1. That the company was not a club organized and operated exclusively for recreation or pleasure within the meaning of the exempting sections but, on the contrary, was organized and operated for the purpose of profit-making and did, in fact, make a profit during each of the relevant years.

2. That the income derived from such operations enured to the benefit of the stockholders and was available for the personal benefit of such shareholders.

I have not overlooked the further submission by counsel for the respondent. The evidence indicates that in its initial year of operation, that is 1941, the company showed a small operating profit in its income tax return. When that return and those for 1942 and 1943 were under consideration in 1944 an assessor of the department apparently reached the conclusion that the company was exempt under the provision of Section 4, subsection (*h*). That conclusion was arrived at after he had received a copy of the resolution of the directors dated October 23, 1944, Exhibit A-10, the essential part of which was as follows:—

> It was moved by the secretary, seconded by Joseph B. Cherrier, and duly carried that the treasurer be and he is hereby authorized to complete for the Income Tax Department Form T2 showing that the club is a non-profit sharing association, and that any earned surplus is to be used to make repairs or improvements or supply necessary equipment required by the club in its operation.

Accordingly, the company was not assessed to tax for the year 1941. For the years 1942, 1943 and 1945 the company had operating losses. In 1944 it had an operating profit of $160.24 and was not assessed to tax. It does not clearly appear whether in that year exemption was granted under Section 4, subsection (*h*), or whether it was found that after taking into consideration the previous years' losses, there was no taxable income.

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The returns for 1946, 1947, 1948 and 1949 were not processed until 1950, and it was not until that year that the company was made aware that the "understanding" arrived at in 1944 for the year 1941 was no longer available to it. That resolution, Exhibit A-10, merely authorizing the treasurer to make representations to the department that the company was "a non-profit sharing association." It was not binding in any sense and could have been altered at any time. It specifically provides for the possibility of making "improvements" to the club, a step which would have enhanced the value of the shares.

I cannot agree that such an "understanding",—to use the word of Exhibit A-5—can be of any assistance to the respondent, and an estoppel cannot override the law of the land, and the Crown is not bound by the errors or omissions of its servants.

In the case of *Woon* v. *The Minister of National Revenue* (1). I had to consider a similar submission to that made here. It is not necessary to refer to more than a few extracts from that case commencing at page 24. There I referred to Phipson on Evidence, 8th Edition, 667, where it is stated:

> Estoppels of all kinds, however, are subject to one general rule: they cannot override the law of the land. Thus, where a particular formality is required by statute, no estoppel will cure the defect.

I then refer to *Maritime Electric Company Limited* v. *General Dairies Limited* (2) in which it was held:

> That the appellants were not estopped from recovering the sum claimed. The duty imposed by The Public Utilities Act on the appellants to charge, and on the respondents to pay, at scheduled rates, for all the electric current supplied by the one and used by the other could not be defeated or avoided by a mere mistake in the computation of accounts. The relevant sections of the Act were enacted for the benefit of a section of the public, and in such a case where the statute imposed a duty of a positive kind, it was not open to the respondents to set up an estoppel to prevent it.
>
> An estoppel is only a rule of evidence, and could not avail to release the appellants from an obligation to obey the statute, nor could it enable the respondents to escape from the statutory obligation to pay at the scheduled rates. The duty of each party was to obey the law.

(1) (1951) Ex. C.R. 18. (2) (1937) A.C. 610.

I then refer to the judgment of Lord Maugham in that case where at page 620 he said:

. . . The court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory provisions . . .

Then in the "*Woon* case," I stated as follows at p. 25:

It was therefore the duty of the taxing authority to apply the provisions of the section to the case of any taxpayer falling within its terms and it was the duty of such taxpayer to pay such tax as might properly be payable thereunder. It was the duty of both to obey the law.

I think it is quite clear that the "ruling" said to have been made in this case, was made without authority and was not in any way binding upon the Crown. There is nothing in the section itself which confers any sort of discretionary powers on the Minister or his officials. Parliament has said that under certain circumstances certain things are deemed to be dividends and manifestly the Commissioner of Taxation had no power to declare otherwise or to settle the limit of taxation thereunder, other than according to the statute itself.

In the same case I referred to *Anderton and Halstead Limited* v. *Birrell* (1), in which the Inspector of Taxes after full disclosure of all the facts had agreed in writing to the writing down for two years successively of a doubtful debt. Subsequently, by an assessment, the writing down of the doubtful debt was disallowed on certain grounds.

In considering an appeal from the Commissioners of Inland Revenue, Rowlatt J. said at page 279:

In order to clear the ground, I may point out at once that there is no question of the Crown having been bound by the first action of the inspector by way of mere contract. No officer has power to do that.

In the result, the appeals will be allowed. The decision of the Income Tax Appeal Board will be set aside and the assessments made by the Minister for each of the years in question are affirmed.

The appellant is entitled to be paid his costs after taxation, and there will be judgment accordingly.

Judgment accordingly.

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(1) (1932) 1 K.B.D. 271.

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June 4 & 5

Sept. 12

BETWEEN:

INDUSTRIAL ACCEPTANCE CORPORATION LIMITED ..... } SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—The Opium and Narcotic Drug Act, 1929—Action to recover possession of an automobile sold under a conditional sales contract but forfeited by the Crown pursuant to provisions of s. 21 of the Act—The Opium and Narcotic Drug Act, 1929, within the competence of Parliament to enact—Provisions of s. 21 of the Act even though they affect "property and civil rights" necessarily incidental to powers conferred on Parliament by the British North America Act, s. 91, head 27—Action dismissed.

In this action the suppliant seeks to recover possession of an automobile (or alternatively its value) on the ground that it is the owner of and entitled to possession of the car under a conditional sales contract, some portion of the purchase price still being unpaid. The respondent admits being in possession of the car but claims that it has been forfeited pursuant to the provisions of s. 21 of the Opium and Narcotic Drug Act, 1929. On the facts the Court found that the automobile on the date in question contained "heroin"—one of the drugs mentioned in schedule to the Act—and was used in connection with the sale of that drug, and that under s. 21 of the Act it was duly forfeited.

Held: That in essence the Opium and Narcotic Drug Act, 1929, is within the term "the criminal law" as found in s. 91, head 27, of the British North America Act, 1867, and was therefore within the competence of Parliament to enact. *Attorney-General for Ontario* v. *Hamilton Street Railway* (1903) A.C. 524; *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (1931) A.C. 310 referred to.

2. That the provisions for forfeiture as contained in s. 21 of the Opium and Narcotic Drug Act, 1929, do affect "property and civil rights" but that of itself does not make the Act *ultra vires* of Parliament. *Proprietary Articles Trade Association* v. *The Attorney-General for Canada* (1931) A.C. 310; *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1937) A.C. 368 referred to.

3. That the provisions of s. 21 of the Opium and Narcotic Drug Act, 1929, insofar as they may appear to trench upon "civil and property rights" are necessarily incidental to the powers conferred on Parliament by s. 91, head 27, of the British North America Act, 1867, and are therefore *intra vires* of Parliament.

PETITION OF RIGHT by suppliant to recover from the Crown possession of an automobile which had been forfeited pursuant to the provisions of s. 21 of the Opium and Narcotic Drug Act, 1929.

The action was tried before the Honourable Mr. Justice Cameron at Toronto.

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W. S. Anderson for suppliant.

Geo. B. Bagwell, Q.C. and *J. T. Gray* for respondent.

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

CAMERON J. now (September 12, 1952) delivered the following judgment:

In this Petition of Right the suppliant, a corporation carrying on business throughout Canada as a finance company, seeks to recover from the Respondent possession of one 1949 Plymouth sedan, serial No. 96000590 (or alternatively the sum of $1,800, the alleged value of the car) on the ground that it is the owner of and entitled to possession of the car under a conditional sales contract, some portion of the purchase price still being unpaid. The Respondent admits that the car is in the possession of the Crown but submits that it had been forfeited pursuant to the provision of S. 21 of the Opium and Narcotic Drug Act, 1929, and amendments thereto.

There is no serious dispute as to the facts. On August 9, 1949, Rheaume Motor Sales of Windsor, Ontario, was the owner of the car and on that date sold it conditionally to one William J. Ciampi for $2,500, pursuant to the terms of a conditional sales contract (Ex. 2) which provided that the ownership of, property in, and title thereto should remain in the vendor until the purchase price should be paid in full. The contract shows that $1,000 was paid in cash, and that after adding insurance and finance charges the total deferred payments aggregated $1,853.50. Actually the vendor received $600 only in cash, and took from Ciampi his promissory note for $400. On the same date Rheaume Motor Sales assigned the conditional sales contract to the suppliant. Monthly payments were made by Ciampi to the suppliant, and as of August 5, 1950, the unpaid balance thereunder was $929.50. On that date the suppliant purchased for $400 the promissory note given by Ciampi to Rheaume Motor Sales and, after adding additional insurance and finance charges, took from Ciampi a promissory note for $1,631, representing the full amount of his indebtedness. Further monthly payments were made and as of March 1951, the general balance owing by Ciampi was $1,010 (Ex. 5). Had all his payments been

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credited to the original conditional sales contract the balance owing thereunder would have been $308.50 and possibly some additional charges for interest and insurance.

As I have said, the respondent relies on S. 21 of the Opium and Narcotic Drug Act, 1929, which is as follows:—

> When any person is convicted of an offence against this Act, the opium pipe or other article or the drug in respect of which the offence was committed and all receptacles of any kind whatsoever found containing the same, and any vehicle, motor car, automobile, boat, canoe, aeroplane or conveyance of any description, proved to have contained such opium pipe or other article or drug or to have been used in any manner in connection with the offence for which such person has been so convicted, and any moneys used for the purchase of such drug, shall be forfeited to His Majesty, and shall be delivered to the Minister for disposition.

The evidence adduced on behalf of the Respondent establishes beyond any doubt that the automobile in question on June 16, 1951, contained Diacetylmorphine (Heroin)—one of the drugs mentioned in schedule to the Act—and was used in connection with the sale of that drug to one Labrash. Exhibit A is the certificate of the Registrar of Motor Vehicles for Ontario indicating that the 1949 Plymouth sedan, licence No. 96000590 in 1951 was registered in the name of William J. Ciampi and bore licence No. 855 R. 4. Labrash—a constable in the Royal Canadian Mounted Police and employed in enforcing the provisions of the Act—stated that on June 16th, he, after being searched by his associates and supplied with bills, the serial numbers of which had been listed, made a telephone call in Windsor and then waited in a prearranged public place. Shortly thereafter a Plymouth sedan bearing licence No. 855 R. 4 approached him and he recognized the driver and sole occupant as Patrick Charles Riley who was previously known to him. Riley signalled to him and opened the car door. Labrash entered the car which was then driven away. Riley handed Labrash a small package for which the latter paid him $10. Labrash then left the car, taking the package with him. Constable Bearesdorf and Corporal McIver of the Royal Canadian Mounted Police were assisting Labrash in the case and had observed the approach of the Plymouth sedan bearing licence No. 855 R. 4 and driven by Riley, had seen Labrash enter the car and had followed

it until he got out. Riley was then searched, the listed bills were found in his possession, he was arrested and the car later seized.

Evidence was also given that the package purchased from Riley by Labrash was forwarded to Mr. C. S. Tinsley, a Dominion analyst, who gave evidence that upon analysis he found it to contain Diacetylmorphine (Heroin) a drug as defined in the Opium and Narcotic Drug Act. That evidence was not challenged in any way.

It is also fully established that Riley was convicted of the offence of selling Diacetylmorphine on that date. It appears from the certificate of the deputy clerk of the Court, dated February 21, 1952, (Ex. B.) that on that date Patrick Charles Riley was charged before His Honour Judge J. A. Legris, Judge of the County Court of the County of Essex, with a number of offences including the following:

> 5. Further for that he, on or about the 16th day of June 1951, at the city of Windsor, in the County of Essex, did unlawfully sell a drug, to wit Diacetylmorphine, to one Charles J. K. Labrash, without first obtaining a licence from the Minister, or without other lawful authority, contrary to Section 4(1) (*f*) of the Opium and Narcotic Drug Act, 1929, and amendments thereto.

To that charge Riley pleaded guilty and was sentenced to six months in gaol and a fine of $200.

Endorsed on the said Exhibit 2 is the following certificate signed by the presiding Judge:—

> I find that automobile bearing 1951 Ontario licence No. 855 R. 4 was used in the commission of the within offence Count Number Five (5).

On the facts alone I would have no hesitation in finding that the Crown has proven its claim, that under S. 21 of the Act the car was duly forfeited. A more difficult question, however, is raised by the suppliant's reply, paragraph 4 of which is as follows:—

> The Suppliant alleges that if the said Statute forfeits the said motor vehicle to Her Majesty as alleged in the Statement of Defence, which the Suppliant does not admit but denies, such Statute purports to forfeit property of the Suppliant who was and is innocent of any violation of the said Statute and of any participation in the alleged offence of Patrick Charles Riley, and such Statute is therefore, in such respect, beyond the Legislative competence of the Parliament of Canada.

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It is submitted that S. 21 of the Act (supra) is ultra vires of the Parliament of Canada in that in providing for forfeiture of property it is an encroachment upon the power exclusively delegated by the British North America Act to the provinces to enact laws regarding "property and civil rights in the province," (S. 92 head 13), and that in any event it is ultra vires insofar as it purports to forfeit property of innocent persons who were not in any way concerned with the commission of the offence.

For the respondent it is submitted that the Opium and Narcotic Drug Act is in pith and substance criminal law, the enactment of which is exclusively assigned to the Parliament of Canada by S. 91, head 27 of the B.N.A. Act, and that the power to declare forfeiture of property is necessarily incidental to the carrying out of the true intent of the Act, namely the complete suppression of the use of and the trafficking in of drugs as defined in the Act, except under licence or other lawful authority.

Disregarding for the moment the provisions for forfeiture as contained in S. 21, it is my opinion that in essence the Act is within the term "the criminal law" as found in S. 91, head 27, and was therefore within the competence of Parliament to enact.

As stated in *Attorney-General for Ontario* v. *Hamilton Street Railway,* (1) the Criminal Law in its widest sense is reserved for the Dominion Parliament. The extent of that power was considered in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (2). In that case it was contended that certain sections of the Combines Investigation Act, R.S.C. 1927, C. 26, were ultra vires of Parliament on the ground that they related to property and civil rights and did not fall within the Dominion powers under S. 91 head 27. In that case Lord Atkin stated at p. 323,

> In their Lordships' opinion s. 498 of the Criminal Code and the greater part of the provisions of the Combines Investigation Act fall within the power of the Dominion Parliament to legislate as to matters falling within the class of subjects, "the criminal law including the procedure in criminal matters" (s. 91, head 27). The substance of the Act is by s. 2 to define, and by s. 32 to make criminal, combines which the legislature in the public interest intends to prohibit. The definition is wide, and may cover activities which have not hitherto been considered to be criminal. But only those combines are affected "which have operated or are likely to operate to the detriment or against the interest

(1) (1903) A.C. 524 at 529. (2) (1931) A.C. 310.

of the public, whether consumers, producers, or others"; and if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes. "Criminal law" means "the criminal law in its widest sense". *Attorney-General for Ontario* v. *Hamilton Street Ry. Co.* It certainly is not confined to what was criminal by the law of England or of any province in 1867. The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality —unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

Adopting the principles set forth in that decision, there is no ground on which it may be held that the legislation here in question on its true construction is not what it professes to be, that is, an enactment creating criminal offences and providing penalties for the commission of such offences, in exercise of powers vested in Parliament by S. 91, head 27, of the B.N.A. Act. Indeed in *Ex. p. Wakabayashi and Ex. p. Lore Yip* (1) the predecessor Act—the Opium and Narcotic Drug Act 1923, was held to be one for remeding an evil and creating a new crime and therefore intra vires of Parliament. In that case Macdonald, J. in rejecting a submission that the Act was one for licensing a particular trade, stated at p. 234,

When I view the "mischief" sought to be remedied and the manner in which this was to be accomplished, the state of the law as it existed prior to the Act of 1923, and the nature of the remedy thus applied, I have no hesitation in holding, that the Act in question is criminal and not licensing legislation. The primary object was to create a crime and afford punishment for its infraction. The licensing provisions were necessary but did not affect the validity of the legislation. It was within the competence of the Dominion Parliament and did not invade the jurisdiction allotted to the province by the B.N.A. Act.

(1) (1928) 3 D.L.R. 226.

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While such legislation constituted a new crime, it was remedial, in order, if possible, to destroy an existing evil. It was for the promotion of "public order, safety and morals," and was enacted by Parliament for the public good.

(See, also, *Dufresne* v. *The King*, 19 C.C.C. 414.)

Reference may also be made to *Russell* v. *The Queen* (1). There it was decided that The Canada Temperance Act 1878 (Dominion C. 16), did not properly belong to the class of subjects "property and civil rights". In that case Sir Montague E. Smith said:—

> It has in its legal aspect an obvious and close similarity to laws which place restrictions on the sale or custody of poisonous drugs, or of dangerously explosive substances. These things, as well as intoxicating liquors, can, of course, be held as property, but a law placing restrictions on their sale, custody, or removal, on the ground that the free sale or use of them is dangerous to public safety, and making it a criminal offence punishable by fine or imprisonment to violate these restrictions, cannot properly be deemed a law in relation to property in the sense in which those words are used in the 92nd section. What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law. Upon the same considerations, the Act in question cannot be regarded as legislation in relation to civil rights. In however large a sense these words are used, it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property, to be criminal and wrongful. Laws which make it a criminal offence for a man wilfully to set fire to his own house on the ground that such an act endangers the public safety, or to overwork his horse on the ground of cruelty to the animal, though affecting in some sense property and the right of a man to do as he pleases with his own, cannot properly be regarded as legislation in relation to property or to civil rights. Nor could a law which prohibited or restricted the sale or exposure of cattle having a contagious disease be so regarded. Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada.

I turn now to a consideration of the effect of S. 21 of the Act (*supra*). In providing for forfeiture of drugs and containers and of conveyances of any description which contained drugs or were used in any manner in connection with

(1) (1882) 7 A C. 829.

the offence for which there has been a conviction, property and civil rights are undoubtedly affected. But that of itself does not make the Act ultra vires of Parliament. In *Proprietary Articles Trade Association* v. *The Attorney-General for Canada* (1) it was stated,

> If then the legislation in question is authorized under one or other of the heads specifically enumerated in s. 91, it is not to the purpose to say that it affects property and civil rights in the Provinces. Most of the specific subjects in s. 91 do affect property and civil rights but so far as the legislation of Parliament in pith and substance is operating within the enumerated powers there is constitutional authority to interfere with property and civil rights.

In the case of *Attorney-General for British Columbia* v. *Attorney-General for Canada* (2) the validity of Section 498(A) of the Criminal Code of Canada was in question. By that section certain trade practices were declared to be offences and penalties were provided. In affirming the validity of the section and rejecting the argument that it dealt with "property and civil rights in the province," it was—

> Held, that the section was in toto intra vires of the Parliament of Canada under s. 91, head 27, of the B.N.A. Act, 1867—"The Criminal Law . . . ." There was no reason for supposing that the Dominion were using the criminal law as a pretence or pretext for invading the Provincial legislative field, or that the legislation was in pith and substance only interfering with civil rights in the Province.
>
> The only limitation on the plenary power of the Dominion to determine what should or should not be criminal was the condition that Parliament should not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in s. 92 of the B.N.A. Act. It was no objection that it did in fact affect them for if it was a genuine attempt to amend the criminal law it might obviously affect previously existing civil rights.
>
> There was no other criterion of "wrongness" than the intention of the Legislature in the public interest to prohibit the act or omission made criminal.
>
> *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (1931) A.C. 310 applied.

Counsel for the suppliant submits, however, that the power of forfeiture is not necessarily incidental to the effective carrying out of the purpose and intent of the Act. He refers to the four propositions (and more particularly

(1) (1931) A.C 310 at 326. (2) (1937) A C. 368.

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to proposition three) stated in *Attorney-General for Canada* v. *Attorney-General for British Columbia* (1) where it was stated,

> Questions of conflict between the jurisdiction of the Parliament of the Dominion and provincial jurisdiction have frequently come before their Lordships' Board, and as the result of the decisions of the Board the following propositions may be stated:—
>
> (1). The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by s. 92:
>
> (2). The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion:
>
> (3). It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91:
>
> (4). There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail.

In considering to what extent encroachment of property and civil rights is necessarily incidental to the effective enforcement of the Act attention must be given to the nature of the "mischief" sought to be remedied. It was referred to by Macdonald, J. in Ex. p. Wakabayashi 1928 (3) D.L.R. 226 at 227 as follows:—

> When one considers, for a moment, that the traffic covered by such Act in narcotics and improper use of opium and drugs constitutes one of the greatest evils of modern times, and legislative efforts have been made in all civilized countries to control, and if possible, destroy this evil, the importance of these applications become apparent. In fact, the matter has been considered, so important from the world's standpoint, that it was dealt with by the League of Nations.

The vicious nature of the drug traffic in all its ramifications, the participation therein by racketeers and criminals, the great profits to be obtained from the ultimate users of the drugs and the deplorable effects on drug addicts themselves made it imperative to take every possible step to stamp it out and to provide penalties which would not only punish the actual offenders but be a deterrent to others. To impose a fine and imprisonment upon a user or vendor

(1) (1930) A.C. 111 at 118.

would be but a small step in the elimination of the traffic. Forfeiture of the drugs was undoubtedly necessary if the "mischief" was to be prevented—and that was conceded by counsel for the suppliant.

Realizing also that narcotics are brought into Canada and must be transported from place to place in order to reach the ultimate user, Parliament also made it an offence for other than common carriers to take or carry or cause to be taken or carried any drug without first obtaining a licence, and in all cases to deliver or distribute such drugs without a licence or other proper authority. It was necessary to strike not only at the distributor and vendor but also at the instrumentalities which aided them in effecting the distribution and sale and more particularly the conveyances so used. By imposing a penalty in rem—the forfeiture of the conveyance which would normally be of considerable value—the convicted person would be handicapped in the distribution of drugs and penalized by the loss of his property which in many cases would be much more valuable than the drugs themselves.

By its terms s. 21 does provide for forfeiture of drugs, receptacles and conveyances under the circumstances specified therein, and whether or not they were the property of the convicted person. So far as conveyances are concerned it is only necessary to prove that *any* person was convicted of an offence under the Act and that the conveyance either contained the opium pipe or other article or the drug in respect of which the offence was committed, or that it had been used in any manner in connection with such offence. The rights of owners of property who have not been convicted of any offence and of owners who were not concerned in any way with and had no knowledge that the offence was likely to be committed are not in any way protected by the section or exempted from the provisions for forfeiture. In that respect the Act differs from the Excise Act, Statutes of Canada 1934, C. 52 as amended. There provision is made by s. 169A under which those who claim an interest as owner, mortgagee, lien holder and the like in any conveyances or appliance which has been seized as forfeited may apply to the courts for an order declaring their interest therein; and if it be made to appear to the satisfaction of the judge that such claimant

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was innocent of any complicity in the offence, and that he exercised reasonable care in respect of the person permitted to obtain possession of the conveyance or other appliance the claimant is entitled to "an Order that his interest be not affected by such seizure."

Such an application came before Dysart, J. in Manitoba in *North West Mortgage and Finance Co. Ltd.* v. *Commissioner of Excise* (1). In that case the claimant had held a chattel mortgage on a car which was seized by Excise officers as it was being used by its owner for transportation of liquor in violation of the provisions of the Excise Act. Dysart, J. not only found the claimant entitled to the Order provided for in s. 169A of that Act but also declared that "the legislation here in question affects the exclusively provincial property rights of innocent persons, and is ultra vires of the Dominion."

An appeal therefrom was taken by the Crown (2) but was dismissed on the ground that there was no right of appeal from an Order made under Section 169A.

In reaching his conclusion that the legislation to the extent indicated was ultra vires the Dominion, Dysart, J. stated at p. 363,

> During the argument, I raised the question of the legislative power of the Dominion to confiscate the property of innocent citizens of a province; on a subsequent day the constitutionality of the act was argued.
>
> For the commissioner, reliance was placed upon the decision of the Supreme Court of Canada in *The King* v. *Krakowec et al,* (1932) S.C.R. 134, 57 C.C.C. 96, (1932) 1 D.L.R. 316, in which the Court unanimously declared that the proper interpretation of sec. 169 of The Excise Act is that the Dominion has the right to forfeit such a car, for the reason chiefly that the legislation is in rem. That case, however, was dealt with before sec. 169A came into existence. Also, the respondents were not represented on the appeal, and the constitutionality of the forfeiture clause was not raised. I do not regard the case, therefore, as decisive on this point. In none of the decisions of provincial courts is constitutionality raised; and in any event, those decisions are not binding upon this Court.
>
> It is admitted, of course, that the Dominion has the power to enact all provisions which are necessarily incidental to effective legislation upon any subject falling within any of the classes expressly enumerated in sec. 91. *Attorney-General for Ontario* v. *Attorney-General for Canada,* (1894) A.C. 189, 63 L.J.P.C. 59; *Attorney-General for Ontario* v. *Attorney-General for Canada,* (1896) A.C. 348, 65 L.J.P.C. 26; *Attorney-General for Canada* v. *Cain,* (1906) A.C. 542, 75 L.J.P.C. 81.

(1) (1945) 52 Man. L.R. 360. (2) (1945) 52 Man. L.R. 365.

It will be admitted also that The Excise Act would carry with it, as incidental thereto, the right to punish offenders against the Act, by all legitimate means, including forfeiture of their automobiles, or of their interests in automobiles, used in violations of the Act.

But it is difficult to find justification for the forfeiture of property belonging to people who are entirely free and innocent of a violation of the Act. These people have their rights to property established by the province, under its exclusive jurisdiction over "Property and Civil Rights"; sec. 92 of the British North America Act. If such confiscation of the property of persons can be justified as being incidental to the punishment of offenders, then it is difficult to understand where the limit must be drawn. If a man's car were stolen, for instance, and used in contravention of The Excise Act, the forfeiture would be maintainable—but at the same time would be an outrage on justice. What essential difference is there between such a case and this present one?

There is nothing in the principles of law or justice that can support this provision of The Excise Act, and while the right of the Dominion should be supported, in so far as its legislation is necessarily incidental to the enforcement of The Excise Act, it seems impossible to understand or to justify the punishment of innocent persons under pretence of enforcing the Act against guilty persons. I am not aware that this point has ever been raised, or strongly supported, or adjudicated upon and therefore I feel at liberty to express my opinion of it. In my opinion, the legislation here in question affects the exclusively provincial property rights of innocent persons, and is ultra vires of the Dominion.

With the greatest respect I find it difficult to understand why in that case the learned judge found it necessary to express any opinion as to whether or not the provisions of the Excise Act relating to forfeiture were invalid in so far as they affected innocent persons. The point was not raised by the parties themselves and in the Court of Appeal counsel for both parties disclaimed any desire to raise the question and no argument was made in regard thereto. Indeed the very point raised by Dysart, J., namely, the protection of property of innocent persons, was specifically provided for in The Excise Act itself and was the basis of the application then before him. In his judgment he found that the claimant was fully entitled to the relief claimed and as provided for in Section 169A. In my view his opinion that the legislation was ultra vires was purely obiter and a reading of the judgment itself suggests very strongly that he did not consider it otherwise.

It is submitted by counsel for the suppliant that while that decision was made in respect to the Excise Act, I should by parity of reasoning apply the same principle to the Opium and Narcotic Drug Act. It seems to me, however, that the true principle to be followed is found in the

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case of *The King* v. *Krakowec* (1) referred to and distinguished by Dysart, J. In that case the holder of a conditional sales agreement on a truck resisted a claim for forfeiture of the truck which had been seized while being used for the purpose of removing unlawfully manufactured spirits. It was admitted that the claimants were not concerned in any way with the commission of the offence. It was held that the truck was liable to forfeiture not only as against the person in whose possession it was found, but also as against the unpaid vendors although the latter had no notice or knowledge of the illegal use which was being made of it. Speaking for the full court, Rinfret, J. (now C.J.) stated in part at p. 142,

> It is sufficient to say that, in the provision respecting forfeiture, the object in view is the connection between the vehicles and the spirits unlawfully manufactured or imported. The point is that the vehicles "have been used or are being used for the purpose of removing the same"; and it is immaterial to whom the vehicles belong. In the words of Sedgwick, J., in The Ship *"Frederick Gerring Jr."* v. *The Queen* (1897) 27 Can. S.C.R. 271, at 285,
>
> > In the enforcement of fiscal law, of statutes passed for the protection of the revenue or of public property, *such provisions are as necessary as they are universal,* and neither ignorance of law, nor, as a general rule, ignorance of fact, will prevent a forfeiture when the proceeding is against the thing offending, whether it be the smuggled goods or the purloined fish, or the vehicle or vessel, the instrument or abettor of the offence.
>
> That the proceeding is, under the Excise Act, "a proceeding against the thing," that is, in the nature of a proceeding in rem, is apparent throughout the Act (Secs. 79, 83, 121, 124, 125, 131, etc.), but is nowhere more evident than in sec. 125, under which all vehicles, vessels, goods and other things seized as forfeited . . . . shall be deemed and taken to be condemned and may be dealt with accordingly, unless the person from whom they were seized, or the owner thereof . . . . gives notice . . . . that he claims or intends to claim the same.
>
> As will be noticed, the automatic condemnation is against the thing seized.
>
> * * *
>
> Adverting to the particular case before us, it is not assuming too much to say that it must have been known to the legislature, when it passed the Excise Act, that a great many drivers of motor vehicles are not the owners thereof, but possess and operate them subject to conditional sale agreements, and if sec. 181 was meant to apply only to vehicles driven by the owners thereof, it is obvious with what ease the provision respecting forfeiture could be evaded.

(1) (1932) S.C.R. 134.

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In that case it does not appear that any question was raised as to whether the provisions for forfeiture were in any degree ultra vires of Parliament. The judgment therefore, does not directly decide that the provisions for forfeiture were "necessarily incidental" to the effective working of the Excise Act but I think that such a finding is implicit thereunder. Emphasis is placed on the connection between the vehicles and the unlawful act and the immateriality of the ownership of the vehicles. Then in the reference to the Frederick Gerring, Jr. case the *necessity* and universality of provisions for forfeiture of vehicles, "the instruments or abettors of the offence" is stressed, and that neither ignorance of the law nor, as a general rule, ignorance of fact would prevent a forfeiture when the proceeding is against the thing offending. Then finally it is pointed out that it is common knowledge that motor drivers of cars operate them subject to conditional sales agreement and the ease with which the provisions for forfeiture could be effected, if forfeiture applied only to vehicles driven by their owners. In my opinion that is a clear indication that if the Excise Act were to be effectively administered the powers of forfeiture must necessarily extend to vehicles which were the instruments or abettors of the offence, regardless of ownership thereof, subject now however, to the special provisions of S. 169A thereof which section was not in the Act at the time the Krakowec decision was rendered.

Now if I am correct in so interpreting the judgment in that case I see no reason why the same principles should not be applied to the instant case. It cannot be doubted for one moment that the health and welfare of the people of Canada, the protection of which is sought by the provisions of the Opium and Narcotic Drug Act, is of at least as great (if not greater) importance as the collection of national revenue by means of the Excise Act. In each case vehicles are frequently used in the commission of offences. The driving of cars subject to conditional sale contracts is more widespread now than it was in 1932. It would be a very simple matter for any distributor of drugs to ensure that the vehicle to be used was that of some other person, or that it was subject to a conditional sale agreement or to a chattel mortgage, if by so doing the penalty of forfeiture

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could be avoided. By such means the effective administration of the Act would be seriously handicapped and the provisions for forfeiture readily evaded. Forfeiture of vehicles used in committing offences is one means and no doubt a very effective means of suppressing the drug traffic.

It may be true, as suggested by counsel for the suppliant, that the mere taking away of the property of innocent parties does not aid in the enforcement of the Act. That, however, is not the point, but rather the fact that the forfeiture of property which has been of assistance in the commission of the offence is of assistance in preventing a continuance of the "mischief" sought to be eradicated and in penalizing the convicted person who, conceivably at least, would be liable to the innocent owner for the loss of his vehicle.

For these reasons I have come to the conclusion that the provisions of S. 21 of the Opium and Narcotic Drug Act insofar as they may appear to trench upon "civil and property rights" are necessarily incidental to the powers conferred on Parliament by S. 91 head 27 of the B.N.A. Act and are therefore intra vires of Parliament.

I may add that it is not the function of the Court to concern itself with the propriety of an act which by forfeiture does affect the rights of innocent parties. If it be found that Parliament has the power to enact such legislation and if the Act clearly brings within its ambit the forfeiture of such property—and I have so found in this case—it is the duty of a judge to administer the law as he finds it and not to endeavour to mould a statute so as to make it agree with his own conception of justice.

In the Opium and Narcotic Drug Act there is no provision for declaring that the interest of innocent parties in articles which have been forfeited is not affected by such seizure, such as is found in S. 169A of the Excise Act and in S. 179 of the Customs Act, R.S.C. 1927 C.42 as amended. Moreover it would appear that the powers for remission of duties and forfeitures conferred on the Governor-in-Council by S. 33 of the Consolidated Revenue and Audit Act, Statutes of Canada 1931 C.27, do not apply to forfeitures under the Opium and Narcotic Drug Act. From the point

of view of the suppliant and others similarly situated it may be regrettable that such is the case. On the other hand it may be an indication that Parliament was of the opinion that in dealing with the nefarious drug traffic it was necessary that the forfeiture of goods and vehicles should be automatic and complete without any provision for relief of innocent parties.

Counsel for the Crown raised a technical objection that the Court had no jurisdiction to consider a claim such as this. In order that the matter might be dealt with on its merits, I have assumed—but without deciding—that S. 18 of the Exchequer Court Act R.S.C. 1927 C. 34 is sufficiently broad to include a claim of this nature.

The Petition of Right will therefore be dismissed and there will be judgment declaring that the suppliant is not entitled to the relief claimed. The respondent is entitled to be paid costs after taxation.

Judgment accordingly.

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Apr. 17

Sept. 23

BETWEEN:

ARMY AND NAVY DEPARTMENT STORE (WESTERN) LTD. ..... } APPELLANT,

AND

MINISTER OF NATIONAL REVENUE RESPONDENT;

AND

ARMY AND NAVY DEPARTMENT STORE, LTD. ..... } APPELLANT,

AND

MINISTER OF NATIONAL REVENUE RESPONDENT.

Revenue—Income Tax—Income Tax Act, S. of C. 1948, c. 52, ss. 36(1) (2) (3) (4) (5), 127(5)—Section 36(4) and section 127(5) of the Act clearly define words "related corporations" and specify when "one corporation is related to another"—Words used in s. 127(5) of the Act not ambiguous—Appeals from the Income Tax Appeal Board dismissed.

The appellant companies carry on a retail business, the first company, in British Columbia, the second company, in Alberta. One half of the issued shares of the British Columbia company is held by the Alberta company and the other half, less two shares, by the Army and Navy Department Store Limited, a third company which carries on a similar business, with its head office in Saskatchewan. The shareholders of the Alberta company are two brothers and a brother-in-law and the same two brothers and a son of one of the latter are the shareholders of the Saskatchewan company. All three companies were assessed under the provisions of the Income Tax Act for the taxation year 1949, but none of them was given any deduction pursuant to s. 36(1) of the Act. Later the Minister ruled that the Saskatchewan company was entitled to receive the 15 per cent deduction in s. 36(1). Against this ruling an appeal was taken to the Income Tax Appeal Board which dismissed the appeal. From this decision the appellants now appeal.

Held: That the words in s. 36(4) together with those in s. 127(5) of the Income Tax Act, S. of C. 1948, c. 52 clearly define the words "related corporations" and specify when "one corporation is related to another".

2. That the words "persons connected by blood relationship" as used in s. 127(5) of the Act are not ambiguous and do not require or permit any interpretation of being restricted in their meaning.

3. That the Minister sufficiently indicated his selection of the company entitled to be designated as the one to receive the deduction in s. 36 of the Income Tax Act.

APPEALS from a decision of the Income Tax Appeal Board.

The appeals were heard before the Honourable Mr. Justice Archibald at Vancouver.

M. M. Grossman, Q.C. for appellants.

J. D. C. Boland for respondent.

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

ARCHIBALD J. now (September 23, 1952) delivered the following judgment:

This appeal was heard at Vancouver, British Columbia, at the same time the appeal in Army & Navy Department Store (Western) Limited was heard. The two appeals involve exactly the same question and the only evidence taken was a brief statement respecting the incorporators of Army & Navy Department Store (Western) Limited. The hearing before me, with the exception of this evidence, was entirely taken up with the arguments of M. M. Grossman, Esq., Q.C., counsel for the appellants and J. D. C. Boland, Esq., counsel for the respondent.

In order that the questions at issue may be more easily understood, I think it desirable to recite briefly from the preliminary statement made by counsel for the appellants together with information from the statement of facts filed by him and concurred in by the respondent. This statement is as follows:

There are three companies involved in these proceedings, namely, Army & Navy Department Store (Western) Limited (hereinafter referred to as the "Western company"); Army & Navy Department Store Limited (hereinafter referred to as the "Alberta company") and Army & Navy Department Store Limited (hereinafter referred to as the "Saskatchewan company").

These stores conduct a general retail and merchandising business as follows: the Western company in New Westminster, in the province of British Columbia; the Alberta company in Edmonton, in the province of Alberta and the Saskatchewan company in Regina and Moose Jaw, in the province of Saskatchewan and at Vancouver, in the province of British Columbia.

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All three companies were assessed under the provisions of The Income Tax Act for the year 1949, but none of them was given any concession or adjustment pursuant to section 36(1) of The Income Tax Act.

The assessment was appealed to the Minister of National Revenue, and he ruled that the Saskatchewan company was entitled to receive the deduction pursuant to section 36 of The Income Tax Act. Against this ruling there was an appeal to the Income Tax Appeal Board and the ruling was confirmed. Against the decision of the Income Tax Appeal Board, the Western company and the Alberta company have appealed to this Court.

Before giving consideration to the matters raised on this appeal, it should be added that counsel for the parties agreed that this information respecting the shareholders in these three companies should be submitted as follows:

(1) *The Saskatchewan company*—the shareholders are—

40 per cent to S. J. Cohen
20 per cent to J. W. Cohen (his son)
40 per cent to H. R. Cohen (a brother of S. J. Cohen)

(2) *The Alberta company*—the shareholders are—

50 per cent to H. R. Cohen
10 per cent to S. J. Cohen (his brother)
40 per cent to S. G. Leshgold (son-in-law of S. J. Cohen)

(3) *The Western company* have 5,000 shares *to the value of* $10 each, divided as follows:

to the Alberta company	2,500 shares
to the Saskatchewan company	2,498 shares
to H. R. Cohen	1 share
to J. F. Bolecon	1 share

The shares in the name of H. R. Cohen and J. F. Bolecon in the Western company are director's qualifying shares.

The preceding paragraph indicates the admissions with reference to the family relationship between the shareholders in the three companies.

Counsel for the appellants urged four reasons why the appeals should be allowed. However, quoting from the transcript of his argument, he says, "I rely most strongly on the meaning of the words 'relations' and 'connected by blood.'" In fact his argument as to the correct meaning to be given to these words as used in the sections 36 and 127 of The Income Tax Act, constituted in the main his argument. In support of his argument numerous authori-

ties were cited to me. In my opinion, subsections (2) (3) and (4) to section 36 of the Act, form a conclusive answer to the argument advanced by him. He argued that the absence of a formula made it necessary to rely on a statute of distributions to obtain the proper meaning for the word "relative", "related to" or "persons connected by blood relationship." I am unable to agree.

Referring again to section 36, subsection (4), it is stated in (4) that:

> For the purpose of this section, *one corporation is related to another* in a taxation year if, at any time in the year,
>
> (*b*) 70 per cent or more of all the issued common shares of the capital stock of each of them is owned directly or indirectly by
>
> (iii) persons not dealing with each other at arms length one of whom owned directly or indirectly one or more of the shares of the capital stock of each of the corporations.

Those words together with those in section 127(5) clearly define the words "related corporations" and specify when "one corporation is related to another."

The decisions in *Ross* v. *Ross* (1) and *Sifton* v. *Sifton* (2) as well as many others referred to me by counsel are not applicable in these appeals.

I wish to add that the use of the words "persons connected by blood relationship" as appearing in section 127(5) (*c*) does not, in my opinion, restrict their meaning to that submitted by counsel for the appellants. The words as used in the Act are not ambiguous and do not require or permit any such interpretation. It may be noted in passing that this subsection was amended in 1952. The amendment, however, is not applicable to these appeals. Nor do I think the reference to the application of the words "deemed" and "dealing" advance appellants' argument.

I am satisfied also that the Minister of National Revenue sufficiently indicated his selection of the company entitled to be designated as the one to receive the deduction in section 36 of The Canadian Income Tax Act.

I am therefore unable to see any good reason why the appellants are entitled to receive any such deduction.

This appeal will therefore be dismissed with costs.

Judgment accordingly.

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(1) (1895) 25 S.C.R. 307. (2) (1938) 3 All E.R. 435.

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Mar. 17
Oct. 1

BETWEEN:

ROTHSTEIN THEATRES LIMITED....APPELLANT;

AND

MINISTER OF NATIONAL REVENUE RESPONDENT.

Revenue—Income Tax—The Income War Tax Act, R.S.C. 1927, c. 97, ss. 4(n), 6(1)—Dividends received by one corporation from another—Depreciation—Excess Profits Tax—The Excess Profits Tax Act, 1940, S. of C. 1940, c. 32, as amended—Investments producing tax-exempt income—Changes in capital during taxation period—Increase in standard profits computed on basis of capital employed not on basis of capital stock of company—Appeal dismissed.

From assessments for income and excess profits tax for the year 1945 the appellant appealed to the Court and, by its statement of claim, sought a revision of certain items of depreciation and an increase in the standard profits awarded in 1944 by the Board of Referees under the Excess Profits Tax Act. The respondent, by his statement of defence, allowed the amount claimed for depreciation and also an increase in the standard profits by adding thereto 7½ per cent of the amount of increase in the appellant's capital between July 1, 1939, being the commencement of its last fiscal period in the standard period, and January 1, 1945. On the hearing of the appeal the appellant claimed a further adjustment in the amount of standard profits on the ground that its capital stock was increased on the 31st day of January, 1944, by the sum of $60,000.

Held: That the appellant is not entitled to have taken into account, in arriving at the proper standard profits pursuant to the Excess Profits Tax Act, 1940, 4 Geo. VI, c. 32, either the $100,000 that it invested in Rothlish Investment Limited because this investment is a deduction under the Act, nor the $60,000 which was issued to Nathan Rothstein on the 31st day of December, 1944, as capital stock in the appellant company because any increase in the standard profits pursuant to the Act is computed on the basis of the *capital employed* not on the basis of the *capital stock of the company.*

2. That the Minister, in determining the amount of the refundable portion, properly employed the 1st day of July, 1939, as the date from which to base his calculations.

3. That the claim for additional allowance in the amount of the standard profits is dismissed.

APPEAL under the Income War Tax Act and the Excess Profits Tax Act, 1940.

The appeal was heard before the Honourable Mr. Justice Archibald at Winnipeg.

C. E. Finkelstein and *D. A. McCormick* for appellant.

Samuel Freedman, Q.C. and *D. K. Petapiece* for respondent.

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

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ARCHIBALD J. now (October 1, 1952) delivered the following judgment:

The appellant was assessed for income and excess profits tax for the year 1945 and appealed from said assessment, which said appeal was disallowed by the Minister and the appellant duly served and filed his notice of dissatisfaction from the decision of the said Minister.

On the 28th day of October, 1949, the Minister adjusted the said assessment and a revised assessment was filed. There was some dispute between counsel as to the correct date on which said revised assessment was served on the appellant. However, having regard to the proceedings which followed, it is not necessary for me to determine the exact date.

The Statement of Claim, pursuant to an order issued out of this Court, was filed on the 8th day of March, 1951. The said Statement of Claim included a claim for revision of certain items of depreciation and for an increase in the standard profits under The Excess Profits Tax Act.

On the 23rd day of June, 1951, the Statement of Defence was filed, in which appears an allowance for depreciation totalling $940, the amount which the appellant claims: also an amendment in the allowance for standard profits. No notification was given to the respondent by the appellant subsequent to the filing of the Statement of Defence.

This appeal was heard before me at Winnipeg on the 17th day of March, 1952.

On the hearing of said appeal, it was urged, by counsel on behalf of the appellant, that the appellant was entitled to a further adjustment in the amount of standard profits, because the capital stock of the company was increased on the 31st day of January, 1944. Subsequently, an amount of $100,000 was invested by Rothstein Theatres Limited in Rothlish Investments Limited. The investment of $100,000 in that company is, however, a deduction under The Excess Profits Tax Act, in computing the proper amount for standard profits, and cannot therefore be taken into account, as urged by counsel for the appellant. Neither is appellant entitled to claim that the standard profits are to be computed simply by the addition of the sum of $60,000 (the amount added to the capital stock on the 31st day of January, 1944), because any increase in the standard profits pursuant to The Excess Profits Tax Act

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is computed on the basis of the *capital employed* not on the basis of the *capital stock of the company.*

George Christie Scrimgeour of Winnipeg, a chartered accountant, residing in Winnipeg and now in the service of the Inspector of Income Tax, explained in detail the manner in which the excess profits were computed. He impressed me as a competent, careful and accurate witness, and I accept, without hesitation, the evidence which he offered. Having regard to his evidence and the provisions of The Excess Profits Tax Act, I am satisfied the appellant is not entitled to have taken into account, in arriving at the proper standard profits pursuant to the Act, either the $100,000, which was invested in the manner hereinbefore described, nor the $60,000 item which was issued to Nathan Rothstein on the 31st day of December, 1944, as capital stock in Rothstein Theatres Limited. Moreover, I am of opinion also, that Scrimgeour, in determining the amount of the refundable portion, properly employed the 1st day of July, 1939, as the date from which to base his calculations. In doing so, the standard profits were increased to the amount shown in the Statement of Defence. This amount I accept as correct and the claim for additional allowance in the amount of the standard profits, as made by the appellant, is dismissed. The appellant, however, is entitled to the depreciation allowance and the increase in excess profits allowed and specified in paragraphs 6 and 13 of the Statement of Defence filed by the respondent on the 23rd day of June, 1951.

I am of opinion, also, that neither party is entitled to any costs of these proceedings. Counsel for the appellant contends that owing to the action of the respondent in adjusting the assessment and refusing to make any adjustment for the depreciation items, these proceedings were taken. He calls attention to the fact that not until the 23rd day of June, 1951, was an examination of the Statement of Defence possible. Counsel for the respondent, on the other hand, while conceding that the appellant may be entitled to costs up to a certain point, is emphatic that the appellant is entitled to no costs after the Statement of Defence was filed by the respondent, but he added, not without significance, that "it may be decided is not a case for costs at all."

I agree that in all the circumstances of this appeal, neither party is entitled to any costs.

Judgment accordingly.

BETWEEN:

McTAGGART, HANNAFORD, BIRKS & GORDON LIMITED .. } APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

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Apr. 17
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Revenue—Income and excess profits tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 3, 4(n), 5(p)—Meaning of word "losses" in s. 5(p).

The appellant sustained a business operation loss of $145,246 in 1946 in its dealings with securities but received $168,402.24 in dividends from other Canadian corporations. These were exempted from taxation by section 4(*n*) of the Income War Tax Act and the appellant contended that they must not be taken into account in determining the amount of the losses sustained by it in 1946 that were deductible under section 5(*p*) of the Act from what would otherwise be its 1945 income. The assessment for 1945 denied this contention.

Held: That the fact that the dividends received by the appellant in 1946 were exempt from tax by section 4(*n*) has no bearing on the question whether it sustained a loss in 1946. The dividends were clearly items of income within the meaning of section 3 and their receipt resulted in the appellant having a net profit in 1946. The exemption of the dividends from taxation did not change their character as items of income or leave the appellant with a loss instead of a profit.

2. That the word "losses" in section 5(*p*), after its amendment in 1944 with the words "in the process of earning income" omitted, must be given its ordinary meaning according to accounting practice and is not limited in its meaning to "business operation losses".

APPEAL from assessment for income and excess profits tax.

The appeal was heard before the President of the Court at Montreal.

J. G. Porteous Q.C. and *K. S. Howard* for appellant.

J. Tellier Q.C. and *R. G. Decary* for respondent.

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

THE PRESIDENT now (December 12, 1952) delivered the following judgment:

This is an appeal from the appellant's income and excess profits tax assessment for 1945. The issue in the appeal is whether the appellant sustained a loss in 1946 within the meaning of section 5(*p*) of the Income War Tax Act, R.S.C. 1927, chapter 97, as it stood in 1945.

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The facts are not in dispute. The appellant is a Canadian corporation and deals in securities. In 1945 it had, according to the Minister, a taxable income of $18,340.35 and was assessed accordingly. In 1946 it sustained a loss of $145,246 in its dealings with securities but received $168,402.24 in dividends from other Canadian corporations leaving it with a profit, according to its own profit and loss statement for 1946, of $23,156.24. The appellant contends, and the respondent denies, that in determining whether it sustained a loss in 1946 that was deductible under section 5(*p*) only its business operation loss should be considered and the amount of the dividends received by it must not be taken into account. If the appellant is right it was entitled to deduct from its 1945 income a sufficient amount of its 1946 loss to make it non-assessable for 1945.

To determine the meaning of the word "losses" as used in section 5(*p*), as it stood in 1945, it is necessary to consider its history. When it was first enacted in 1942 by section 5(7) of chapter 28 of the Statutes of 1942-43 it read as follows:

> 5. "Income" as hereinafter defined shall for the purposes of this Act be subject to the following exemptions and deductions:—
>
> (*p*) losses sustained in the process of earning income during the year last preceding the taxation year by a person carrying on the same business in both of such years, if in the calculation of such losses, no account is taken of any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence, or of any disbursements not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income, except such amount for the depreciation as the Minister may allow.

In 1943 paragraph (*p*) was repealed and re-enacted by section 5 of chapter 14 of the Statutes of 1943-44, the only change being the addition of the words "and depletion" in the last line. In 1944 paragraph (*p*) was again repealed and re-enacted by section 4(5) of chapter 43 of the Statutes of 1944-45 and read as follows:

> (*p*) amounts in respect of losses sustained in the three years immediately preceding and the year immediately following the taxation year, but
>
> (i) no more is deductible in respect of a loss than the amount by which the loss exceeds the aggregate of the amounts deductible in respect thereof in previous years under this Act,

(ii) an amount is only deductible in respect of the loss of any year after deduction of amounts in respect of the losses of previous years, and

(iii) nothing is deductible in respect of a loss unless the taxpayer carried on the same business in the taxation year as he carried on in the year the loss was sustained,

if, in ascertaining the losses, no account is taken of an outlay, loss or replacement of capital, a payment on account of capital, any depreciation, depletion or obsolescence or disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income, except such amount for depreciation and depletion as the Minister may allow for the purposes of this paragraph.

There were thus two changes in the 1944 amendment as compared with the former enactment. One was that whereas the 1942 enactment allowed the deduction of losses sustained in a previous year the 1944 amendment allowed the deduction of losses sustained in a subsequent year as well as in three previous ones. The second change was that the words "in the process of earning income" which appeared in the 1942 and 1943 enactments were omitted.

The scope of section 5(*p*), as it stood in 1943, was considered by this Court in *Luscar Coals Ltd.* v. *Minister of National Revenue* (1). There the appellant, which was in the business of coal mining, claimed that it was entitled to deduct from its income for 1943 the sum of $20,299.57, being its business operation losses in 1942, but the Minister allowed a deduction of only $9,945.97 on the ground that the appellant had received the sum of $10,352.60 in dividends from other Canadian companies and that this amount must be deducted from the amount claimed by the appellant in order to arrive at the amount of the 1942 losses that were deductible under section 5(*p*). It was contended for the appellant that the words "losses sustained in the process of earning income" meant the appellant's losses in the operation of the business from which it earned its income without any deduction of the amount of dividends received by it. Cameron J. agreed with this view and allowed the appeal accordingly. In his opinion, the losses that were deductible under section 5(*p*) were the losses sustained "in the process of earning income". This meant that the appellant was entitled to deduct the losses sustained by it in 1942 in its coal mining operations and that

(1) (1949) Ex. C.R. 83.

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in the computation of such losses the amount of the dividends received by it must not be taken into account. It is plain that Cameron J. considered that the words "in the process of earning income" qualified the losses that were deductible under section 5(*p*) as business operation losses and that if these words had not been in the section he would have given the word "losses" its ordinary meaning and held that in computing the appellant's losses in 1942 the amount of the dividends received by it in that year must be taken into account. At page 87, Cameron J. said:

> I think it is clear that if the words "in the process of earning the income" did not appear in the subsection the appellant would have no case.

And, at page 90, he elaborated his view of the effect of the words as follows:

> I think it is clear that if the words "in the process of earning the income" were not used in the subsection, then "losses", lacking any direction as to what losses are meant, would have to be given the meaning attributed to it in ordinary commercial practice, in which case I have no doubt that the losses would be reduced by the amount of investment income received. But I regard the use of these words in the subsection as a provision requiring a departure from the ordinary commercial principles, and conferring on the appellant a right to deduct, not the net losses incurred in the prior year, but its losses incurred in the operating of its business of coal mining, that being the only activity in which there was a process of earning income.

In the present case we have to determine the meaning of the word "losses" in section 5(*p*), as it stood in 1945, with the words "in the process of earning income" omitted from it. Counsel for the appellant submitted that the remarks of Cameron J. in the *Luscar Coals* case (*supra*) on the effect of these words were *obiter dicta* in that they were not necessary to the decision. He contended that the omission of the words made no change in the law and that the "losses" that were deductible under section 5(*p*), as it stood after the deletion of the words, were business operation losses just as they had been previously. In support of this submission he relied on section 4(*n*) of the Act which, after its amendment in 1943 by section 3(1) of chapter 14 of the Statutes of 1943-44, read as follows:

> 4. The following incomes shall not be liable to taxation hereunder:
>
> (*n*) Dividends paid to an incorporated company incorporated in Canada, the profits of which have been taxed under this Act, except as hereinafter provided by sections 19, 22A and 32A.

The exceptions referred to have no application in the present case. It was then argued that since the dividends received by the appellant in 1942 were not liable to taxation by reason of the exemption granted by section 4(*n*) they must not be taken into account in determining whether there were losses that were deductible under section 5(*p*) and that to hold otherwise would have the effect of bringing the exempted dividends back into taxability notwithstanding their exemption.

There are several reasons for not accepting this submission. I reject the contention that the remarks of Cameron J. in the *Luscar Coals* case (*supra*) on the effect of the words "in the process of earning income" in section 5(*p*) were *obiter dicta* as not being necessary for his decision and that their omission made no difference. It is as plain as language can make it that his decision was based on the presence of these words as defining the losses that were deductible under the section and that if they had not been there he would have decided that the word "losses" must bear its ordinary meaning, in which case the amount of the business operation losses would have been reduced by the amount of the dividends.

The matter has been dealt with by the Income Tax Appeal Board and its decisions have all been against the appellant's argument. In *McTaggart, Hannaford, Birks & Gordon Limited* v. *Minister of National Revenue* (1), the present appellant filed its income tax return for 1946 showing its statement of profit before income and excess profits taxes of $23,156.24 and also the receipts of $168,-402.24 in dividends from Canadian corporations which it claimed as a deduction. The dividends being exempt from taxation, the appellant received a notice of assessment showing no income tax payable by it. From this it appealed to the Income Tax Appeal Board asking for a declaration that it had sustained a loss in 1946. The Board held that it had no jurisdiction to make any such declaration and dismissed its appeal. Mr. Fisher, however, went further and expressed the opinion that in 1946 the appellant had not suffered any loss within the meaning of section 5(*p*) of the Act. While this expression of opinion is *obiter* in view of the decision by the Board that it had no jurisdiction, I agree with it.

(1) (1950) 2 Tax A B C. 26.

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The matter came squarely before the Board in *Corneil Limited* v. *Minister of National Revenue* (1). There the appeal was from the appellant's 1946 assessment. The appellant claimed as a deduction from its 1946 taxable income a loss of $886.96 in 1944 and $1,709.43 in 1945. These were business operation losses in these years but in these years the appellant received dividends from other Canadian corporations amounting to $3,916.45 in 1944 and $6,660 in 1945. The Board, with Graham J. dissenting, held that although the dividends were exempt from tax under section 4(*n*) of the Act they constituted income under section 3(1) of the Act and there were no losses in 1944 and 1945 that could be deducted under section 5(*p*) from the appellant's 1946 income. The judgment of the majority of the Board was given by Mr. Monet with Mr. Fisher concurring. I cite the following extract from the English translation of Mr. Monet's judgment, as it appears at p. 127:

> The appellant maintains that it is not bound to include dividends from Canadian corporations in its income because, it says, "These dividends are not taxable". It is true, in accordance with the provisions of section 4(*n*) of the Act, that dividends paid the appellant by Canadian corporations are not taxable and that the appellant is not required to take them into account when determining its taxable income. On the other hand, there is nothing in the Act permitting the appellant not to consider the dividends in question as income when determining whether or not it sustained a loss. The appellant maintains that if, in the computation of its income, regard must be had to the dividends received from Canadian corporations, which are non-taxable under the provisions of section 4(*n*) of the Act, it is not benefiting from the provisions of section 4(*n*) and is paying tax on the dividends in question. In my opinion, this is not so. As a matter of fact, when determining its *taxable income* the appellant company took full advantage of the provisions of the Act regarding dividends from Canadian corporations and did not pay tax on the dividends in question. Only when determining whether or not there was a loss, was the appellant required to include the dividends in question in its income.
>
> Acceptance of the appellant's proposal would mean that not only are the dividends it received from Canadian corporations non-taxable, but they should not even be considered as income. In view of the wording of section 3(1) of the Act which provides, among other things, that " 'income' . . . . includes . . . . dividends . . .", it is impossible for me to accept this proposal.

The Board dealt with the matter again in *Smith, Davidson and Wright Limited* v. *Minister of National Revenue* (2). There the appellant in 1948 incurred an operating

(1) (1950) 2 Tax A.B.C. 116. (2) (1950-51) 3 Tax A.B.C. 187.

loss of $34,385.33 but received from another Canadian corporation a dividend of $12,495. It claimed a deduction of the former amount from its 1947 income but was allowed to deduct only its over-all loss of $21,888.33. The appellant's claim was disallowed by the Board which followed its previous decision in the *Corneil* case (*supra*).

I am in agreement with the reasoning in these cases. In my view, the fact that the dividends received by the appellant in 1946 were exempt from tax by section 4(*n*) has no bearing on the question whether it sustained a loss in 1946. The dividends were clearly items of income within the meaning of section 3 and were properly taken into account in determining its income position. Their receipt resulted in the appellant having a net profit of $23,156.24, according to its own profit and loss statement, prepared by its own auditor. Nothing can alter this fact. There is an obvious *non sequitur* in the argument that because the dividends were exempt from tax they must be excluded from the appellant's income and thus leave it with a loss. This identification of non-taxability with loss results from the confusion of two different ideas. It is quite possible for a taxpayer to have a profit and yet have no taxable income. That was the position of the appellant in 1946. It had no taxable income because the dividends it received were exempt from tax but it nevertheless had a profit because its receipts exceeded its expenditures. The exemption of the dividends from tax did not change their character as items of income or leave the appellant with a loss instead of a profit. Section 4(*n*) went no farther than to exempt the dividends. It did not touch the question whether the appellant had a profit or sustained a loss. The fact is that according to the ordinary principles of accounting it had a profit in 1946.

To succeed in its appeal the appellant must show that the word "losses" in section 5(*p*), as it stood after the 1944 amendment, meant only business operation losses, but this it cannot do. As I read the section, the word "losses" must bear its ordinary meaning according to accepted accounting practice. That being so, the appellant has failed to show that it comes within the benefit of section 5(*p*). It would have done so if the word "losses" had continued to be defined as business operation losses, as was the case prior

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to the 1944 amendment, when the deductible losses were those sustained "in the process of earning income", but to construe the word "losses" in the amended section as meaning only business losses means reading into it a limitation that was not there. This is not permissible.

The appellant has thus failed to discharge the onus cast on it to show that the assessment appealed against is erroneous and its appeal must be dismissed with costs.

Judgment accordingly.

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BETWEEN:

MOUNTAIN PARK COALS LIMITED..APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .....} RESPONDENT.

Revenue—Income and excess profits tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 3, 4, 4(n), 5, 5(p), 9—Meaning of word "losses" in s. 5(p)—The Income Tax Act, S. of C. 1948, c. 55, ss. 26(d), 127(w)—Legislative intent of Act to be gathered from words used—Marginal notes not a legitimate aid to construction—Resolution preceding introduction of bill not admissible to explain meaning of enactment—Act not to be construed by reference to subsequent Act—Meaning of "income as hereinbefore defined" in s. 5—Profit and taxable income not necessarily the same—Loss not the inverse of taxable income—Exempted income not to be excluded from computation of profit or loss.

The appellant contended that the amount of the dividends which it had received from other Canadian corporations, which were exempted from taxation by section 4(*n*) of the Income War Tax Act, should be excluded from the amount of its deductible losses under section 5(*p*). In assessing the appellant the Minister added back the amount of the dividends.

Held: That it is not permissible to interpret words that have a well known ordinary meaning, such as the word "losses", by assuming a legislative intent that involves a departure from or a restriction of such meaning. The legislative intent of an Act must be gathered from the words by which it is expressed and it is the meaning of the words as used that is to be ascertained.

2. That the marginal notes to the section of an Act of Parliament cannot be referred to for the purpose of construing the Act.

3. That the parliamentary history of an enactment, including the resolution preceding its introduction, is not admissible to explain its meaning.

4. That it is not permissible to construe an Act to which the Interpretation Act applies by reference to a subsequent Act unless such subsequent Act directs how the prior Act is to be interpreted.
5. That the expression "'income' as hereinbefore defined" in section 5 of the Act does not mean the income as defined in section 3 less the income exempted by section 4. The expression relates only to the income as defined by section 3. Section 4 has nothing to do with the definition of income.
6. That it is erroneous to say that loss, which is the inverse of profit, is the inverse of taxable income as if profit and taxable income were the same. They may not be.
7. That section 4(*n*) of the Act does not have the effect in the appellant's case of excluding the dividends received by it from the computation of its profit or loss.
8. That the word "losses" in section 5(*p*), as it stood after its amendment in 1944, must be given its ordinary meaning according to ordinary business practice and accepted principles of accounting.

APPEALS from income tax and excess profits tax assessments.

The appeals were heard before the President of the Court at Ottawa.

J. R. Tolmie and *J. M. Coyne* for appellant.

W. R. Jackett Q.C. and *R. G. Decary* for respondent.

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

The PRESIDENT now (December 12, 1952) delivered the following judgment:

These appeals from the appellant's income tax and excess profit tax assessments for 1945, 1946, 1947 and 1948 turn on the meaning of the word "losses" in section 5(*p*) of the Income War Tax Act, R.S.C. 1927, chapter 97, as it stood after its amendment in 1944, and particularly on whether the appellant was entitled to exclude the dividends received by it from other Canadian corporations from the computation of its deductible losses under the section.

The facts are not in dispute. The appellant carried on the business of coal mining in Alberta. For the year ending June 30, 1944, it showed a business operation loss of $65,357.85 and a receipt of dividends from other Canadian corporations of $12,010.13. For the year ending June 30, 1945, it showed a loss of $11,138.76 after deducting from its income for the year the business operation loss of $65,357.85 sustained in 1944, but the Minister, in assessing

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it for 1945, added back the sum of $12,010.13, being the amount of the dividends received by it in 1944. This left it with a small profit the tax on which was offset by other deductions leaving it non-taxable for 1945. For the year ending June 30, 1946, it showed a profit of $31,278.10 and claimed a deduction of $11,138.76 as the balance of its 1944 deductible loss that was not used up in 1945 but the Minister, in assessing it for 1946, added back this amount. For the years ending June 30, 1947, and 1948 the appellant showed a profit of $109,681.57 in 1947 and a business operation loss of $64,810.85 in 1948 but in the latter year it received dividends from other Canadian corporations of $28,321.89. It claimed a deduction of $64,810.85 from its 1947 income but the Minister, in assessing it for 1947, added back the amount of $28,321.89. There were other adjustments in the assessments for the years in question but these are not in dispute, the only question in the appeals being whether the appellant was entitled to exclude the amounts of the dividends received by it from the computation of the losses it was entitled to deduct under section 5(*p*). The issues are thus confined to the questions whether the loss sustained by the appellant in 1944 which it was entitled to deduct from what would otherwise have been its income in 1945 and 1946 was $65,357.85 or $53,347.72, the difference of $12,010.13 being the amount of the dividends received by it in 1944, and whether the loss sustained by it in 1948 which it was entitled to deduct from what would otherwise have been its income for 1947 was $64,810.85 or $36,488.96, the difference of $28,321.89 being the amount of the dividends received by it in 1948.

The issues in the appeals herein are thus the same as that in *McTaggart, Hannaford, Birks and Gordon, Limited* v. *Minister of National Revenue* in which judgment has just been given. The reasons for judgment in that case are, therefore, *mutatis mutandis*, applicable herein and need not be repeated. In view of the fact, however, that the arguments submitted to the Court in support of the appeals, although essentially the same as those submitted for the appellant in the *McTaggart* case (*supra*), were put somewhat differently and they merit being dealt with accordingly.

Before I deal with them I should point out that, while the appeals are stated to be from the assessments for 1945, 1946, 1947 and 1948, there was a nil assessment for 1945 and there was no notice of assessment for 1948, although it appears from the notice of assessment for 1947 that there was an assessment for 1948 showing no taxability although no separate notice of it was given. It should also be noted that this Court has no jurisdiction to entertain the appeals from the income tax assessments for the years subsequent to 1945 so that in respect of the years 1946, 1947 and 1948 it must confine itself to the appeals from the excess profits tax assessments.

Two main arguments were made for the appellant, one that the word "losses" in section 5(*p*) meant only business operation losses and the other that because the dividends received by the appellant were exempt from taxation by section 4(*n*) of the Act they must be excluded from the computation of the losses that were deductible under section 5(*p*). The second argument was said to be complementary and alternative to the first.

The first submission in support of the contention that the word "losses" meant only business operation losses was that since it was provided in sub-paragraph (iii) of section 5(*p*) that nothing was deductible in respect of a loss unless the taxpayer carried on the same business in the taxation year as he did in the year the loss was sustained Parliament must have intended that the losses to be deducted were business losses. This does not follow. All that the subparagraph does is to lay down a condition of deductibility. It has no bearing on the meaning of the word "losses".

The next submission was that it had been the consistent policy of Parliament ever since 1942 that the losses to be deducted should be business operation losses and that the word "losses" should be construed accordingly. In support of this submission counsel referred to the marginal note opposite section 5(*p*) of the Act, the budget resolution adopted by Parliament in 1944 prior to the introduction of the bill containing the 1944 amendments of the Act and section 26(*d*) and 127(*w*) of The Income Tax Act, Statutes of Canada, 1948, chapter 55.

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There are several reasons for not accepting this argument. In the first place, it is, I think, an erroneous approach to the interpretation of the word "losses" to assume such a legislative intent as counsel for the appellant suggested and then interpret the word accordingly. It is not permissible to interpret words that have a well known ordinary meaning, such as the word "losses", by assuming a legislative intent that involves a departure from or a restriction of such meaning. A sound warning against a somewhat similar approach to interpretation was given by Rand J. in *Commissioner of Patents* v. *Winthrop Chemical Co. Ltd. Inc.* (1). The legislative intent of an Act must be gathered from the words by which it is expressed and it is the meaning of the words as used that is to be ascertained.

Moreover, there are objections to the use of some of the aids to the interpretation of the word "losses" on which counsel relied. I shall deal first with his use of the marginal note. The law on this has wavered. In the older cases there were conflicting opinions on whether a marginal note might be referred to in considering the sense in which words are used in a statute but the modern cases are clear that it can afford no legitimate aid to their construction: Craies on Statute Law, 5th edition, page 184. In *Thakurain Balraj Kunwar* v. *Rae Jagatpal Singh* (2) Lord MacNaghten, delivering the judgment of the Judicial Committee of the Privy Council, said that it was well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. *Vide* also *Nixon* v. *Attorney General* (3) where Lord Hanworth M.R. held that marginal notes are not part of an Act of Parliament and the Courts cannot look at them, and *Longdon-Griffiths* v. *Smith* (4) where Slade J. expressed the view that he was not entitled to have regard to the marginal note in interpreting a statute. Moreover, it is well known that marginal notes are frequently incorrect.

It is stated in Maxwell on Interpretation of Statutes, 9th edition, page 29, that it is unquestionably a rule that what may be called the parliamentary history of an enactment is not admissible to explain its meaning. While there

(1) (1948) S C.R. 46 at 55.
(2) (1904) 31 I.A. 132 at 142
(3) (1930) 1 Ch. 566 at 593.
(4) (1950) 2 All E.R. 662 at 672

are many instances where the Courts have resorted to the parliamentary history of an enactment in aid of its construction and while on grounds of principle it may be argued that the so-called rule should be regarded as a counsel of caution rather than a canon of construction, the weight of judicial authority supports the statement in Maxwell. While I have not been able to find any decision directly on the question whether a resolution preceding the introduction of a money bill, such as that preceding the bill containing the 1944 amendments to the Income War Tax Act, can be resorted to for the purpose of interpreting the Act that follows the introduction of the bill I see no reason for excluding it from the scope of the rule denying the use of the parliamentary history of an enactment as an aid to its construction. In any event, in the present case, counsel did not press his argument on this point.

I now come to counsel's use of sections 26(*d*) and 127(*w*) of The Income Tax Act in aid of his interpretation of the word "losses" in section 5(*p*) of the Income War Tax Act. In *Morch* v. *Minister of National Revenue* (1) I touched on the question whether it was permissible to construe an Act in the light of a subsequent Act. There I pointed out that in the United Kingdom there was a conflict of judicial opinion on the subject and then expressed the opinion that it was at least doubtful whether such an aid to construction is permissible in Canada in the case of an Act to which the Interpretation Act, R.S.C. 1927, chapter 1, applies. After further consideration I am of the view that I ought to have gone further. Section 21 of the Interpretation Act provides in part as follows:

> 21. 2. The amendment of any Act shall not be deemed to be or to involve a declaration that the law under such Act was, or was considered by Parliament to have been, different from the law as it has become under such Act as so amended.
>
> 3. The repeal or amendment of any Act shall not be deemed to be or to involve any declaration whatsoever as to the previous state of the law.

In view of these provisions it seems to me that a subsequent Act cannot throw any light on the meaning of a prior one. That was the view taken by Cameron J. in *Luscar Coals Ltd.* v. *Minister of National Revenue* (2)

(1) (1949) Ex C.R. 327 at 388. (2) (1949) Ex. C.R. 83 at 90.

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when he said that he could not draw any inference from the Income Tax Act as to what was meant by the word "losses" under the Income War Tax Act as it stood in 1943. With this view I agree. In my opinion, it is not permissible to construe an Act to which the Interpretation Act applies by reference to a subsequent Act unless such subsequent Act directs how the prior Act is to be interpreted.

There would have been no difficulty in the way of counsel's contention that the word "losses" in section 5(*p*) meant only business operation losses if the words "in the process of earning income" had been retained in it. The appeals would then have come within the decision of Cameron J. in *Luscar Coals Ltd.* v. *Minister of National Revenue* (*supra*) which has been fully discussed in the *McTaggart* case (*supra*). Counsel for the appellant sought to escape from the consequences of the omission of these words in the 1944 amendment of the section by contending that under the previous wording all investment income, regardless of whether it was exempted from taxation by section 4 or not, was excluded from the computation of deductible loss under the section and that all that Parliament intended to do by the omission of the words was to prevent income that was not exempted from taxation from being excluded from the computation. My only comment is that if that was the limit of Parliament's intention, which I do not admit, the language used did not express it. In my judgment, the correct view of the effect of the omission of the words is that expressed by Cameron J. in the *Luscar Coals Ltd.* case (*supra*), where he said, at page 87:

> I think it is clear that if the words "in the process of earning the income" did not appear in the subsection the appellant would have no case.

The alternative argument for the appellant revolved around sections 3, 4, 5 and 9 of the Act. Section 3 defines income for the purposes of the Act as meaning "annual net profit or gain or gratuity" and then sets out various particulars of income including dividends. Section 4 opens with the words

> 4. The following incomes shall not be liable to taxation hereunder:—

and then specifies the particular incomes or items of income that are exempt from taxation, including paragraph (*n*), reading as follows:

> (*n*) Dividends paid to an incorporated company by a company incorporated in Canada the profits of which have been taxed under this Act, except as hereinafter provided by sections 19, 22A and 32A.

Section 5 opens with the words

> 5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemption and deductions:—

and then enumerates the various items dealt with by it, including paragraph (*p*). Then section 9, the general charging section of the Act, subjects the income of the person specified by it to the tax imposed by the Act. The argument for the appellant, as I understood it, was that the expression " 'income' as hereinbefore defined" in section 5 meant the income defined by section 3 less the income exempted from taxation by section 4, that the income thus defined was subject to the exemptions and deductions permitted by section 5 and that the net result was the taxable income that was subject to the charge imposed by section 9. This line of argument led to the submission that "loss", within the meaning of section 5(*p*), was the converse of taxable income and should be computed similarly, namely, that the profit or loss for income tax purposes should be computed by ascertaining the profit or loss according to section 3 and excluding from such computation whatever income was exempted from taxation by section 4. It followed that if this method of computation was followed in the appellant's case the "losses" that would be deductible under section 5(*p*) would be greater than if they were computed according to ordinary business practice and accepted principles of accounting by reason of the fact that the amounts of the dividends received would be excluded from the computation of such losses.

This argument is, in my opinion, unsound. In the first place, I do not agree that the expression " 'income' as hereinbefore defined" in section 5 means the income as defined in section 3 less the income exempted by section 4. The expression relates only to the income as defined by section 3. It is that income which is subject to the exemptions and deductions permitted by section 5. Section 4 has nothing to do with the definition of income. As I see the scheme of the Act, it is the income as defined by section

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3 less the exemptions and deductions permitted by section 5 that is the taxable income that is subject to the charge imposed by section 9 except to the extent that it or an item of income in it is exempted from taxation by section 4. This really disposes of the alternative argument.

Moreover, there is a fallacy in the argument in the failure to observe the distinction between profit and taxable income. They are not necessarily the same. The amount of the former is determined according to ordinary business practice and accepted principles of accounting, without regard to liability to tax or otherwise, whereas the amount of the latter depends on the provisions of the taxing Act. Consequently, it is erroneous to say that loss, which is the inverse of profit, is the inverse of taxable income as if profit and taxable income were the same. They may not be for it is possible for a person to have a profit and yet have no taxable income. This is obviously the case where his whole income is exempted from taxation by section 4 or a sufficient item of income is exempted to make him non-taxable. Section 4(*n*) of the Act does not have the effect in the appellant's case of excluding the dividends received by it from the computation of its profit or loss. It has nothing to do with that matter. It is concerned only with their exemption from taxation. In that sense, it assumes that they constitute an item of income and possible profit. Their non-taxability does not change their character as items of income or leave the appellant with a greater loss than would otherwise be the case. Thus the appellant's argument that section 4(*n*) by exempting its dividends from taxation excluded them from its income and left it with the deductible loss claimed by it falls to the ground.

It follows from what I have said that, in the absence of any reason to the contrary, such as that which existed in 1943 when the section contained the words "in the process of earning income", the word "losses" in section 5(*p*) must be given its ordinary meaning, namely, that which it would have according to ordinary business practice and accepted principles of accounting. Since that meaning could not exclude the dividends received by the appellant from the computation of its deductible losses under section 5(*p*) the appellant has failed to show that the assessments appealed against are erroneous, and its appeals must be dismissed with costs. *Judgment accordingly.*

QUEBEC ADMIRALTY DISTRICT

1952
June 3

BETWEEN:

MAXIME FOOTWEAR COMPANY LIMITED ..... PLAINTIFF;

AND

CANADIAN GOVERNMENT MERCHANT MARINE LIMITED ... DEFENDANT.

Shipping—Water Carriage of Goods Act, 1936, I Ed. VIII, c. 49, Art. IV—Action to recover damages for loss of cargo destroyed by fire on board ship in Halifax harbour—Bill of lading—Action against defendant properly brought—Defendant entitled to benefit of exemptions from liability provided by statute—Failure to prove unseaworthiness of vessel or negligence on part of crew—Action dismissed.

Plaintiff shipped goods from Montreal to Halifax by rail and from Halifax to Kingston, Jamaica, by Canadian National Steamships. A through export bill of lading for the shipment was delivered to plaintiff at Montreal by the Canadian National Railways. At Halifax the goods were placed on board a vessel operated by the defendant. Before sailing from Halifax the ship's crew, pursuant to orders of the Captain, used an acetylene torch to thaw out some pipes that had frozen and in the course of such thawing a fire broke out on board ship and plaintiff's goods were destroyed. Plaintiff seeks to recover from defendant the damages resulting from the loss of the goods.

Held: That the action is properly brought against the company defendant instead of against His Majesty the King represented by The Honourable Minister of Transport.

2. That defendant company having contracted to carry plaintiff's cargo and having accepted and had the same under its control and possession owed to the plaintiff the duty of transporting and delivering the cargo to Kingston, Jamaica and if the cargo was lost due to defendant's negligence or its failure to discharge its obligations under the contract of carriage the defendant must answer for the loss unless relieved of liability by some provision of law.

3. That the plaintiff failed to prove that the presence of ice in the scupper pipes had the effect of making the vessel unseaworthy or even if that were so that the defendant had not exercised due diligence to make the vessel seaworthy.

4. That it is only when unseaworthiness is the direct cause of the loss or damage that the carrier is deprived of the benefit of the exceptions afforded by Article IV of the Water Carriage of Goods Act, 1936, I Edward VIII, c. 49.

5. That defendant is entitled to the benefit of the exemptions provided by the Water Carriage of Goods Act, 1936, and is not liable for the damage claimed.

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ACTION to recover damages for loss of cargo on board a vessel operated by defendant.

The action was tried before The Honourable Mr. Justice A. I. Smith, District Judge in Admiralty for the Quebec Admiralty District, at Montreal.

C. Russell McKenzie, Q.C. for plaintiff.

Lucien Beauregard, Q.C. for defendant.

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

SMITH D.J.A. now (June 3, 1952) delivered the following judgment:

The plaintiff claims damages alleged to have resulted from the loss of certain of plaintiff's goods entrusted to the defendant for transportation from Montreal to Kingston, Jamaica. The said goods were shipped from Montreal to Halifax by rail to be there carried by water to Kingston by Canadian National Steamships. The contract of carriage consisted of a through export bill of lading delivered to the plaintiff at Montreal by the Canadian National Railways, who, it is alleged, acted as the agent for the defendant.

The said cargo was duly transported to Halifax, at which port the *M/V Maurienne,* operated by the defendant, arrived on January 31, 1942. On the following Tuesday, February 3, loading of the vessel's No. 3 hold, in which plaintiff's cargo was placed, was commenced and the loading of this hold was completed on the evening of Friday, the 6th, it being the intention to sail on the following morning, February the 7th.

During Friday orders were given by the Captain to the Fourth Mate to have certain pipes, which were found to be frozen, thawed out. Amongst these pipes were three scuppers discharging respectively from the bath, the toilet and the galley sink.

In order to free these pipes which discharged through the starboard side of the vessel, adjoining No. 3 hold and some 8 to 10 feet below deck level, a man or men working on a scaffold suspended over the ship's side, used an acetylene torch to melt the ice accumulated at or near the

openings of the said pipes. This work was carried out between three and four o'clock in the afternoon of Friday, February the 6th, and early in the evening all three pipes were found to be free.

About 11.30 Friday evening the smell of smoke was detected and it was found that there was fire in or close to No. 3 hold, near the place where the acetylene torch had been used in the afternoon. Although strenuous efforts were made to extinguish the fire it spread and by 5.30 a.m. had reach such proportions that the Captain ordered the opening of the sea-cocks and this being done the vessel soon sank with complete loss of the cargo.

While direct and positive proof of the cause of the fire is lacking, the facts proven give rise to a presumption that it had its origin in the heat generated by the acetylene torch which, in some way or other was communicated to the insulation in the ship's wall immediately adjoining the said scuppers pipes.

The plaintiff's action is based both upon alleged breach of contract and negligence.

The endorsement on the Writ of Summons reads as follows:

> The plaintiffs claim from the defendant the sum of $2,800 as and for damages arising from an agreement relating to the carriage of goods on the Motor Vessel *Maurienne* and in tort in respect of the said goods received by the defendant on board the said *Maurienne* in good order and condition at Halifax, N.S. on or about the 3rd day of February 1942, for carriage and delivery by the defendant in like good order and condition at Kingston, Jamaica, B.W.I.; the whole with interest and costs.

Plaintiff's Statement of Claim contains the following paragraph 3:

> 3. In breach of the defendant's undertaking as evidenced by Bill of Lading filed herewith and by reference incorporated herein as plaintiffs' Exhibit No. 1, and in dereliction of its duty in the premises implied by law, the defendant failed and has refused to deliver the said cargo.

By the Statement of Defence the defendant alleges that the said Bill of Lading speaks for itself, that the said cargo was loaded on the *M/V Maurienne* at Halifax for carriage to Kingston, Jamaica, admits that the said cargo was not delivered at Kingston, but denies that the plaintiff is entitled to claim any damages from the defendant. It is further alleged that the *M/V Maurienne* is the sole property

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of His Majesty the King and that the defendant was never the owner, charterer or operator of the said vessel but that at all times acted solely as manager or agent thereof for and on behalf of His Majesty the King. It is moreover alleged that no seaboard Bill of Lading was issued by the Master of the said vessel, or by the defendant as agent for the owner of the said vessel, covering plaintiff's cargo, which was shipped under through export Bill of Lading (Plaintiff's Exhibit No. 1), but that it is provided in Clause 16 of Condition II of the said Bill of Lading that the plaintiff's shipment was to be subject to all the provisions and conditions mentioned in the form of local Bill of Lading used by the defendant, one of which purports to provide that the defendant Company is acting only as an agent and shall be under no personal liability.

The defendant alleges, therefore, that any recourse which plaintiff may have, as a result of the loss of the said cargo, should have been directed against His Majesty the King represented by the Minister of Transport, as owner of the said vessel, and that there is no *lien de droit* between the plaintiff and the defendant.

Without prejudice to the foregoing defence, the defendant alleges that the said shipment was subject to the provisions of the Water Carriage of Goods Act (1936), which statute the defendant invokes. The defendant alleges that if said cargo was lost and not delivered, it was due to and resulted from a fire which occurred on board the said vessel on February 6, 1942, in Halifax harbour, which fire was not caused by the actual fault or privity of the defendant and that the defendant is, therefore, not responsible for the said loss. The defendant, moreover, without admission of liability and under reserve of the other grounds of defence raised, sets out allegations from which it concludes that in the event of the defendant being held liable, it should be declared entitled to limit its liability to $38.92 for each ton of the said vessel's tonnage, or a total amount of $90,372.24.

The plaintiff, by its reply to said statement of defence, after praying *acte* of the admissions therein contained and denying or joining issue as to the other allegations thereof, alleges that the said fire was caused or brought about by the fault and negligence of the defendant and its agents by their improper use of an acetylene torch used in an effort

to thaw out the scuppers on the starboard side of the said vessel. It is alleged that the Chief Engineer of the said vessel negligently failed in carrying out this operation, to take into account that the said vessel was insulated in the way of the said pipes and scuppers and that heat and fire would result from the use of the said torch, and that this is what actually occurred and resulted in the loss and destruction of the said cargo. It is further alleged that the defendant failed, before and at the beginning of the voyage, to exercise due diligence to make the *M/V Maurienne* seaworthy, and the holds and all other parts of the vessel fit and safe for the reception of the said cargo.

The proof establishes that the *M/V Maurienne* was registered in the Port of Montreal in March 1941 in the name of His Majesty the King, represented by the Honourable Minister of Transport of the Dominion of Canada. Although it appears that the said vessel was, at all times pertinent to this case, being operated by the defendant company as agent for His Majesty the King, this is a fact of which there is no reason to believe that the plaintiff had knowledge, either at the time the said Bill of Lading was issued or at the time of the loss of its said cargo. In fact, the evidence is that the defendant company operated the said vessel exactly as the owner would have done. The master, officers and crew were engaged by the defendant company and from the point of view of the shipper of the cargo there would be no distinction as between the manner in which the said vessel was operated by the defendant company and the manner in which it would have been operated by the owner of the said vessel.

The Bill of Lading states specifically that the plaintiff's goods are to be carried to the Port of Halifax, N.S., and thence by Canadian National Steamships to the Port of Kingston, Jamaica, B.W.I. The proof establishes that the Canadian National Steamships was merely a trade-name for Canadian National (West Indies) Steamships Limited and Canadian Government Merchant Marine Limited.

The said Bill of Lading is signed by Canadian National Steamships and expressly states that it is so signed on behalf of Canadian National (West Indies) Steamships Limited and Canadian Government Merchant Marine Limited severally.

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The effect is therefore exactly as if the said Bill of Lading had been signed by the defendant company itself. It was the defendant company therefore who contracted to carry the plaintiff's said cargo and it was the defendant and its servants who accepted the said cargo at Halifax on the *M/V Maurienne*, which it had under its control and in its possession.

Under such circumstances the defendant company having contracted to carry the plaintiff's said cargo, and having accepted and had the same under its control and possession, owed to plaintiff the duty of transporting and delivering the said cargo to Kingston, Jamaica, and if said cargo was lost due to the negligence of the defendant, or by its failure to discharge its obligations under the contract of carriage, the defendant must answer for such loss unless relieved of liability by some provision of law.

58 Corpus Juris, page 469, Paragraph 794:

One who operates a vessel as agent for the owners thereof is not liable to a shipper for breach of a contract of carriage made by the shipper *with the owner*, but he is liable in tort for losses and damages negligently caused to such cargo. (Citing *Fioretta* v. *Cunard S.S. Company*, 10 Fed. (2d) 244).

Scrutton on Charter Parties 15 Ed. page 69:

Semble that the companies other than the company which signs and delivers the Bill of Lading are not liable and cannot sue on the contract of carriage contained in such bill of lading, unless the signing company had authority to act in their behalf, or its action was afterwards ratified by them. But they will be liable as carriers for goods shipped on board their ships, or to an action of tort for negligent dealings with the said goods.

Also Scrutton at page 451, Paragraph (*a*):

Carrier includes the owner or the charterer who enters into a contract of carriage with the shipper.

NOTE—"includes"—The use of the words suggests:

that the definition is not exhaustive and, if so, the term "carrier" might include a freight agent, a forwarding agent or carriage contractor in cases where by issuing a bill of lading, he enters into a contract of carriage with the shipper.

The defendant, however, invokes the following paragraph from the said Bill of Lading:

The property covered by this Bill of Lading is subject to all the conditions expressed in local bills of ladings used in the steamship or steamship companies carrying this property at the time of shipment.

As above indicated, the plaintiff's shipment was made on a through export bill of lading issued at Montreal. No seaboard or local bill of lading was issued. Had one been issued, the evidence is that it would, in the normal course, though not invariably, have had the following clause stamped upon it.

> If the ship is not owned by or chartered by demise to Canadian Government Merchant Marine Limited this bill of lading shall take effect only as a contract with the owner or demise charterer, as the case may be, as principal, made through the agency of the Canadian Government Merchant Marine Limited who act as agents only and who shall be under no personal liability whatsoever in respect thereof.

As above stated, no seaboard or local bill of lading was issued in respect of plaintiff's said shipment and there is no proof that this clause was ever brought to the attention of the plaintiff, or that it ever had knowledge of it. In the circumstances, it would be unreasonable to hold that the plaintiff is bound by the conditions of the said clause. In any event this clause would not be a bar to plaintiff's action insofar as it is in an action in tort.

I, therefore, conclude that the defendant's plea, insofar as it attacks plaintiff's action solely on the ground that it is directed against the company defendant, and not against His Majesty the King, represented by the Honourable Minister of Transport as owner of the said vessel, is unfounded.

It is provided in the Bill of Lading issued to the plaintiff that the Contract of Carriage shall be governed by the provisions of the Water Carriage of Goods Act (1936). Section 2, subsection (*a*) of Article IV of the said statute reads as follows:

> 2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:
>
> (*a*) Act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the maintenance of the ship;
>
> (*b*) Fire unless caused by the actual fault or privity of the carrier.

There is no doubt that if it is established that the direct cause of the said loss was the unseaworthiness of the vessel the defendant will not be entitled to invoke the exceptions provided by the Article of the Water Carriage of Goods Act above quoted, unless the defendant has proven that it exercised due diligence to make the ship seaworthy.

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The burden of proof, however, rested upon the plaintiff to prove the unseaworthiness alleged. Carver's "Carriage by Sea", 8th Edition, Section 78, page 121:

> The burden of proving that a loss which has occurred has been due to an expected cause has been held to be upon the shipowner who seeks to excuse himself . . . But in the case of loss apparently falling within an exception, the burden of showing that the shipowner is not entitled to the benefit of the exception, on the ground of negligence, has been held to be upon the person so contending . . . . Similarly if a prima facie case of peril of the seas is made out and the plaintiffs allege unseaworthiness, it is upon the plaintiffs that the burden of proving unseaworthiness rests.

Five witnesses were heard in regard to the matter of seaworthiness. Mr. Campbell, the assistant superintending Engineer of the defendant company at Halifax, testified that he examined the vessel on her arrival at Halifax and subsequent thereto and that she was seaworthy.

Mr. Carswell, marine engineer and marine consultant of great experience, stated that, in his opinion, the fact that ice had formed in the said scuppers did not render the said vessel unseaworthy, and Mr. Tait, also a consulting engineer of experience, expressed the same view.

On the other hand Mr. Crichton, heard on behalf of the plaintiff, stated that, in his opinion, the fact of the said pipes being frozen made the ship unseaworthy insofar as the cargo was concerned. On cross-examination, however, he modified this statement by alleging that "as long as they are not fractured or broken, the ship is not unseaworthy".

Finally, Mr. Fletcher, a marine consultant also of great experience, expressed the view that the fact of scuppers being frozen had the effect of making the ship unseaworthy from a cargo point of view.

Insofar as the testimony of the witnesses goes, therefore, the evidence of Messrs. Campbell, Carswell and Tait is that the ship was seaworthy while Crichton shares the same view so long as the pipes are not fractured. On the other hand, there is the evidence of Mr. Fletcher, that the vessel was, in his opinion, unseaworthy from a cargo point of view.

It is important, however, to note that the evidence offered by Fletcher and Crichton relates to the condition of the vessel after the said scupper pipes had become frozen,

that is, during the afternoon or evening of February 6th. There is no evidence whatever that the said pipes were frozen at the time the loading of cargo into hold No. 3 commenced, which appears to have been on the preceding Tuesday. On the contrary, there is the uncontradicted testimony of Mr. Campbell who examined the ship on her arrival, and each day subsequent thereto, that she was entirely seaworthy.

It must be remembered that the carrier's warranty of seaworthiness, insofar as the cargo is concerned, is not a continuing warranty. It is rather a warranty that "at the commencement of loading, the ship must be fit to receive her cargo and fit as a ship for the ordinary perils of lying afloat in harbour while receiving her cargo, but need not be fit for sailing". (Scrutton page 93). "There is no continuing warranty that the ship shall be at the time of sailing fit to receive her cargo". (Scrutton page 94).

In the present case the evidence is that the plaintiff's cargo had been completely loaded prior to the attempt to thaw the ice from the ship's said scuppers. There is no proof that any ice existed either prior to or during the loading of the cargo. The plaintiff has, therefore, failed to establish that the vessel was unseaworthy for the reception and storage of the said cargo while she lay at the dock.

Moreover, it must be borne in mind that the carrier's warranty of seaworthiness is not absolute. To discharge his obligations in this matter, he is obliged only to "exercise due diligence to make the ship seaworthy". Having done so he is entitled to invoke the exceptions provided by Article IV of the statute, even although it is found that the vessel was in fact unseaworthy.

The plaintiff takes the position that the *M/V Maurienne* was unseaworthy by reason of the said frozen scuppers and that its officers or crew having been negligent in thawing out the said scuppers in order to make the vessel seaworthy, the defendant has failed to exercise due diligence.

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In the first place, as above stated, the proof does not support the contention that the fact that the said scuppers were frozen rendered the ship unseaworthy either for the reception of cargo or for the voyage. In the opinion of the Court, the weight of the evidence is to the contrary. In any case, as above noted, there is no proof that the said scuppers were frozen when loading of cargo was commenced.

Furthermore, the evidence is that frozen scuppers are common in the harbour of Halifax in wintertime, and that it is the usual practice to thaw them out by the use of a torch. There is proof also, which is uncontradicted, that while it is usually advisable to thaw out the said scuppers, the ice which is formed around the openings while the vessel is in port rapidly melts and disappears of its own accord when the vessel gets to sea and rarely, if ever, has ice formed to such an extent that the pipes have broken or burst.

The Court finds therefore that the plaintiff has failed to prove that the presence of ice in the said scupper pipes had the effect of making the vessel unseaworthy and that, even if this were so, the defendant has established that it exercised due diligence to make the vessel seaworthy.

It should be noted that the seaworthiness of the vessel for the voyage is not in question since she never sailed and moreover the proof is that the said scuppers were in fact freed of ice early in the evening on February 6th, it being the intention to sail the following morning.

In their endeavour to melt the ice and thus restore the scuppers to their normal function those undertaking the task may have been negligent and their negligence may have been the cause of the fire. But if so, it was this negligence and not the unseaworthiness of the vessel which brought about the loss.

It is only when unseaworthiness is the direct cause of the loss or damage that the carrier is deprived of the benefit of the exceptions afforded by Art. IV of the Statute (Scrutton page 96 citing *The Europa* (1) and *Kish* v. *Taylor* (2)). Compare *S.S. Anglo Indian* v. *Dominion Glass Company* (3).

(1) (1908) P. 84. (2) (1912) A.C. 604.
(3) (1944) S.C.R. 409.

Even if it had been established that the presence of ice in the scupper pipes rendered the ship unseaworthy in respect of plaintiff's cargo, and it does not, it was not this unseaworthiness which caused the fire.

The case would have been very different if as the result of the ice the said pipes had burst with resultant damage to the cargo. In that case, assuming that the frozen condition of the pipes rendered the vessel unseaworthy, the damages resulting from the bursting of the pipes would have been caused by the unseaworthiness of the ship and to escape liability the defendant would have been obliged to prove that it had exercised due diligence to make the vessel seaworthy. (Compare *Dominion Glass Co. Limited* v. *Anglo Indian* (1); *Spencer Kellogg* v. *Great Lakes Transit* (2)).

That the loss of plaintiff's cargo was caused by the fault or negligence of those who undertook to thaw out the pipes may be true, but it is in respect of said fault or negligence that the carrier is relieved of liability provided that there is no fault or privity on its part.

As to this the proof shows that it is usual to thaw out scupper pipes with an acetylene torch and that it is quite safe to do so provided the operation is properly executed. The order to thaw out the said pipes by using an acetylene torch was therefore not *per se* fault or negligence. In any case, the defendant is a limited company and consequently there was no fault or privity on its part in respect of whatever negligence there may have been on the part of those actually ordering or doing the work.

(*The Desmond* (3); Scrutton Bills of Lading, 15th Edit. page 259).

The defendant is therefore entitled to the benefit of the exceptions provided by subsection (*b*) of Section 2 of Art. IV of the Statute and cannot be held responsible for the loss of plaintiff's cargo.

It would appear, moreover, that the defendant is also entitled to the benefit of the exceptions provided by subsection (*a*) of Section 2 of Art. IV of the Statute since, if there was any neglect or default on the part of the master

(1) (1944) 4 D.L.R. 721. (2) (1940) 32 Fed. Supp. 520.
(3) (1906) P. 282.

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or servants of the defendant, such neglect or default occurred in the course of acts related to the "navigation or management of the ship".

The facts here are not dissimilar to those involved in *The Rodney* (1). In that case a boatswain while trying to clear a blocked pipe in order to drain water from a flooded forecastle and thereby make it habitable, drove a poker through the pipe allowing water to reach the cargo. The Court held that the act having been done with the purpose of making the forecastle habitable, it was one which related to the management of the vessel and the shipowner was therefore exempt from liability under subsection (*a*) of section 2 of Art. IV of the Statute. (See also *Kalamazoo Paper Company* v. *C.P.R.* (2); Scrutton pp. 267-8. Compare holding in *Goose Millard Limited* v. *Canadian Government Montreal Merchant Marine* (3), where negligence in handling of tarpaulin covering the cargo was held to relate rather to the care of the cargo than to the navigation or management of the ship).

The Court therefore concludes that the defendant has brought itself within the exemptions provided by the statute and is not liable in respect of the damages claimed.

Since the foregoing was drafted the Court has been referred to the decision in the case of *MaGhee* v. *Camden & Amboy R.R. Company* (4). It is apparently suggested that since the plaintiff's contract required that its cargo would "be carried to the port of Halifax, N.S. and thence by Canadian National Steamships Limited to the port of Kingston, Jamaica", the defendant deviated from said contract in loading the said cargo onto *M/V Maurienne,* a vessel owned by His Majesty and operated on his behalf by the defendant company.

The proof, however, as above stated, is that the Canadian National (West Indies) Steamships Limited and the Canadian Government Merchant Marine are one and the same and that the name "Canadian National Steamships" is the trade-name for Canadian National (West Indies) Steamships Limited and Canadian Government Merchant Marine. The stipulation therefore that the said cargo was

(1) (1900) P. 112.
(2) (1950) S.C.R. 356.
(3) (1929) A.C. 223.
(4) (1871) 45 N.Y. 514.

to be transported from Halifax to Jamaica by Canadian National Steamships Limited was equivalent to a stipulation that the said cargo would be transported by Canadian Government Merchant Marine Limited or Canadian National (West Indies) Steamships Limited and there was therefore no deviation from the contract.

Plaintiff's action is accordingly dismissed with costs.

Judgment accordingly.

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COPYRIGHT—*Infringement action—Copyright Act R.S.C. 1927, c. 32, s. 3 (1), 17—"Public performance of any musical work in furtherance of a religious, educational or charitable object"—"In furtherance of" means to promote, to advance or to assist—Defendant a fraternal organization—Receipts from dance at which musical works alleged to have been infringed were performed expended by defendant on charitable, religious or educational objects.* The action is for infringement of copyright in two musical works owned by the plaintiff, a company incorporated under the Dominion Companies Act. Plaintiff alleges that an orchestra under contract with the defendant provided music for public dances held by the defendant at premises in Toronto, Ontario, known as Casa Loma, and at a public dance at such place conducted under the auspices of the defendant the orchestra played these two musical works. S. 17 of the Copyright Act, R.S.C. 1927, c. 32 provides *inter alia* "that no church, college or school and no religious, charitable or fraternal organization shall be held liable to pay any compensation to the owner of any musical work or to any person claiming through him by reason of the public performance of any musical work in furtherance of a religious, educational or charitable object." Defendant is a service club incorporated without share capital under the Companies Act of the Province of Ontario. Its Letters Patent set forth its purposes and objects *inter alia* as ". . . *(g)* To carry on charitable and relief work of all kinds and to receive and collect gifts and donations for that purpose; . . .". By an agreement with the Corporation of the City of Toronto for the use and occupation of Casa Loma as a tourist attraction and entertainment centre defendant was obligated to maintain the premises and expend any surplus funds from receipts derived by defendant from its operation "entirely for the benefit of under-privileged, needy and crippled children, other charities and war service work" and in operating the premises "shall do so always with the object of raising money for such children, charities and/or war service work". Defendant performed fully

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all its obligations entered into under the contract with the City of Toronto and the net revenue earned from the venture was used for no other purposes than those set forth in the agreement. *Held:* That "in furtherance of" in s. 17 of the Copyright Act means to advance or to assist or to promote and to come within the exempting proviso it is not necessary that the function at which the musical work is publicly performed should itself be of a religious, educational or charitable nature. 2. That on the date when the musical works, copyright in which is claimed to have been infringed, were performed, they were performed in the furtherance of a charitable object and the entire proceeds of the Casa Loma project, including the proceeds from the dances in question, were expended almost entirely on charitable objects and those not so specifically expended were directed to religious or educational objects. 3. That defendant is a fraternal organization since it is a body of men associated by some common interest not only fraternizing or uniting as brothers but by those activities which have been undertaken they exemplify towards the needy and underprivileged the care and solicitude which one would expect of a brother. COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LIMITED v. KIWANIS CLUB OF WEST TORONTO. **162**

COST OF "BARKING" LOGS EXCLUDED AS BEING CONSIDERED AS PART OF MANUFACTURING OR PROCESSING.

See REVENUE, No. 7.

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See REVENUE, No. 8.

CROWN

1. ACTION DISMISSED. Nos. 4, 6 AND 7.
2. ACTION FOR DAMAGES FOR INJURY TO CROWN'S MOTOR VEHICLE AND FOR LOSS OF SERVICES OF MEMBER OF RESERVE ARMY DUE TO NEGLIGENCE OF DEFENDANT. No. 1.
3. ACTION TO RECOVER MONEY PAID AS SPECIAL SUBSIDIES TO DEFENDANT. No. 3.
4. ACTION TO RECOVER POSSESSION OF AN AUTOMOBILE SOLD UNDER A CONDITIONAL SALES CONTRACT BUT FORFEITED BY THE CROWN PURSUANT TO PROVISIONS OF S. 21 OF THE ACT. No. 7.
5. APPEALS DISMISSED. No. 5.
6. APPEALS FROM ORDERS AND DIRECTIONS OF THE MINISTER. No. 5.

CROWN— *Negligence — Negligence Act, R.S.O. 1937, c. 115—The Highway Traffic Act, R.S.O. 1937, c. 288, ss. 39(15), 60(1) —Action for damages for injury to Crown's motor vehicle and for loss of services of member of reserve army due to negligence of defendant—Concurrent negligence of servant of Crown—Crown action not barred by Provincial Act.* The action was brought to recover damages for loss and injury

EXPROPRIATION—*Expropriation Act, R.S.C. 1927, c. 64, ss. 9, 23—Hospital operated as charitable institution not an object of commercial dealing—Principle of re-instatement applicable to property of exceptional character—Depreciation inevitable notwithstanding maintenance—Depreciation to be ascertained from tables and actual condition of property—Ten per cent allowance for compulsory taking only in exceptional cases—Additional allowance applicable to whole amount of value to owner.* The plaintiff expropriated property in the City of Hull on which there was a hospital operated by a religious community of nuns on a non-profit basis as a charitable institution. The action was taken to have the amount of compensation payable to the owner determined by the Court. *Held:* That the nature of the expropriated property takes it out of the class of properties whose value to their owners is measured by the ordinary economic and commercial tests of value. It is not of the kind that lends itself to commercial dealing but is of an exceptional character and its value to the owner must be measured by a standard that is appropriate to it. 2. That this is a case in which the principle of re-instatement should be applied and the defendant should receive such a sum of money as will enable it to replace the expropriated property by property which will be of equal value to it. 3. That it is fallacious to assume that an asset can be so well maintained that it will remain in as good as new condition indefinitely. Depreciation begins from the moment of its first use and continues notwithstanding maintenance. *City of Knoxville* v. *Knoxville Water Co.* (1909) 212 U.S. 1 followed. 4. That although well recognized depreciation tables are of great assistance in ascertaining the amount of depreciation of an asset they ought not to be used by themselves. It is always necessary to make a careful examination of the asset and consider its structural and functional condition so that consideration may be given not only to the elapsed time of its expectancy of life according to the tables but also to the remaining life that may be expected in the light of its actual condition. 5. That it is only in cases where it is difficult by reason of certain uncertainties to estimate the amount of the compensation that there is ground for adding the ten per cent allowance for compulsory taking to the owner's indemnity. *The King* v *Lavoie* December 18, 1950, unreported, followed. 6. That the estimation of the compensation in the present case involves sufficient difficulty and uncertainty to bring it within the ambit of the rule in the *Lavoie* case. 7. That the

PRACTICE — *Trade Marks — Motion to expunge—Alternative motion for an order for pleadings and directing that issues of fact be determined on oral evidence—The Unfair Competition Act, 1932, 22-23 Geo. V, c. 38, ss. 52, 53, 54—Proceedings under s. 52 of a summary nature and determined on affidavit evidence—Issues of fact required by either party to be determined on oral evidence should be specific issues settled by the Court after hearing both parties—Originating notice of motion to state clearly issues raised and include particulars as to why entry in the Register does not accurately express or define existing rights of registrant—Rules 167 and 168 of Exchequer Court—Affidavit contrary to provisions of Rule 168 disregarded—The Court in proper circumstances may adjourn hearing of motion to enable applicant to perfect his case.* In an originating notice of motion under section 52 of the Unfair Competition Act, 1932, Statutes of Canada, chap. 38, for an order expunging the respondents mark "Nitey Nite" from the Register, the applicant included a further notice in the alternative, namely, that if the respondent should appear and oppose the application, the Court would be asked to order pleadings and to direct that issues of fact be determined on oral evidence. On the return of the motion respondent appeared and opposed the motion. *Held:* That proceedings under section 52 of the Unfair Competition Act, 1932, should be of a summary nature and heard on affidavit evidence except on specific issues required to be determined on oral evidence and which issues should be settled by the Court after hearing both parties. 2. That an originating notice of motion should state clearly the issues raised by the applicant and include the particulars as to why the entry in the Register does not accurately express or define the existing rights of the registrant. 3. That the affidavit in support of a motion under section 52 of the Act in

WORDS AND PHRASES.