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Exchequer Court of Canada

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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.

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

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

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

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

DEPUTY DISTRICT JUDGE

His Honour JOHN A. BARRY, New Brunswick Admiralty District.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Honourable STUART S. GARSON, K.C.

CORRIGENDA

At page 111 in the headnote the word "Taysty" should read "Tasty".

At page 201 in the headnote, L. St. M. DuMoulin appeared as senior counsel for the respondent instead of Dougald Donaghy, K.C.

TABLE OF CONTENTS

MEMORANDA RESPECTING APPEALS FROM JUDGMENTS OF THE EXCHEQUER COURT OF CANADA

A. To the Judicial Committee of the Privy Council:

1. *Canada Steamship Lines Ltd. v. The King* (1948) Ex.C.R. 635. Appeal to the Supreme Court of Canada allowed, (1950) S.C.R. 532. Leave to appeal to Privy Council granted. Appeal allowed.
2. *Minerals Separation North American Corpn.* v. *Noranda Mines Ltd.* (1947) Ex. C.R. 306. Appeal to the Supreme Court of Canada allowed (1950) S.C.R. 36. Appeal to the Privy Council dismissed.

B. To the Supreme Court of Canada:

1. *Beament, George Edwin* v. *Minister of National Revenue* (1951) Ex.C.R. 187. Appeal pending.
2. *Bouck, Phyllis* v. *Minister of National Revenue* (1951) Ex. C.R. 118. Appeal pending.
3. *Campbell, Thomas* v. *Minister of National Revenue* (1951) Ex.C.R. 290. Appeal pending.
4. *Flintoft, Felicia H. et al.* v. *Minister of National Revenue* (1951) Ex.C.R. 211. Appeal pending.
5. *Goldman, Henry* v. *Minister of National Revenue* (1951) Ex.C.R. 274. Appeal pending.
6. *Grossman, Irving H. et al.* v. *The King* (1950) Ex.C.R. 469. Appeal of appellant Grosman allowed. Appeal of appellant Sun dismissed.
7. *Huntting Merritt Shingle Co. Ltd.* v. *Minister of National Revenue* (1951) Ex.C.R. 148. Appeal pending.
8. *Joy Oil Co. Ltd. et al* v. *The King* (1949) Ex.C.R. 136. Appeal allowed.
9. *King, The* v. *Pacific Bedding Co. Ltd.* (1950) Ex.C.R. 456. Appeal dismissed.
10. *King, The* v. *Planters Nut & Chocolate Co. Ltd.* (1951) Ex.C.R. 122. Appeal dismissed.
11. *King, The* v. *Uhlemann Optical Co.* (1950) Ex.C.R. 142. Appeal dismissed.
12. *King, The* v. *Woods Mfg. Co. Ltd.* (1949) Ex.C.R. 9. Appeal allowed.
13. *Manning Timber Products Ltd.* v. *Minister of National Revenue* (1951) Ex.C.R. 338. Appeal pending.
14. *Minister of National Revenue* v. *Stanley Mutual Fire Insurance Co.* (1951) Ex.C.R. 341. Appeal pending.
15. *Nisbet Shipping Co. Ltd.* v. *The King* (1951) Ex.C.R. 225. Appeal pending.

16. *Philliponi, Joseph Jr.* v. *Minister of National Revenue* (1951) Ex.C.R. 291, No. 38424. Appeal pending.

17. *Philliponi, Joseph Jr.* v. *Minister of National Revenue* (1951) Ex.C.R. 292, No. 40182. Appeal pending.

18. *Puget Sound Navigation Co. Ltd.* v. *The Ship Dagmar Salen* (1950) Ex.C.R. 283. Appeal allowed.

19. *Robson, James Goodfellow* v. *Minister of National Revenue* (1951) Ex.C.R. 201. Appeal pending.

20. *Spence, Trevelyn* v. *The King* (1950) Ex.C.R. 488. Appeal pending.

21. *Sweeney, W. Laurence* v. *The King* (1951) Ex.C.R. 31. Appeal pending.

22. *Wain-Town Gas & Oil Co. Ltd.* v. *Minister of National Revenue* (1951) Ex.C.R. 1. Appeal pending.

23. *Wilder, James E.* v. *Minister of National Revenue* (1949) Ex.C.R. 347. Appeal allowed.

24. *Woon, Bert W.* v. *Minister of National Revenue* (1951) Ex.C.R. 18. Appeal pending.

A. TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME

A TABLE

OF THE

NAMES OF THE CASES CITED

IN THIS VOLUME

A

B

C

C—*Concluded*

D

E

F

G

H

I

J

K

L

Mc

M

M—*Concluded*

R—*Concluded*

St.

S

T

U

V

W

W—*Concluded*

Y

Z

CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

WAIN-TOWN GAS & OIL COMPANY LIMITED, ... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE, ... RESPONDENT.

1950

Sept. 15
Nov. 18

Revenue—Income Tax—Excess Profits Tax—Income War Tax Act, R.S.C. 1927, c. 97, s. 3(1) (f)—Franchise to supply natural gas—Sale of franchise only in consideration of payments, from the proceeds of sales of natural gas under the franchise, of certain percentages of gross sales of gas reckoned at consumers' prices less consumers' discounts—Payments so stipulated whether "income" within s. 3(1) (f) of the Act or instalments on the purchase price, i.e. capital—Appeal allowed.

Appellant had an exclusive franchise to supply natural gas to the Town of Vermilion, in Alberta, and its inhabitants but did not own gas wells, pipes or conduits. The term of the franchise was for ten years, appellant having the option of renewing it for a further period of ten years and a similar option, at the expiry of each succeeding ten-year period for which the franchise may be renewed. Appellant sold the franchise to another company, the latter agreeing to pay to the former by way of royalty, from the proceeds of sales of natural gas under the franchise, percentages of the actual gross sales of gas at consumers' prices less consumers' discounts, fixed at six and one quarter per cent during the first three years, at eight and one third per cent during the next seven years and at twelve and one half per cent thereafter during the currency of the agreement and of the franchise.

Respondent, considering the sums received by appellant to be "income" within s. 3(1) (*f*) of the Act, assessed them to tax. Contending that the franchise sold was capital, appellant appealed to this Court from the assessments.

1950

WAIN-TOWN GAS AND OIL COMPANY LTD. v. MINISTER OF NATIONAL REVENUE

Angers J.

Held: That these payments do not constitute a profit, gain or gratuity and are not rents, royalties or annuities or other like periodical receipts within the meaning of paragraph (*f*) of subsection (1) of section 3 of the Income War Tax Act.

2. That the payments stipulated in the agreement and received by appellant are instalments on the purchase price, i.e. capital.

APPEAL under the Income War Tax Act.

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

Harold W. Riley, Jr., K.C. for appellant.

F. J. Cross for respondent.

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

ANGERS J. now (November 18, 1950) delivered the following judgment:

The question arising for determination is governed by paragraph (*f*) of subsection (1) of section 3 of the Income War Tax Act. The material part of section 3 reads thus:

3. (1) For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be whether derived from sources within Canada or elsewhere; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source including (*f*) rents, royalties, annuities or other like periodical receipts which depend upon the production or use of any real or personal property, notwithstanding that the same are payable on account of the use or sale of any such property;

The facts are simple and undisputed. They may be summarized briefly.

By an agreement dated September 19, 1938, Wain-Town Gas and Oil Company Limited got from the Town of Vermilion an exclusive franchise to supply natural gas to the town and its inhabitants. The term of the franchise was for ten years, as set forth in clause 2, the company

having the option of renewing it for a further period of ten years and a similar option, at the expiry of each succeeding ten-year period for which the franchise may be renewed. The clause contains a proviso which is not material herein.

Clause 16 stipulates that in view of the large expenditure incurred by the company the Town covenants and agrees that the franchise and all other rights, powers and privileges granted to the company are and shall be granted to it exclusively for a period of ten years, subject to renewal as set forth in clause 12, and that during the said period or renewal thereof the Town will not itself supply natural gas to any of its inhabitants or allow any other person, firm or corporation using the streets, lanes, highways, thoroughfares and other public places for the purpose of laying gas pipes along, through or under the same.

By an agreement dated December 8, 1939, Wain-Town Gas and Oil Company Limited sold the franchise aforesaid, absolutely with no reversion, to Franco Public Service Limited. The only thing sold under that agreement was the franchise; no gas wells, pipes or conduits were included in the assignment.

By the agreement exhibit 3, i.e. the assignment by appellant to Franco Public Service Limited, the value of the franchise was estimated on the basis of a percentage of the natural gas distributed by Franco Public Service Limited.

It was submitted on behalf of appellant that the franchise sold was capital. It is idle to say that the purpose of the Income War Tax Act is to tax income, not capital. If the respondent be correct in his assessment, the whole of appellant's capital sum will be taxed as income. I do not think that this is the intention of the Act.

Taxing Acts must be construed strictly and a taxpayer must not be found liable to tax unless the tax be imposed expressly and clearly: *re Micklethwait* (1); *Partington* v. *Attorney General* (2); *Cox* v. *Rabbits* (3); *Tennant* v. *Smith* (4); *Shaw* v. *Minister of National Revenue* (5);

(1) (1855) 11 Ex. 456.
(2) (1869) L.R. 4 H.L. 109, 122.
(3) (1878) 3 App. Cas., 473, 478.
(4) (1892) A.C. 154.
(5) (1938) C.T.C. 346, 348, 352.

1950

WAIN-TOWN GAS AND OIL COMPANY LTD. v. MINISTER OF NATIONAL REVENUE

Angers J.

Foley v. *Fletcher et al* (1); *Moore and Company* v. *Inland Revenue* (2); *Robert Addie & Sons Collieries Limited* v. *Commissioners of Inland Revenue* (3); *British Insulated and Helsby Cables Limited and Atherton* (4); *Minister of National Revenue* v. *Spooner* (5); *Capital Trust Corporation Limited* v. *Minister of National Revenue* (6); *Vanden Bergs Limited* v. *Clark* (7); *Inland Revenue Commissioners* v. *Ramsay* (8); *Minister of National Revenue and Dominion Natural Gas Company Limited* (9); *O'Connor* v. *Minister of National Revenue* (10); *Mahaffy* v. *Minister of National Revenue* (11).

In re *Tennant* v. *Smith*, at p. 154, we find the following observations of Halsbury, L.C.:

> My Lords, to put this case very simply, the question depends upon what is Mr. Tennant's income. This is an Income Tax Act, and what is intended to be taxed is income. And when I say "what is intended to be taxed," I mean what is the intention of the Act as expressed in its provisions, because in a taxing Act it is impossible, I believe, to assume any intention, any governing purpose in the Act, to do more than take such tax as the statute imposes. In various cases the principle of construction of a taxing Act has been referred to in various forms, but I believe they may be all reduced to this, that inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed. Cases, therefore, under the Taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation. Lord Wensleydale said, in In re Micklethwait, 11 Ex. at p. 456, "It is a well-established rule, that the subject is not to be taxed without clear words for that purpose; and also, that every Act of Parliament must be read according to the natural construction of its words."

Reference may also be had beneficially to *Maxwell, Interpretation of Statutes*, 9th ed., 291; *Craies, Treatise on Statute Law*, 4th ed., 107; *Beal, Cardinal Rules of Interpretation*, 3rd ed., 492.

It was argued by appellant's counsel that the payments are not "royalties", as such payments presuppose to continue in the recipient of title to the property or an interest therein, such as exists in the relationship between lessor and lessee or between licensor and licensee. The appellant

(1) (1859) L.J., Exchequer Court, 100.
(2) (1914-15) S.C. 91.
(3) (1924) S C. 231.
(4) (1926) A.C. 205.
(5) (1933) A.C. 684.
(6) (1935) C.T.C. 258.
(7) (1935) A.C. 431, 440.
(8) (1936) 154 L.T.R. 141.
(9) (1941) S.C.R. 19.
(10) (1943) Ex. C.R. 168.
(11) (1945) C.T C. 408, 413.

is being paid by Franco Public Service Limited not for the use of appellant's property nor for the production from it, but for the absolute loss of such property, forever assigned to Franco Public Service Limited. It was urged by counsel that the payments do not depend upon the production or the use of the franchise, but on the production or use of natural gas obtained by Franco Public Service Limited, which gas is in no means the property of appellant.

I do not think that the payments stipulated in the agreement exhibit 3 are royalties, notwithstanding the words "by way of royalty" used erroneously in clause 4. These payments, in my opinion, are instalments on the purchase price. One must scrutinize the purpose of a clause in a deed in order to determine its meaning. A definite price was set once and for all, payable by yearly instalments calculated on the proceeds of gross sales of natural gas under the franchise reckoned at consumers' prices, less consumers' discounts, fixed at six and a quarter per cent during the first three years, at eight and one third per cent during the next seven years and at twelve and one half per cent thereafter during the currency of the agreement and franchise.

After carefully listening to the oral evidence and reading the transcript thereof, examining attentively the documents produced, perusing the verbal and written arguments of counsel and studying the doctrine and the precedents, I am satisfied that the payments made by Franco Public Service Limited to Wain-Town Gas and Oil Company Limited do not constitute a profit, gain or gratuity and are not rents, royalties or annuities or other like periodical receipts within the meaning of paragraph (*f*) of subsection (1) of section 3 of the Income War Tax Act, that they are not income but are instalments of the purchase price.

A brief review of the doctrine and decisions seems apposite.

In the case of *Secretary of State for India* v. *Scoble et al* (1) the following observations of Halsbury, Lord Chancellor, much to the point, are very interesting (p. 3):

. . . Still, looking at the whole nature and substance of the transaction (and it is agreed on all sides that we must look at the nature of the transaction and not be bound by the mere use of the words), I cannot

(1) (1903-04) 89 L.T.R. 1.

1950

WAIN-TOWN GAS AND OIL COMPANY LTD. v. MINISTER OF NATIONAL REVENUE

Angers J.

doubt that in this contract—it cannot be denied that what was done and agreed to was in one sense under a contract, though undoubtedly it is not a case of the purchase of an annuity, but it is a case in which under powers reserved by a contract one of the parties agrees to buy from the other party that which is their property—I cannot doubt, I say, that what is called an "annuity" in the contract between the parties, and in the statute, was a mode of making the payment for that which, by the hypothesis on which I am speaking, had become a debt to be paid by the Government. If it was a debt to be paid by the Government it introduces this consideration: Was it the intention of the Income Tax Acts ever to tax capital as if it was income? I think that it cannot be doubted, both upon the language of the Act itself and upon the whole purport and meaning of the Income Tax Acts, that it never was intended to tax capital, at all events as income.

In *re Foley* v. *Fletcher and Rose* (1) Pollock, C.B. expressed the following opinion (p. 778):

> Mr. Phipson contended that they were profits, because when the value of money and the effect of such a protracted period of payment are considered, we could not assume that the value of the plaintiff's moiety was more than some £23,000, and that the rest must be considered as profit, and that it was the fault of the plaintiff that she has so mixed up profits with capital that they cannot be distinguished; and that therefore the whole must be liable to income tax. But there is nothing on this record to shew that the property was not worth more than £99,000, nor is there anything to shew that the postponement of payment was not a mere indulgence on the part of the seller. But if we were at liberty to speculate on the matter, and could come to the conclusion that a part of the annual payments is the price of the convenience of getting the payment postponed, we could not say that the payments are within the Act because a part of them consists of profit. These instalments are payments of money due as capital: the Act has made no provision for such a case. It professes to charge profits only, and we cannot say that capital is liable to the income tax because found in company with profits. If payments such as those in the present case are subject to income tax, wherever any debt of any sort is to be repaid by annual payments, or by instalments at three or six months, it would be subject to income tax.

In re *Inland Revenue Commissioners* v. *Ramsay* (*ubi supra*) it was held by the Court of Appeal (Lord Wright, M.R., Romer and Greene, L.JJ.) that the question to be determined was whether, under the terms of the agreement in question, the consideration for the purchase of a dentist's practice was a sum of money, though payable in instalments, or an annuity; that the sum of $15,000 was made the purchase price from beginning to end and the fact that in the result the amount paid might be greater or less than the primary price did not alter the legal

(1) (1858) 3 H. & N. 769.

position; that therefore the instalments were not annuities, but merely the manner and form in which a lump sum was paid. At page 145, Lord Wright states:

> The question involved in the case is the question which has so often to be debated where property has been sold, namely, whether the consideration is a sum of money, though payable in instalments, or whether it is an annuity. It is, of course, quite clear that for a lump sum of money the right to receive periodical payments may be purchased, and in that case if the transaction constitutes the purchase of an annuity and each one of these payments is in the nature of income in the appropriate hands and in the appropriate manner, it is taxable as such, but if that is not the case and the instalments are not annuities in the proper sense of the term, but are merely the method and the manner and the form in which a lump sum is paid, then the position is different, and the sums in question are not to be deemed income but capital, and accordingly in the hands of the payer when he comes to make his returns for super tax cannot be deducted under the provisions of sect. 27 of the Income Tax Act of 1918.

The learned Lord then analyses certain judgments. I do not deem it expedient to sum up his comments, since I have annotated or will hereafter annotate them briefly.

In the case of *Minister of National Revenue* v. *Dominion Natural Gas Company Limited* (*ubi supra*) the report discloses that the respondent company supplied natural gas to inhabitants in parts of the City of Hamilton. Its right to do so was attacked in an action in which there were claimed a declaration that it was wrongfully maintaining its mains in the streets and wrongfully supplying gas to the inhabitants, an injunction against the continuance thereof, a mandatory order for removal of the mains, and damages. Respondent contested the action and was successful. Its legal expenses of the litigation amounted to $48,560.94, after crediting all sums recovered from the other party as taxed costs. The question in dispute was whether that sum, paid by respondent in 1934, should be allowed as a deduction in computing respondent's taxable income for that year. The Supreme Court, reversing the judgment of MacLean, J. ((1940) Ex. C.R. 9), held that the sum was not deductible. This judgment is evidently not applicable herein. There is however in the reasons for judgment of Duff, C.J. an *obiter dictum*, which, I may say with all due deference, does not seem to me pertinent; it is worded as follows (p. 24):

> Again, in my view, the expenditure is a capital expenditure. It satisfies, I think, the criterion laid down by Lord Cave in ***British Insulated***

1950

WAIN-TOWN GAS AND OIL COMPANY LTD. v. MINISTER OF NATIONAL REVENUE

Angers J.

v. *Atherton*, 1926 A.C. 205 at 213. The expenditure was incurred "once and for all" and it was incurred for the purpose and with the effect of procuring for the company "the advantage of an enduring benefit". The settlement of the issue raised by the proceedings attacking the rights of the respondents with the object of excluding them from carrying on their undertaking within the limits of the City of Hamilton was, I think, an enduring benefit within the sense of Lord Cave's language.

In re *The Hudson's Bay Company Limited* v. *Stevens* (*Surveyor of Taxes*) (1) the headnote, fairly comprehensive and exact, is in the following terms:

The Appellants are a Company established by Charter, who prior to 1869 were the owners of large territories in Rupert's Land, North America. In 1869 they surrendered to the Crown their territory and rights of government in exchange, *inter alia*, for a money payment and for a right to claim, within fifty years, a twentieth share in certain lands in the territory as from time to time the lands were settled. The lands granted to the Company in pursuance of this agreement were sold by the Company from time to time, and the proceeds applied partly in payment of dividends and partly in reduction of capital.

Held, that the proceeds of the sales of the lands so granted were not profits or gains derived by the Company from carrying on a trade of dealing in land, and were not assessable to income tax.

See also *William M. O'Connor* v. *The Minister of National Revenue* (2); *Samson* v. *Minister of National Revenue* (3); *Inland Revenue Commissioners* v. *Wesleyan Assurance Society* (4); *Wilder* v. *Minister of National Revenue* (5).

In the matter of *Jones* v. *Commissioners of Inland Revenue* (6) it appears from the report that the appellant had sold his interest in certain inventions and letters patent for a sum in cash and a percentage, called a "royalty", payable for ten years on the sale of all machines constructed under the patent. It was held by the Court of King's Bench that the sums received by the appellant in respect of the royalty were taxable income.

Rowlatt, J., after referring to the judgments in *Foley* v. *Fletcher* and *Secretary of State for India* v. *Scoble* (*ubi supra*), made the following statements (p. 715):

On the other hand, a man may sell his property nakedly for a share of the profits of the business. In that case the share of the profits of the business would be the price, but it would bear the character of income in the vendor's hands. *Chadwick* v. *Pearl Life Assurance Co.*, (1905) 2 K.B. 507, 514, was a case of that kind. In such a case the man bargains

(1) (1903-11) 5 R.T.C. 424.
(2) (1943) Ex. C.R. 168, 175 et seq.
(3) (1943) C.T.C. 47, 72.
(4) (1948) 1 All E.R. 555.
(5) (1949) Ex. C.R. 347.
(6) (1920) 1 K.B. 711.

to have, not a capital sum but an income secured to him, namely, an income corresponding to the rent which he had before. I think therefore that what I have to do is to see what the sum payable in this case really is. The ascertainment of an antecedent debt is not the only thing that governs, although in many cases it is a very valuable guide. In this case there is no difficulty in seeing what was intended. The property was sold for a certain sum, and in addition the vendor took an annual sum which was dependent upon the volume of business done; that is to say, he took something which rose or fell with the chances of the business. When a man does that he takes an income; it is in the nature of income, and on that ground I decide this case.

I may say respectfully that I cannot agree with this decision.

It was urged on behalf of respondent that the sums received by appellant from Franco Public Service Limited in compliance with clause 4 of the agreement exhibit 3 are periodical receipts, dependent upon the use of the franchise, that they are like royalties and are income of the appellant, notwithstanding that they are payable on account of the sale of the franchise to Franco Public Service Limited. Counsel pointed out that in virtue of clause 5 of the agreement all royalties must be deposited monthly to the credit of Wain-Town Gas and Oil Company Limited; this provision seems to me immaterial herein.

Respondent's contention that the receipts in question are dependent on the use of the franchise assigned by appellant to Franco Public Service Limited is unfounded. They are no more dependent on the franchise than on the use of Wain-Town Gas and Oil Company Limited's charter or on its certificate to carry on business. Such a use is not that contemplated by the Act; the use thereby considered is of something that of itself produces. In the present case the receipts may be dependent on the use of gas in the ground or in Franco Public Service Limited's transmission lines, but not on the use of the franchise, which is merely a means whereby Wain-Town Gas and Oil Company Limited is put in a position to gather receipts in much the same way as its charter does.

It was submitted by counsel for respondent that by clause 4 of the agreement exhibit 3 Franco Public Service Limited agreed to pay to the appellant, from the proceeds of all sales of natural gas under the franchise, certain percentages of the gross sales of gas reckoned at consumer's price, less consumer's discounts.

1950

WAIN-TOWN GAS AND OIL COMPANY LTD. v. MINISTER OF NATIONAL REVENUE

Angers J.

To the question as to what is the franchise counsel referred to the observations of Stuart, J. in the case of *Northern Alberta Natural Gas Company* v. *Edmonton* (1), appearing on page 44 of the report:

> The very essence of a franchise is the right to use streets and highways. If the use of these were not required a company could act, as any other industrial concern does, entirely by private contract and as a private trader, and sell its commodity, e.g. gas, to the householders as it pleased. It is the unavoidable necessity of using the public streets to convey the commodity that forces such a company to secure the right to use them, and it is this right which in substance constitutes the "franchise".

Counsel further submitted that the "receipts" of appellant are "dependent" upon the use of the right to operate pipe-lines under the streets of the town to convey natural gas and that the quantum of the receipts is likewise dependent upon the extent to which this right is used. He specified that it is the extent of operation of the pipe-lines which determines the amount of gas which can be sold and hence the percentage of gross sales of gas which the appellant will receive. He intimated that it cannot be too strongly emphasized that the franchise is not merely the right to lay pipe-lines but the right to use them for the purpose of supplying natural gas to the town's inhabitants. This seems elementary.

It was contended for respondent that a franchise is real or personal property. In support of this contention counsel referred to the reasons for judgment of Harrison, J. in *New Brunswick Power Company* v. *Maritime Transit Company* (2). A brief extract from these reasons may be useful (p. 395):

> . . . The defendant argues that the right to operate street cars is a franchise, but he says a franchise is not property. It is, I think, quite proper to call the plaintiff's right to operate its street railway upon the streets and highways a franchise.

The learned judge then refers to a definition of a franchise by Blackstone and continues:

> In later years the term "franchise" has been used to include that body of rights or privileges conferred by a Legislature (with, of course, the assent of the King) upon corporations to enable them to supply the public with some commodity or service in general use such as gas, electricity or transportation.

(1) (1920) 1 W.W.R. 31.

(2) (1937) 4 D.L.R. 376.

Further on he adds (p. 396):

In Canada no private person can establish a public highway or a public ferry or railroad or charge tolls for the use of the same without authority from the Legislature direct or derived, and the power given to invade public rights by the establishment of these public utilities is generally referred to as a "franchise": see *Calgary* v. *Can. Western Natural Gas Co.* (1917) 40 D.L.R. 201.

A franchise to operate a street railway and to collect tolls for such service is a property right, an incorporeal hereditament, the interference with which is a private nuisance, and the party wronged may have the nuisance abated.

In answer to appellant's claim that a franchise is a "chose in action" and not property, counsel for respondent stated that it is established that a "chose in action" is personal property and in support of this statement he cited *Williams on Real Property,* 23rd ed., pp. 3 to 6, and *Halsbury's Laws of England,* 2nd ed., vol. 25, pp. 189 to 194. Counsel's contention in this regard seems to me well founded.

The next argument raised by counsel for respondent is that the receipts are like royalties. In his brief counsel for respondent gave several definitions of the word "royalty", gathered from Webster's New International Dictionary, 2nd ed., The Standard Dictionary of the English Language and from the decisions in *Perry* v. *Clergue* (1); *The King* v. *Trusts and Guarantee Co. Ltd.* (2); *Attorney-General for British Columbia* v. *The King* (3).

In Webster's dictionary we find the following definition of the word "royalty":

7. (*a*) a share of the product or profit (as of a mine, forest, etc.) reserved by the owner for permitting another to use the property.

(*b*) A duty or compensation paid to the owner of a patent or a copyright for the use of it or the right to act under it, usually at a certain rate for each article manufactured, used, sold, or the like;

In The Imperial Dictionary of the English Language we read this definition:

4. A tax paid to one who holds a patent protected by government for the use of the patent, generally at a certain rate for each article manufactured; a percentage paid to the owner of an article for its use.

The Standard Dictionary of the English Language gives this definition:

3. A share of proceeds paid to a proprietor by those who are allowed to develop or use property, or operate under some right belonging to

(1) (1903) 5 O.L.R. 357.
(2) (1916) 15 Ex. C.R. 403; (1916) 54 S.C.R. 107.
(3) (1922) 68 D.L.R. 106.

1950

WAIN-TOWN GAS AND OIL COMPANY LTD. v. MINISTER OF NATIONAL REVENUE

Angers J.

him, as to the owner of mining lands for ore taken out, to the owner of a copyright for books published and sold, or to the owner of a patent for articles manufactured and disposed of thereunder.

The case of *Perry* v. *Clergue* (*supra*) in which it was held (*inter alia*) that the right to create and license a ferry, having been one of the *jura regalia* or royalties belonging to the Provinces at the Union, continued to belong to them after Confederation according to section 109 of the British North America Act, 1867, notwithstanding subsection 13 of section 91 giving the Dominion legislative power in relation to ferries, is, to my mind, irrelevant.

In the case of *The King* v. *Trusts and Guarantee Co.* (*supra*) the facts were briefly these: A resident of the Province of Alberta was, at the time of his death, the registered owner of a parcel of land in that province under a patent issued to him by the Department of the Interior of Canada. He died leaving no heirs or next of kin. Letters of administration to his property, real and personal, were granted to the defendant. The land was subsequently sold by the latter and the provincial government claimed the proceeds of the sale, except insofar as they were amenable to debts and administration expenses, as belonging to it under the Alberta Statute 5 Geo. V, chap. 5, section 1. Upon an information exhibited by the Attorney-General of Canada to have it determined that such proceeds belong to the Crown in right of Canada, it was held that the right of escheat to the lands in question, or if the principle of escheat did not apply and the lands were to be treated as *bona vacantia,* the right to them belonged to the Crown in right of the Dominion as *jura regalia.*

I must say that this judgment seems to me beside the point at issue.

The headnote in the case of *Attorney-General for British Columbia* v. *The King* (*supra*) is in the following terms:

> The rights of bona vacantia in regard to the assets of a defunct English corporation which previously had carried on business in British Columbia is vested in the Province under subsections 102 and 109 of the British North America Act, being comprised in the word "royalties" which at the time of the union were assigned to the Province.

I do not think that this judgment has any more bearing on the present case than the two previous ones.

Counsel for respondent drew the attention of the Court to the fact that no specific mention is made in the dictionaries regarding sums paid to the owner of a franchise. He specified that in the case of *Attorney-General* v. *British Museum* (1) Farwell, J. held that a franchise was a royal privilege or a branch of the King's prerogative subsisting in a subject by a grant from the King and he referred to the reasons for judgment of Harrison, J. in *New Brunswick Power Company* v. *Maritime Transit Company* (*ubi supra*).

Referring to the definition of the word "patent" in The Standard Dictionary of the English Language as "a grant of any privilege, franchise, etc., made by a sovereign authority", counsel suggested that there would seem to be equal basis for saying that a sum paid to the owner of a franchise for the use of it was a "royalty" as for saying that a sum paid to the owner of a patent or a copyright for the use of it is a "royalty". He concluded that the respondent's submission is that a sum paid to the proprietor of a franchise for the right to use it is a "royalty".

Counsel for respondent further submitted that, to come within the words of paragraph (*f*) of subsection 1 of section 3, it is not necessary that the "receipts" be in fact "royalties", if they are "like" royalties. The question of what constitutes receipts "like royalties" was considered by Mr. Justice Cameron in *May McDougall Ross* v. *Minister of National Revenue* (2). At page 176 the learned Judge expressed the following opinion:

> It is sufficient to bring the receipts into tax if they are "like" rents, royalties or annuities, provided, of course, they fulfil the other requirements of the subsection. Royalties, in reference to mines or wells in all the definitions, are periodical payments either in kind or money which depend upon and vary in amount according to the production or use of the mine or well, and are payable for the right to explore for, bring into production and dispose of the oils or minerals yielded up. All these conditions exist in the present case. Another matter which may not exist is the reservation of rights at the time of the grant and the consequent payment to the appellant as owner of such reserved rights. But even assuming that to be the case it is not sufficient, in my opinion, to prevent the "receipts" here being like or similar to royalties, all other essential requirements being fulfilled. It may well be that the concluding words of the subsection "notwithstanding that the same are payable on account of the use or sale of such property" are sufficient in themselves to do away with any requirement that the receipts must be paid to an owner.

(1) (1903) 2 Ch. 612.

(2) (1950) C.T.C. 169

1950

WAIN-TOWN GAS AND OIL COMPANY LTD. v. MINISTER OF NATIONAL REVENUE

Angers J.

At least the appellant was a former owner. I find, therefore, that the receipts here were like royalties, if not royalties themselves, and therefore they come within the meaning of that part of the subsection.

The facts in that case are substantially different from those in the case at bar. There the appellant, who on June 30, 1938, owned certain lands in the Province of Alberta, transferred all hydro carbons, except coal, in said lands and the right to work the same to a company in consideration of a sum in cash and the execution of an incumbrance to secure to her a further sum of $60,000 payable out of 10 per cent of oil produced from the lands, with the option to the company to pay her the cash market value of such production. The company made certain payments in 1944 and 1945 which appellant did not include in her estate returns for those years. The respondent, considering these payments to be "income", allowed a deduction of 25 per cent for exhaustion and assessed the balance to tax. These payments were taxable since they depended not only for their existence, but also for their quantum, on the ownership of minerals; they depended on "the use or production of" the property transferred.

Counsel contended that, while it is true that Mr. Justice Cameron "did not actually decide the point", he has intimated that "receipts" may be "like royalties", even though they are not paid to an owner. Counsel added that such is the respondent's submission. He acknowledged that, if real or personal property were sold, the receipts of the purchase price cannot be "rents" or "royalties" in their true meaning. He stated however that Parliament must be presumed to have recognized this inconsistency; hence the use of the words "other like periodical receipts."

The respondent's last claim is that the receipts are income notwithstanding that they are payable on account of the sale of the franchise to Franco Public Service Limited. In counsel's opinion it is apparent from the concluding words of paragraph (*f*) of subsection 1 of section 3 that Parliament intended to make it clear that certain "receipts" were to be treated as "income", even though they were the consideration for a sale of real or personal property. He relied on the case of *Spooner* v. *Minister of National Revenue* (*ubi supra*). The facts in

this case are simple. The respondent sold her right, title and interest in land which she held in freehold to a company in consideration of a sum in cash, shares in the company and an agreement to deliver to her 10 per cent (described as a royalty) of oil produced from the land, on which the company covenanted carrying out drilling and, if oil was found, pumping operations. The company struck oil and paid to respondent in 1927 10 per cent of the gross proceeds of the oil produced, which she accepted in discharge of the royalty. At page 690 we find the following observations by Lord MacMillan, who delivered the judgment of the Judicial Committee of the Privy Council:

Into which category, then, does the present case fall? Their Lordships agree with Newcombe J. that "the case is not without its difficulties", as all cases must be which turn upon such fine distinctions, but they are not prepared to differ from the view of the transaction which that eminent judge took, and with which all his colleagues agreed—namely, that "the respondent has converted the land, which is capital, into money, shares and 10 per cent of the stipulated minerals which the company may win . . . there is no question of profit or gain, unless it be as to whether she has made an advantageous sale of her property." It was for the Minister to displace this view as being manifestly wrong. In their Lordships' opinion he had failed to do so.

In the judgment of the Supreme Court (1) Newcombe, J., speaking for the Court, expressed this opinion (p. 406):

. . . but the question here is, does a man take an income within the meaning of the Canadian Act when he sells his land in consideration of a part of the oil and gas to be extracted from it by the purchaser, if, as is stated in the present admissions, "the appellant was not and is not a dealer in or in the business of buying and selling oil lands or leases"; and, when there is no provision for taxing the property delivered by the purchaser to the appellant, either as annuity or royalty; neither of these words having been used in the statute to describe any right such as that which the vendor acquired under the agreement.

* * *

The case is not without its difficulties, but I am not satisfied that the Crown has made out its claim. And, "inasmuch as it is the duty of those who assert and not of those who deny, to establish the proposition sought to be established, I think the Crown must fail." *Secretary of State in Council of India* v. *Scoble,* (1903) A.C. 299.

Regarding the question of the receipts being "like royalties", counsel for appellant pointed out that the issue in *Jones* v. *Commissioners of Inland Revenue* (*supra*) centred around royalties dependent on the thing sold, i.e. the invention. He submitted that the true position in so far

(1) (1931) S.C.R. 399.

1950

WAIN-TOWN GAS AND OIL COMPANY LTD. v. MINISTER OF NATIONAL REVENUE

Angers J.

as royalties payable on account of the user of a patent or a copyright is laid down in the decision of the Court of Appeal in *Withers* v. *Nethersole* (1), where Lord Greene, M.R. made the following observations (p. 715):

> One might perhaps have expected that where a piece of property, be it copyright or anything else, is turned to account in a way which leaves in the owner what we may call the reversion in the property so that upon the expiration of the rights conferred, whether they are to endure for a short or a long period, the property comes back to the owner intact, the sum paid as consideration for the grant of the rights, whether consisting of a lump sum or of periodical or royalty payments, should be regarded as of a revenue nature. We emphasize the word "intact"—*salva rei substantia*, to use the expression adopted by Lord Fleming in *Trustees of Earl Haig* v. *C. I.R.* (3) (22 Tax Cas. 725, at p. 735)—since, save in the special cases of wasting property, if the property is permanently diminished or injuriously affected, it means that the owner has to that extent realized part of the capital of his property as distinct from merely exploiting its income-producing character.

The decision of the Court of Appeal was affirmed by the House of Lords, (2).

In the case of *Perrin* v. *Dickson* (*Inspector of Taxes*) (3) the facts were briefly these. By a policy of assurance effected by the appellant with an Assurance Society to provide for his son's education, the Society, in consideration of six premiums of £90 each, paid annually between 1912 and 1917, agreed to pay him an annuity of £100 each year for seven years as from September 29, 1920. It was agreed that, if the son should die before the expiry of this period, the premiums were to be repaid to the parent or his representatives less any annual payments already made, but without interest. The parent also effected a similar policy to provide for his daughter's education, by which the Society agreed to pay him £50 a year during a period of five years. The parent duly received the annual payments for the seven years (1920 to 1926) and assessments were made on him for income tax on these sums as on an annuity for these years. It was held that the annual payments made by the Society did not constitute an annuity, but were intended to effect a repayment of the principal sum with interest, and therefore that income tax was only payable upon such part of them as consisted of interest. The judgment of Rowlatt, J. in the King's Bench

(1) (1946) 1 All E.R. 711.
(2) (1948) 1 All E.R. 400.
(3) (1929) 2 K.B. 85; (1930) 1 K.B. 107.

1950

WAIN-TOWN GAS AND OIL COMPANY LTD. v. MINISTER OF NATIONAL REVENUE

Angers J.

Division was affirmed by the Court of Appeal. In his reasons for judgment Lord Hanworth, M.R. expressed the following opinion (p. 119):

> The view that I have taken is to follow what I conceive to be the method directed in Scoble's case, (1903) 1 K.B. 494. Each case must be examined on its own data. I do not feel at all pressed with the observations that the effect of the decision will be to release all annuities for a fixed term of years from income tax. The immunity will be given only in proper cases in which an attempt is being made wrongly to tax capital under statutes which are intended to charge income and income only, for, as was said by Bramwell B. in *Foley* v. *Fletcher*, (3 H. & N. 783, cited by Scrutton L J. in Lord Howe's case, (1919) 2 K.B. 336, 353, it cannot be taken that the Legislature meant to impose a duty on that which is not profit derived from property, but the price of it. The appeal is dismissed with costs.

Reference may also be made advantageously to *Halsbury's Laws of England*, 2nd edition, volume 17, p. 180, paragraph 378 (in fine), and the decisions therein quoted; *Beal's Cardinal Rules of Legal Interpretation*, 3rd ed., pp. 92, 267, 318; *Craies, Treatise on Statute Law*, 4th ed., p. 154; *Maxwell, The Interpretation of Statutes*, 9th ed., pp. 19, 291; *Shore* v. *Wilson* (1); *Burton* v. *Reevell et al* (2); *The Queen on the prosecution of J. F. Pemsel* v. *The Commissioners of Income Tax* (3).

Considering the nature and substance of the transaction involved it seems to me that the agreement exhibit 3 is a sale and not a deed creating annuities or royalties. For the above reasons I have reached the conclusion that the assessments in question and the decision of the Minister affirming the same are ill founded and must be set aside and that the appeal must be allowed.

The appellant will be entitled to its costs against the respondent.

Judgment accordingly.

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(1) (1842) 9 C. & F. 355, 565.
(2) (1847) 16 M. & W. 307, 309.
(3) (1889) 22 Q.B. 296, 306.

1950
Oct. 23
Nov. 21

BETWEEN:

BERT W. WOON,.....APPELLANT;

AND

MINISTER OF NATIONAL REVENUE, ... } RESPONDENT.

Revenue—Income—Income War Tax Act R.S.C., 1927, c. 97, s. 19, ss. 1—"Undistributed income" on hand "in any form" at time of winding up of company—Minister and officials do not have discretionary power to settle or limit taxation other than according to the statute—Change in form of assets does not cause them to lose quality of undistributed income—Appeal dismissed.

By s. 19, ss. 1 of the Income War Tax Act it is provided that the payment received by a taxpayer under the circumstances there mentioned shall be a dividend and, therefore, part of a taxpayer's assessable income. Appellant sought to avoid such assessable income by obtaining a ruling of the Commissioner of Income Tax approving an arrangement entered into by appellant and others adjusting the distribution of its property on the winding up of an incorporated company in which appellant held shares.

Appellant was assessed for income tax on such payment to him and that assessment was affirmed by the Minister of National Revenue, and appealed to this Court.

Held: That the assessment here under appeal was made pursuant to the terms of a statute and is not open to the appellant to set up an estoppel to prevent its operation.

2. That the Commissioner of Income Tax has no power to bind the Crown by a ruling or declaration settling or limiting taxation other than according to the statute itself since the section of the Income War Tax Act referred to does not confer any discretionary power on the Minister or his officials.

3. That the undistributed income of an incorporated company on hand at the time of its winding up does not lose the quality of being undistributed income by the conversion of the assets of which it is made up into another form of assets such as cash or stock in a new company.

APPEAL under the provisions of the Income War Tax Act.

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

W. Judson, K.C. for appellant.

J. D. Arnup, K.C. and *Miss Helen Currie* for respondent.

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

1950

WOON
v.
MINISTER OF NATIONAL REVENUE

Cameron J.

CAMERON J. now (November 21, 1950) delivered the following judgment:

This is an appeal from an assessment to income tax dated May 17, 1946, in respect of the taxation year 1944.

The appellant declared his income at $7,800, but the respondent added thereto an item of $78,165.87 said to be made up of undistributed income received from Arrow Bedding Limited in that year and assessable to the appellant under section 19. -1. of The Income War Tax Act. The taxpayer appealed and by his decision the respondent affirmed his assessment; notice of dissatisfaction was given and in his reply the respondent affirmed his assessment as levied. By order of this Court pleadings were delivered.

Woon and one F. J. Mackie were the beneficial owners of all the issued stock of Arrow Bedding Limited, which company carried on business until January 31, 1944. By agreement in writing, dated June 2, 1933 (Ex. 1), Woon and Mackie entered into an agreement with themselves and with the Toronto General Trusts Corporation, as trustee, the effect of which was that upon the death of either Woon or Mackie, the personal representatives of the deceased should sell and the survivor should purchase all the shares of the deceased party in the capital stock of Arrow Bedding Limited, at a valuation to be arrived at as set forth in the agreement. Mackie died early in 1943 and, pursuant to the agreement, Woon was called upon to purchase Mackie's shares in the company. Certain insurance moneys on the life of Mackie had been provided for the purpose of paying for his stock, but were insufficient to the extent of about $35,000 to complete the full payment. Woon's only available assets consisted of his shares in the company. After a consultation between Woon, his solicitor, and an official of the Toronto General Trusts Corporation (which was also one of the executors of Mackie's will), and following certain interviews and correspondence with the Commissioner of Taxation (which will later be referred to), the following plan was arranged and carried out by or on behalf of the appellant.

A new company—Arrow Bedding (Eastern) Ltd. (hereinafter to be called "the new company")—was incorporated on January 19, 1944, one of its purposes being to

1950

WOON
v.
MINISTER OF NATIONAL REVENUE

Cameron J.

purchase as a going concern the business assets and all the undertaking of Arrow Bedding Limited (hereinafter to be called "the old company") and to pay therefor by the issue of its fully paid up shares. The capital of the new company was divided into 1,000 redeemable preference shares of a par value of $100 each and 3,000 common shares without any nominal or par value. On January 31, 1944, by deed and bill of sale, the realty and all other assets of the old company were conveyed to the new company, the consideration therefor being 800 redeemable preference and fully paid up shares and 3,000 shares without nominal or par value of the new company, to be allotted to the old company or its nominees. Thereupon, the only assets of the old company then remaining consisted of stock in the new company. On March 27, 1944, the old company passed a by-law providing for the distribution of its assets rateably among its shareholders and thereafter for the surrender of its charter. By direction of the old company, the new company issued to the appellant or his nominees 800 preference shares and 3,000 common shares. The next step taken was that on or about March 31, 1944, the new company passed a by-law providing for the redemption of 315 shares of its preference stock at $100 per share, all of which shares were to be taken from the shares held by the appellant. The by-law further provided for payment to the Receiver General for Canada of $1,260, being the tax payable under section 19A of The Income War Tax Act and being 4 per cent of the par value of the shares so redeemed. The tax was paid on or about April 1, 1944.

315 preferred shares of the new company which were held by the appellant were then redeemed by the new company and $31,500, paid to him. The agreement (Ex. 1) provided that after applying the net proceeds of the life insurance on the purchase price, the balance would be paid to the Mackie estate within five years of Mr. Mackie's death, in half-yearly instalments and with interest. Woon, however, with the cash available from the redemption of the shares, was able to negotiate a cash settlement, and instead of spreading his payments over five years secured a 10 per cent discount on the ascertained value by payment of the whole in cash.

These facts which I have just enumerated are not in any way disputed. It is also admitted that as of January 31, 1944, and just prior to the sale of its assets to the new company, the books of the old company showed a surplus of undistributed income of $75,444.08. As shown by the evidence of Mr. McLachlin, an assessor in the Toronto branch of the National Revenue Department, that figure was adjusted by certain additions and deductions and as a result the amount of such surplus of undistributed income was finally ascertained to be $78,165.87 as of January 31, 1944. No objection is now taken to that computation.

The respondent, being of the opinion that the receipt by the appellant in 1944 of the shares of the new company, upon the winding up of the old company, brought him within the provisions of section 19.1. of The Income War Tax Act, assessed him accordingly. That section then was as follows:

> 19.1. On the winding-up, discontinuance or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income.

The appeal is based on two grounds: (1) That the provisions of section 19.1. have here no application because at the time of the winding up of the old company it had no undistributed income on hand; (2) That the respondent is estopped from alleging that section 19.1. is applicable to the appellant because of a "ruling" made by the Commissioner of Taxation that, if the procedure which was in fact followed, was carried out, the only tax which would result would be that arising under section 19A, and that that tax has in fact been paid.

At the trial, counsel for the respondent made a general objection to the admissibility of any evidence as to any statements or rulings, either verbal or in writing, made by the Commissioner of Taxation or the Deputy Minister of National Revenue (Taxation) in regard to the incidence of tax which might result from any step proposed by or on behalf of the appellant, on the ground that such statement or ruling was irrelevant to the issues here raised. Upon his statement that the presentation of his case

1950

WOON
v.
MINISTER OF NATIONAL REVENUE

Cameron J.

would not in any way depend on my ruling on that objection, I thought it advisable to reserve my opinion until later.

The objection is based on the submission that the evidence is led for the purpose of establishing an estoppel, and that, as the doctrine of estoppel does not apply as against the Crown, the evidence is therefore irrelevant and for that reason inadmissible.

In the pleadings the appellant has set out the facts on which he relied as giving rise to the application of the doctrine of estoppel and has pleaded estoppel. Those facts are therefore in issue. Later herein I shall have occasion to refer to certain cases in which the question of the applicability of estoppel in pais as against the Crown has been considered. It is sufficient to say at this point that the decisions are somewhat conflicting. The point is not sufficiently clear to justify a categorical finding that it can never apply as against the Crown. If that were the case then the evidence proposed might be considered irrelevant and therefore inadmissible. Under the circumstances, however, the issue being clearly raised in the pleadings, I think the evidence is in this case admissible.

Mr. Woon, faced with the problem of raising money to pay for the shares held by the Mackie estate, consulted his solicitor, Mr. John Jennings, K.C. On April 28, 1943, Mr. Jennings had an interview with the then Commissioner of Taxation in Ottawa and discussed with him the possibility of the old company redeeming its shares to such an extent as might seem desirable, and the resulting tax that would be payable by Mr. Woon upon the receipt of the old company's undistributed income in that fashion. Ex. 2 is a copy of a letter sent by Mr. Jennings to the Commissioner on the following day and attached thereto is the Commissioner's reply of May 1, 1943, confirming Mr. Jenning's opinion as to the effect of the interview on April 28, 1943. While it was thought advisable to proceed under the plan proposed in the letter of April 29, 1943, it was decided to submit a further proposition to the Commissioner as to the tax effect of proceeding under section 19A.-1. of The Income War Tax Act, which section then was as follows:

19A. 1. Where the assets of a company, which had on hand undistributed income at the end of its 1929 taxation period, have been received

by another company, either directly or through an intermediary, and whether by the sale of the assets of such first mentioned company to such other company, or through the sale by the shareholders of the shares of such first mentioned company to such other company, and such other company issues or has issued redeemable shares, bonds, notes, or other like instruments in an amount which in whole or in part absorbs the said undistributed income, then on any redemption of such instruments the company redeeming shall pay a tax of four per centum on the amount of such instruments redeemed to the extent of the said undistributed income.

Mr. Jennings states that on September 10, 1943, he had a further interview with the Commissioner of Taxation at Ottawa, the particulars of which may be found on pp. 17-18 of the evidence. He outlined to the Commissioner a proposal to proceed under section 19A in the same manner as was eventually carried out and which I have above set forth. He asked for a ruling as to whether under the suggested proposal there would be any incidence of taxation other than the 4 per cent tax mentioned in section 19A. He states that thereupon the Commissioner gave him "a clear unequivocal 'ruling' that if the procedure outlined in section 19A were carried out in detail the only incident of taxation which would result would be the 4 per cent on the redemption of the securities of the new company." The Commissioner also stated that he thought it unfair that the tax in this case should be only 4 per cent when others were paying a much higher rate and that he proposed to have section 19A removed from the Act at the then session of Parliament. Accordingly, he advised Mr. Jennings to do nothing further until that section was removed. Mr. Jennings delayed proceedings until the end of the Parliamentary session and, as section 19A still remained in the Act, he considered it proper to proceed thereunder and in accordance with the Commissioner's ruling.

Mr. Jenning's evidence as to this interview is not denied. No letters were exchanged as had been done in respect to the original proposition. Mr. Jennings then proceeded with the matter in the manner which has been outlined. Under these circumstances, it is submitted by counsel for the appellant that the respondent is now estopped from alleging that Mr. Woon is subject to the taxes imposed by section 19.1. and from assessing him accordingly.

1950

WOON
v.
MINISTER
OF
NATIONAL
REVENUE

Cameron J.

The question as to the applicability of the rule of estoppel in pais as against the Crown has been raised in many reported cases and the opinions expressed therein are not at all uniform. In the following cases it was held that it did apply. In *Queen Victoria Niagara Falls Park Commissioners* v. *International Railway Company* (1), Grant, J. stated that it is well established that the doctrine of estoppel in pais operates as against the Crown. In *Attorney-General to the Prince of Wales* v. *Collom* (2), Atkin, J. found that the defendant had established a good equitable defence based on estoppel and that such equitable defence was good against the Crown. Reference may also be made to *Attorney-General of Victoria* v. *Ettershank* (3), *Plimmer* v. *Mayor of Wellington* (4), and *Attorney-General for Trinidad* v. *Bourne* (5); and *The King* v. *Canadian Pacific Railways* (6).

For cases in which the opposite view was held, reference may be made to the following: *Western Vinegars Ltd.* v. *The Minister of National Revenue* (7); *Bank of Montreal* v. *The King* (8); and to *Attorney-General for Canada* v. *C. C. Fields & Company* (9), and the cases therein cited.

It is not necessary in this case, however, to consider the effect of the cases to which reference has just been made. It is sufficient to state that the assessment here under appeal was made pursuant to the terms of a statute and that, therefore, it is not open to the appellant to set up an estoppel to prevent its operation.

In Phipson on Evidence, 8th Ed., 667, it is stated that:

> 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.

The most recent case that I am aware of is *Maritime Electric Co. Ltd.* v. *General Dairies Ltd.* (10), 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.

(1) (1928-29) 63 O.L.R. 49.
(2) (1916) 2 K.B. 193 at 204.
(3) (1875) L.R. 6 P.C. 354.
(4) (1883-84) 9 A.C. 699.
(5) (1895) A.C. 83.
(6) (1930) Ex. C.R. 26.
(7) (1938) Ex C.R. 39.
(8) (1907) 38 S.C.R. 258.
(9) (1943) O.R. 120 at 129.
(10) (1937) A.C. 610.

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.

The judgment in that case was delivered by Lord Maugham. At p. 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 provision.

And at p. 621:

If we now turn to the authorities it must be admitted that reported cases in which the precise point now under consideration has been raised are rare. It is, however, to be observed that there is not a single case in which an estoppel has been allowed in such a case to defeat a statutory obligation of an unconditional character. The textbooks have regarded the case as one closely analogous to the cases of high authority where it has been decided that a corporation could not be estopped from contending that a particular act was *ultra vires*.

He referred also to In re *A Bankruptcy Notice* (1), in which Atkin, L.J. stated:

Whatever the principle may be (referring to a contention as regards approbation and reprobation) it appears to me that it does not apply to this case, for it seems to me well established that it is impossible in law for a person to allege any kind of principle which precludes him from alleging the invalidity of that which the statute has, on grounds of general public policy, enacted shall be invalid.

In the instant case, section 19.1. of the statute expressly provides that the payment received by a taxpayer under the circumstances there mentioned shall be a dividend and therefore part of a taxpayer's assessable income. It was therefore the duty of the taxing authorities 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

(1) (1924) 2 Ch. 76.

1950

WOON
v.
MINISTER OF NATIONAL REVENUE

Cameron J.

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 that connection, reference may be made to *Carling Export* v. *The King* (1), in which at p. 438 Lord Thankerton said:

> In their Lordships' opinion it is not to be readily assumed, in a Taxing Act, that Parliament has delegated to a Minister the power to settle the limits of taxation, and such intention must be clearly shown by the terms of the statutory provision.

In *Liberty & Company Ld.* v. *C.I.R.* (2) a somewhat similar case arose. There the Commissioners of Inland Revenue had issued an official notice regarding the effect of subscriptions to certain war loans on the liability to excess profits duty. Rowlatt, J., in referring to the power to issue such a notice said at p. 638:

> But thereupon two difficulties are raised by Mr. Konstam, and they arise out of the circulars that were sent by the Inland Revenue when it was desired to attract as much money as possible into War Loan. The Solicitor-General, quite correctly and quite properly, and I think in the performance of his manifest public duty, takes the point that he is here to argue the real question of law and to get a determination of what the law is, and that he cannot be prevented from doing that and must not allow himself to neglect to do it. I think that is absolutely right, and it must be pointed out that the Commissioners of Inland Revenue have no power to bind the Crown by a general declaration of what the law is in particular circumstances beforehand. They make a statement for the information of those who like to act upon it in perfect faith and having great skill, and the parties to whom it is addressed may say "The Commissioners say this, it is probably right," and they are justified in acting upon it from that point of view in the same sense as they are justified in acting on the view of any person who advises them with knowledge and to the best of his ability. But the Commissioners cannot bind the Crown. It used to be said in the old cases there was no estoppel against the Crown. It used to be said in the old cases that employment under the Crown was by law at will only. Both those sounded arbitrary principles in favour of monarchical rights, but as at present expressed and as rarely understood it means this, that no servant of the Crown has authority in a case of service to create a freehold office by a promise on behalf of the Crown when there is not one by law, and no servant of the Crown is entitled to lay down principles of law for the future which will bind the Crown. Looked at from that point of view they are not principles which support an autocratic Government, they are principles which protect the public from being fettered in the future by the acts of persons who for the time being are occupying important positions. Therefore I think that is an answer to it, although I can understand Mr. Konstam's clients, if the case really turned on that, feeling a little soreness about it in the circumstances, they themselves, of course, not being constitutional lawyers, but I ought to say that I think any soreness of that kind is

(1) (1931) A.C. 435. (2) (1917-30) 12 T.C. 630.

quite ill-founded because really on the substance of the case it is perfectly clear in my judgment, for the reasons I have already expressed, that on the facts looked at in the broadest possible way the Crown are right in this case.

That judgment was affirmed by the Court of Appeal, (1).

In the case of *Anderton & Halstead Ld.* v. *Birrell* (2), 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 p. 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.

On the principles laid down in these cases I have reached the conclusion that the so-called "ruling" of the Commissioner was nothing more than his personal opinion as to the meaning of the statute, or, at the most, that the department in assessing the appellant would carry into effect the "ruling" so made. In either event it was made without authority and was not binding on the Crown. I find, also, that it cannot be invoked by the appellant as a ground for raising estoppel in this case, as to do so would be to nullify the requirement of the statute itself.

The only other ground of appeal is that under the circumstances mentioned the old company, at the time of its winding up or discontinuance, had no undistributed income on hand. It is submitted that when on January 31, 1944, it transferred its whole undertaking to the new company in return for preferred and common shares in the latter, the undistributed income was absorbed in the shares of the new company and that therefore, so far as the old company was concerned, it had thereafter—and on the date when it distributed the shares of the new company rateably amongst its own shareholders and was wound up—no undistributed income on hand.

It is submitted that as the undistributed income of the old company was "absorbed" in the issue of the redeemable shares by the new company, within the meaning of

(1) (1917-30) 12 T.C. 640 (2) (1932) 1 K.B.D. 271.

1950

WOON
v.
MINISTER OF NATIONAL REVENUE

Cameron J.

"absorb" as contained in section 19A, that having been so "absorbed" it became non-existent in so far as the old company was concerned and that, therefore, the old company did not have it "on hand" at the time of its winding up or discontinuance.

In support of this contention there is cited the case of *Stewart and Company, Ltd.* v. *M.N.R.* (1). In that case, O'Connor, J. did determine that in the situation there arising under section 19A, the undistributed income of a vendor company could be absorbed by the issue of redeemable shares of the purchasing company. But he decided also that "to absorb" meant "to incorporate," although it had at times another meaning—"to swallow up." He did not suggest that in any such transaction the undistributed income disappeared or became non-existent so far as the vendor company was concerned; in fact, he was of the contrary opinion. At p. 672-3 he said:

> Does an issue of redeemable shares in a transaction of this kind incorporate the undistributed income of the vendor company?
>
> I reach the conclusion that it does so, and that this can be best shown by the position after the sale and on the winding up of the vendor company.
>
> The asset side of the balance sheet of the vendor company would show the redeemable shares of the purchaser company in lieu of the assets which it sold. *Both before and after the sale the liability side would show the paid up capital and the undistributed income. The undistributed income of the vendor company is then in the form of redeemable shares of the purchaser company and on the winding up when such shares are distributed among its shareholders, the undistributed income is distributed in the form of such shares.* So to that extent and in that sense the issue of redeemable shares has incorporated the undistributed income of the vendor company.

It is suggested that the sentences which I have underlined are obiter; but even if that be so I am satisfied that they correctly state the true situation. The undistributed income of the old company prior to the sale of its assets to the new company was represented by buildings, stock on hand, equipment and the like; upon the sale, its form was changed and thereafter it was represented by the preference redeemable shares of the new company into which it had been incorporated. It did not thereby become non existent although it was represented in a new form.

These shares were the ones received by the appellant. I do not think that it is of any importance that he received

(1) (1946) Ex. C.R. 669.

them direct from the purchasing company. (*Merritt* v. *M.N.R.* (1) affirmed on this point by (1942) S.C.R. 259.) Actually, it is not clear that he did receive them directly from the new company. The oral evidence indicated that such was the case but the minute book of the old company (Ex. 3) contains a record of the directors' meeting of March 27, 1944, in which it is recited that the shares had been received by it, and a by-law was passed authorizing their distribution rateably among its shareholders. I am of the opinion, also, that notwithstanding the fact that the appellant received the shares before the charter of the old company was surrendered, that they were distributed during the process of winding up or discontinuing the business and that, therefore, they fell within the opening words of section 19.1. (see *MacLaren* v. *M.N.R.* (2)).

It is to be kept in mind that the assessment now under appeal was made under section 19.1. That section is quite distinct from section 19A, the latter being concerned only with payment of a specified tax by a purchasing company under the conditions therein mentioned; while the former declares to be dividends (and therefore taxable profits or gain), what is distributed to a taxpayer upon the winding up, discontinuance or reorganization of a company, to the extent that such distribution includes undistributed income of that company. Payment of the tax under section 19A does not in any way affect the question as to what constitutes dividends under section 19.1., or the liability of a taxpayer receiving dividends thereunder to pay income tax thereon.

I think that the Arrow Bedding Company, Ltd. did have undistributed income on hand at the time of its winding up. It is admitted that it was on hand on January 31, 1944, and at least from a taxation point of view it could not lose the quality of being "undistributed income" by the conversion of the assets of which it was made up into another form of assets, such as cash or stock in a new company. It may be conceded, I think, that such undistributed income was here incorporated in the preferred shares of the new company but these were the shares which became the property of the old company and were distributed to the appellant. The form in which the undis-

(1) (1941) Ex. C.R. 175. (2) (1934) Ex. C.R. 13.

1950

WOON
v.
MINISTER OF NATIONAL REVENUE

Cameron J.

tributed income is distributed is quite immaterial because of the words "in any form" contained in the section. I agree, also, with the opinion of O'Connor, J. in the *Stewart* case that from an accounting point of view the old company's balance sheet following the receipt of the shares in the new company should show on the liability side the paid up capital and the surplus of undistributed income. That was not done by the accountant of the company, the liability side of the balance sheet (Ex. 8) comprising only the same items as on the asset side, namely, the preferred and common shares of the new company.

My conclusion, therefore, must be that the shares which the appellant received in 1944 were so received upon the winding up or discontinuance of the business of Arrow Bedding Company, Ltd. and constituted a distribution of the property of that company; and that to the extent that the company had on hand undistributed income, they constituted dividends in his hand. The amount, as I have said, is not in dispute. Such receipts, therefore, fall squarely within the provisions of section 19.1. and they were properly added to the income of the appellant.

The Income War Tax Act levies taxes on profits, and it is the clear intention of section 19 that the undistributed income of a corporation (which is composed of corporate profits remaining undistributed for the time being) should, at the time it is distributed upon the winding up, discontinuance or reorganization of the company, constitute dividends in the hands of the recipients and therefore be subject to taxation in the year in which they are so received.

For the reasons which I have stated, the appeal will be dismissed with costs to be taxed.

Judgment accordingly.

BETWEEN:

W. LAURENCE SWEENEY, ...CLAIMANT;

AND

HIS MAJESTY THE KING..... ..RESPONDENT.

1950

June 6, 7, 8 & 9

Dec. 2

Appropriation—War Measures Act, R.S.C. 1927, c. 206—The Compensation (Defence) Act, 1940, 4 Geo. VI, c. 28—Compensation payable for ships appropriated—"Value to the owner"—Matters to be considered in determining value to the owner.

Under the War Measures Act, R.S.C. 1927, c. 206 respondent appropriated four vessels owned by the claimant or by companies in which the claimant owned all the issued capital stock. By agreement between the parties certain compensation was paid to the claimant at the time of acquisition of the vessels by respondent without prejudice to the claimant to regard such payment as not being full compensation. The matter now comes before the Court by way of reference by the Minister of Justice to have adjudicated the proper compensation payable to the claimant.

Held: That in ascertaining value in cases of compulsory taking the cost of the acquired property is not conclusive but should be considered.

2. That claimant is entitled to some allowance for services rendered by him during the construction of the vessels by way of inspection, supervision, the purchase of engines and equipment and for securing priorities in obtaining necessary goods and articles, together with incidental expenses incurred.

3. That as part of the operating expense claimant is entitled to an allowance for interest disbursed by him during the construction of the vessels.

4. That the claimant is entitled to the value to him of the property taken as it existed at the time of the taking excluding all appreciation due to the war; that there must be taken into consideration all advantages, present or future, which the property possesses for other possible purchasers as well as for the owner; that any special value to the owner is not a capitalized value of estimated savings or increased profits; that market value while not conclusive is of great importance; that damages as such are not recoverable to the extent that such damages would add to the actual value to the owner of the property.

5. That the claimant is entitled to include in the value to him not only the actual cost of construction and equipment but something additional by way of a sale-profit on vessels which he had constructed, and a further amount attributable to the fact that he would lose some operating profits which he was reasonably entitled to believe would accrue to him.

REFERENCE by the Minister of Justice under the War Measures Act to have determined the compensation payable for four vessels appropriated by the Crown.

1950

SWEENEY v. THE KING

Cameron J.

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

F. D. Smith, K.C. and *A. J. Meagher* for claimant.

J. T. McQuarrie, K.C., R. T. Vaughan and *K. E. Eaton* for respondent.

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

CAMERON J. now (December 2, 1950) delivered the following judgment:

Under the War Measures Act, 1927, R.S.C., ch. 206, the respondent in 1942 appropriated four vessels, two of which were owned outright by the claimant personally, the other two being owned by companies in which the claimant owned all the issued capital stock. By an agreement between the parties hereto dated February 28, 1947, (Ex. 1) the respondent paid compensation to the claimant therefor as follows:

Name of Vessel	*Date of Acquisition*	*Compensation Paid*
J. E. Kinney	6th October, 1942	$ 79,881.13
Laurence K. Sweeney	29th June, 1942	84,085.40
W. D. Sweeney	6th October, 1942	100,850.06
M. 522	14th October, 1942	18,276.15
Interest at 3 per cent to the date hereof		38,041.38
		$321,133.12

It was a term of the said agreement that such payments would be made by the respondent and accepted by the claimant without prejudice to the right of the latter to regard the said sums as not being full compensation. The claimant did claim additional compensation and, pursuant to section 7 of The War Measures Act, the Minister of Justice referred the claim to this Court. The case came originally before my late brother, O'Connor, J., in June, 1948. Certain matters regarding the incidence of sales tax were not then disposed of and therefore judgment had not been delivered at the time of his death. The matter came before me at Halifax in June, 1950, and it was agreed by counsel for both parties that the evidence given at the original hearing should be considered as part of the

evidence, but that both parties would have the right to supplement it by further evidence, and that the respondent would have the right to cross-examine the claimant.

The claimant advances a claim for an additional $193,866.88 and interest, the respondent submitting that the sums already paid are sufficient to satisfy all claims in respect of the vessels.

The matter falls for determination under the provisions of section 5(1) of The Compensation (Defence) Act, 1940, 4 George VI, ch. 28, the relevant part of which is as follows:

> 5. (1) The compensation payable in respect of the acquisition of any vessel . . . shall be a sum equal to the value of the vessel . . . no account being taken of any appreciation due to the war, . . .

"Acquisition" in relation to any vessel means the appropriation by or on behalf of His Majesty of the title to or the property in such vessel under the provisions of The War Measures Act and all four vessels in this case were so acquired.

The question for determination is, therefore, "the value of the vessel" and the statute provides no definition of that phrase. It is limited, however, by the negative phrase which follows: "No account being taken of any appreciation due to the war".

While all four vessels were not absolutely identical, they were substantially the same in design, equipment, carrying capacity and power. They were of the schooner type, of wooden construction, having a length between perpendiculars of approximately 153 ft. and were powered by a single Fairbanks-Morse engine, developing 540 B.H.P. at 360 R.P.M. Ex. 5 and 6 are photographs of the *J. E. Kinney* and the *W. D. Sweeney* at the time of their launching. The carrying capacity was approximately 550 tons.

As far as I am aware, section 5(1) has received judicial interpretation in one case only—*The King* v. *Northumberland Ferries Ltd.*, (1). Later herein I shall have occasion to refer to certain specific principles laid down in that case. It is sufficient at this point to state that in the Supreme Court all of the judges were of the opinion that in ascertaining "value," the principle of "replacement

(1) (1945) S.C.R. 458, reversing (1944) Ex.C.R. 123.

1950

SWEENEY v. THE KING

Cameron J.

value" or "re-instatement" was not applicable; and that it is the value to the owner that must be determined, but limited, however, by the words, "no account being taken of any appreciation due to the war."

I think it is well settled that in ascertaining "value" in cases of compulsory taking, the "cost" is not necessarily conclusive; but it must be kept in mind. In this case "cost" is of basic importance and was so considered by both parties at all stages. Following the acquisition of the vessels, the representatives of the respondent endeavoured to ascertain the established cost of each vessel to the claimant. Before the Advisory Board the claimant used his alleged costs as the foundation on which to establish value; and at the trial all the evidence as to value was related in one way or another to the cost of each vessel to the claimant, by whom or on whose behalf they had been constructed. It therefore becomes necessary to first ascertain the cost (and by that I mean the actual outlay) of each vessel to the claimant.

I shall consider first the *J. E. Kinney*. The claimant entered into a contract for the construction of its hull with Messrs. Smith and Ruhland (a well known firm of ship-builders at Lunenburg, Nova Scotia) at a cost of $28,000. Construction was commenced in March, 1941, and was completed in December of that year and it was immediately put into operation by the claimant. The engine was purchased by him from Fairbanks-Morse and installed by Lunenburg Foundries. Ex. 12 is a statement submitted by the claimant showing the cost to be $66,670.64. I have some doubts as to the complete accuracy of this statement due to the inefficient bookkeeping methods of the claimant but in the absence of any other evidence will accept it as reasonably correct. The claimant also installed on this ship certain equipment which he had purchased from the underwriters of another vessel (the *Student Prince*) which he had formerly owned and which had been wrecked, and for which he paid $800 in all. It is not an easy matter to determine what amount should be added for this item. Before the Advisory Board the claimant gave its value at $3,000 and at the trial he valued it both at $6,000 and $5,000. There is no other evidence on this point, but taking

everything into consideration, I think that its value to the ship was somewhat in excess of $800, and for that item I shall allow $2,000 in all. He also claimed $700 for fuel oil and lubricating oil said to have been on board the ship when acquired, the amount of which is not seriously challenged. These three items aggregate $69,370.64 and that amount, I find, represents the cost of the *J. E. Kinney* to the claimant. In his pleadings he asks for $150,000; and at the trial he estimated the total cost to him at $82,885.40, and the value at $129,508.44. I shall have occasion later to refer to the manner in which he estimated both the cost and the value.

The *L. K. Sweeney* was identical in every way to the *J. E. Kinney*. The hull was constructed by Smith and Ruhland in 1941-2 at a contract price of $34,000, and the engine was purchased by the claimant and installed by Lunenburg Foundries. At the time of its acquisition it was about completed but had not had a trial run. The claimant produced Ex. 7 as a statement of his costs and, while again I doubt its complete accuracy, I shall accept it as reasonably correct. From its total of $77,985.40 I will deduct, however, an item of $500, which amount was paid directly to the claimant and is said to have been for travelling expenses. That item and similar ones will be considered later. I find, therefore, that the actual cost of the *L. K. Sweeney* to the claimant was $77,485.40. In his pleadings the claimant asserted the value to him at $150,000. At the trial he estimated its cost at $86,577.40, and the value at $134,695.93. These estimates will be later examined.

I may note in passing that the difference ($8,814.76) in the cost of the *J. E. Kinney* (excluding the item of $700 for oil) and the *L. K. Sweeney* appears to be made up of two major items. The contract for the hull of the latter exceeded that of the former by $6,000, and the cost of the engine was $850 more; the balance no doubt arises through small differences in cost and installation of equipment.

In 1942 the claimant again entered into a contract with Smith and Ruhland for the construction of the hull of a new vessel almost identical with the others, and later called *M. 522*, at a price of $35,000. At the date of acqui-

1950

SWEENEY v. THE KING

Cameron J.

sition on October 14, 1942, that vessel was in their yards only partially completed. The claimant had paid them $17,000 on account and had also expended $26.15 for incidentals and Government approval of the plans—a total of $17,026.15, which amount I find as the actual cost of the vessel to him. The respondent took over the contract with Smith and Ruhland and the construction of the vessel was later completed. In his pleadings the claimant asserted a value of $40,000; at the trial he placed it at $39,322.27 and estimated the cost to him at $20,625.15. These estimates will later be considered.

The *W. D. Sweeney* was constructed throughout at the claimant's own shipyard at Yarmouth and it was the first vessel of this size he had ever built. It was almost identical in plan and equipment with the other three vessels. Construction was commenced in December, 1940, and when acquired by the respondent in October, 1942, was just completed. From the fact that it took twenty-two months to complete and from an examination of the pay sheets produced, it is very apparent that its construction was done in a leisurely fashion, only one or two workmen being engaged thereon at times. The claimant produced Ex. 8 as a statement of his costs, aggregating $83,350.06. This is a summary only and is not supported by the production of any vouchers or original records, (except the contract for the engine with Fairbanks-Morse). Ex. 13 is said to be a statement of wages paid but I cannot relate its figures in any way to Ex. 8. The men in the claimant's employment were engaged on other enterprises as well as in the construction of this vessel and the only method of apportioning their wages was that the foreman indicated verbally to the bookkeeper the amount of such work to be charged to each job. To this amount of $83,350.06 the claimant adds $500 for spars and derrick, $500 for deck houses, and $65 for a windlass, a total of $84,415.06. But that is not all. He said that following a practice which he alleged was in existence in Nova Scotia before the war, he, as builder of the vessel, was entitled to add to his costs the following items: 40 per cent of labour costs amounting to $8,262.16; 10 per cent of cost of materials and equipment—$6,375.85, and then 10 per cent

over all, a further item of $9,905.30, making a grand total of $108,958.37. It appears, therefore, that on this basis the cost of the *W. D. Sweeney* exceeded the cost of the *J. E. Kinney* ($69,370.64), a similar vessel and built at a approximately the same time, by $39,587.73, or about 57 per cent. That is difficult to understand in the light of the claimant's own statement that he had purchased all the lumber for the *W. D. Sweeney* in 1940 before there was any substantial increase in price, that the engine was purchased in December, 1940 (Ex. 9), at the same price as that of the *J. E. Kinney* engine, and that the whole construction was done with low cost labour and before costs of labour had advanced to any material extent.

Moreover, I find no support for his statement as to the practice of builders operating on a cost plus basis to add the percentages above mentioned. He himself admitted later that he had no personal knowledge that such was the case and that his evidence was purely hearsay. Mr. V. J. Price was the only witness called for the claimant who gave evidence on this point. For a few years after 1941 Price was office manager for Fairbanks-Morse at Shelbourne. That firm had certain cost plus work to do in connection with the construction of mine sweepers and he said that the practice then was to charge these rates, but only on extras and where there was a change from the original plan, and not on the ordinary construction.

I cannot accept Ex. 8 as constituting satisfactory proof that the amounts therein stated were in fact actually expended by the claimant. Throughout the trial the claimant referred to that exhibit and others as being the "audited costs," apparently intending to convey the impression that these statements had in fact been audited and approved by the auditors of the respondent. That, however, was not so. They were in fact presented to the auditors but were not accepted by them in the absence of proper bookkeeping records and vouchers. The auditors' mark merely indicates that they were examined and not that they were approved. There is no reason why the costs of the *W. D. Sweeney* should have exceeded those of the *J. E. Kinney,* unless it be the inexperience of the claimant in the construction of such vessels. The main

1950

SWEENEY v. THE KING

Cameron J.

item of expense would be the construction of the hull, the cost of the engine and its installation, and in the case of the *J. E. Kinney,* these costs and the profits of Smith and Ruhland and the Lunenburg Foundries were all included. In the absence of any satisfactory proof as to the actual outlay, I must find that the cost of the *W. D. Sweeney* in so far as it could be reflected in the value of the vessel did not exceed that of *J. E. Kinney,* (less oil), namely, $68,670.64. It may be noted here that included in Ex. 8 is an item of $1,150, paid to the claimant "for use of my own wharf." That item should be disallowed in any event, as it is apparently related to a period after the acquisition and with that I am not concerned. I would disallow also an item of $886.87 paid to Fairbanks-Morse for interest. That item I shall consider later.

For the *W. D. Sweeney,* the claimant in his Statement of Claim asserted a value of $175,000. At the trial he estimated it at $175,372.45, and the actual cost at $110,558.37; these estimates will be referred to later.

The following therefore is a summary of the actual costs of each vessel, the amount actually paid by the respondent, and the approximate percentage of the latter to the former:

Name of Vessel	*Actual cost to Claimant*	*Amount paid to Claimant*	*Percentage of actual payment to actual cost*
J. E. Kinney	$ 69,370.64	$ 79,881.13	110.82%
L. K. Sweeney	77,485.40	84,085.40	108.51%
W. D. Sweeney	68,670.64	100,850.06	146.86%
M. 522	17,026.15	18,276.15	107.34%

In estimating his costs, the claimant adds a very substantial amount for his own services in the supervision of construction, preparation of plans and specifications, office overhead and purchase of engines and equipment. These items he estimates as follows: *J. E. Kinney*—$6,200; *L. K. Sweeney*—$6,200; *M. 522*—$3,100 and the *W. D. Sweeney* (for supervision only)—$1,600.

These claims, in my opinion, are grossly exaggerated. There is no evidence as to the actual time spent by the claimant in these operations. The plans and specifications of the first vessel constructed—the *J. E. Kinney*—were

very sketchy and uncomplicated and were prepared at a total cost of $25. My impression is that most of the work regarding the plans and specifications of the three vessels built by Smith and Ruhland was done by them without any separate charge. The Steamship Inspection Department appears to have waived the production of plans and specifications for the *L. K. Sweeney,* the *W. D. Sweeney* and the *M. 522* on the ground that they were identical to those of the *J. E. Kinney.*

The claimant says that while the three vessels built by Smith and Ruhland were under construction he, as owner, visited their yards about once a month to see what progress was being made, to check on construction and to determine what changes, if any, should be made. How necessary these inspections were I do not know, but it is apparent that the claimant had complete confidence in the ability and trustworthiness of Smith and Ruhland, as is shown by the fact that he never felt it necessary to have a written contract with them and gave them new contracts from time to time. The only change he made as a result of these inspection visits was in the construction of the deckhouses.

Then it is stated that the claimant was a shrewd buyer, that he bought the engines and equipment at a minimum price and that he was able to secure priorities; but there is no evidence as to how much, if any, may have been saved by his special ability or exertion.

I believe, however, that some allowance should be made for these services. The type of vessel, while not entirely new, was larger than those previously constructed and I have no doubt the claimant showed some skill in the planning and by his efforts was able to secure good prices and in some cases the necessary priorities. In endeavouring to ascertain the amount which should be allowed I must keep in mind the evidence that the period for which the services extended was approximately twenty-two months, that in the main, they were the same for each vessel, and that the claimant throughout was engaged in many other enterprises—the operation of a marine railway, a ship repair yard and the maintenance and operation of fifteen fishing and freight vessels.

1950

SWEENEY v. THE KING

Cameron J.

There is evidence that in Canada a naval architect might charge 5 per cent of the cost of the construction of a hull. I think that charge, however, is referable to the complete preparation of the plans and specifications of a vessel of a new type and it may also include the complete supervision of all construction.

Taking all these matters into consideration I think that full justice will be done to the claimant if I make a total allowance of $3,000 for all these services and any expenses incidental thereto, that amount to be apportioned as follows: to the *J. E. Kinney*—$1,000; to the *L. K. Sweeney*—$750; to the *W. D. Sweeney*—$750 and to the *M. 522*—$500.

The claimant also claims as part of the cost of construction, interest at 5 per cent per annum up to the date of acquisition of the vessels, on the amounts he had paid out during the course of construction. As a matter of fact no interest was disbursed by him except in regard to the unpaid amounts due to Fairbanks-Morse for the engines. I am inclined to the view that some such allowance should be made as part of the operating expense. The evidence as to the amounts claimed is very meagre and unsatisfactory, but under all the circumstances, I shall dispose of this claim as follows:

(*a*) No further allowance will be made in regard to the *L. K. Sweeney* as the claimant has already been allowed $1,392 for interest in the statement, Ex. 7. That amount, as computed by Sweeney, did include interest beyond the date of acquisition, but on the whole, it represents a fair interest charge for the average outlay made during construction.

(*b*) For the *M. 522,* I shall allow $308.46, as claimed in Ex. 14.

(*c*) For the *J. E. Kinney,* I shall allow the same amount as previously allowed for the *L. K. Sweeney,* namely $1,392.

(*d*) For the *W. D. Sweeney,* I shall allow interest at 5 per cent for ten months (which would be the average time for the construction of such a vessel) on $35,000 (being approximately one-half of the ascertained actual cost), namely $1,458.36.

While the *W. D. Sweeney* was built in the claimant's own yards, I do not think that anything further should be added to its costs, in respect of overhead, supervision or builder's profit. I have fixed its cost at the same figure as that of the *J. E. Kinney,* mainly because of the unsatisfactory evidence adduced by the claimant as to its actual costs. All these items for overhead, supervision and builder's profit were included in the ascertained cost of the *J. E. Kinney.* Had there been satisfactory evidence as to the actual cost of the construction of the *W. D. Sweeney* I would have adopted one or other of the methods followed by W. C. McKay and Sons Limited (shipbuilders of Shelbourne N.S.), as given by Mr. C. McKay. In one method (of which Ex. A. is an example), that company for the construction of a hull on a cost plus basis, charged a fee of $1,500 for the use of its shipyards, plant and machinery, depreciation, wear and tear, plus 10 per cent of the cost. Mr. McKay stated that in pre-war days, on a firm contract for the construction of a hull, his company in executing a contract for $35,000 would expect to make $5,000, which latter amount included overhead. Even if further amounts were allowed on one or other of these bases, the result would not assist the claimant to establish a value for the *W. D. Sweeney* in excess of that already paid him.

Taking into consideration the additional items which I have just referred to, the total cost of the four vessels would respectively be as follows:

Name of Vessel	*Actual Outlay*	*Services Rendered by the Claimant*	*Allowance for Interest*	*Total Cost*
J. E. Kinney	$ 69,370.64	$ 1,000.00	$ 1,392.00	$ 71,762.64
L. K. Sweeney	77,485.40	750.00		78,235.40
M. 522	17,026.15	500.00	308.46	17,834.61
W. D. Sweeney	as fixed: 68,670.64	750.00	1,458.36	70,879.00

The cost of the four vessels having been so ascertained, I now turn to the question of the value of each to the owner.

The claimant for many years had been engaged in the operation of fishing and freight vessels and since 1924 had operated some sixty-five different ships. In 1942, he owned and operated about fifteen. In 1936, he decided to purchase a vessel of larger size than those he had previously

1950

SWEENEY v. THE KING

Cameron J.

used and to use it to carry freight to and from the West Indies and Newfoundland, operating out of Nova Scotia ports. Due to the obsolescence of the old type of three and four-masted schooners, competition was lessening and he says he found the operation very successful. In 1940, he decided to expand these services and he therefore planned to construct three or four more vessels of a somewhat larger capacity and to put them into the same service. The *J. E. Kinney,* immediately following its completion in December 1941, was placed on that run and it was the claimant's intention to use the other three vessels for the same purpose.

He says that with the considerable number of ships at his disposal, the facilities of his repair yard and marine railway, and his long years of experience as a ship operator, he was able to give good service, secure large quantities of freight and that his operations were very successful.

In considering the claimant's own estimate of the value to him of the vessels, I shall keep in mind his admission that he had never sold vessels of this type and size, that he knew of no one else who had done so, that he did not pretend to know what a purchaser would be willing to pay and that he would not express any opinion on the market values except to say that in wartime and due to the war, such prices were fantastic. His estimate of value to him was arrived at by taking the costs to him and by adding an allowance for estimated loss of profits and a further allowance for normal profits on the sale.

In regard to the first item—loss of profits—he says that while he was unable to secure replacements for the four vessels due to war controls and priorities, he estimated that in normal times it would take one year to replace each vessel by constructing a new one. He states that in pre-war years it was normal to make profits which, in four years, would completely reimburse him for the cost of the vessel; and that the ten months operation of the *J. E. Kinney* confirmed him in this opinion. He says, therefore, that his loss of profits for one year would be 25 per cent of the cost of the vessel and that this percentage should be added as part of the value to him for the *J. E. Kinney,* the *L. K. Sweeney* and the *W. D. Sweeney.* For the *M. 522*

which had been six months under construction, but was incomplete, he adds only one half of the allowance he had made for the *L. K. Sweeney*—$10,759.67. To the total so ascertained he adds a further item of 25 per cent thereon for profit on the selling of the ships. He puts the claim in this way:

> I take into consideration the fact that I should have made a profit on the selling of my ship. In other words I did not want to sell my ship just for the sake of the revenue, just for the matter of selling my ship rather than working it for a year. I took it that in a normal case a person wanting to buy my ship, in addition to what I should have been earning with her, should pay something extra that I would have been willing to sell her for . . . and for that I made an allowance of 25 per cent.

The total claimed for one year loss of profit exceeds $80,600, and for profit on sale exceeds $95,200; a grand total of profit of approximately $175,800. That figure represents approximately 75 per cent of the total proven cost of the vessels.

I consider the amount of these claims to be grossly exaggerated and quite fantastic. The evidence is that in 1942 the sale price of vessels may have increased by as much as 50 per cent beyond the prices existing in 1939, and all occasioned by the war. Moreover, I must decline to accept the claimant's evidence as to the profits made by him in pre-war operations or in the operation of the *J. E. Kinney* as indicating that he could expect to have the capital cost returned in four years. Admittedly his statement failed to take into account any allowance whatever for depreciation or income tax. His statement of profits was quite unsupported by documentary proof of any sort, although his records were said to have been readily available. At the request of his counsel he gave his estimate without reference to records or documents. In the absence of any supporting evidence as to his profits, and being of the opinion that throughout the whole of his evidence he was quite willing to exaggerate and pyramid all his costs and estimates wherever it was to his financial advantage to do so, I must decline to accept his statement as to his profits. Moreover, in one or two of the income tax returns referred to at the trial, it was shown that one of his operating companies—the Nova Scotia Shipping Company —in 1938 (and I think also in 1939) operated at a loss. If

1950

SWEENEY v. THE KING

Cameron J.

there were in fact any profits after making due provision for income tax, depreciation, maintenance, insurance and the like, no satisfactory proof thereof has been furnished to me.

He considered the second addition of 25 per cent to be the normal profit that an owner would expect to make. It is nothing more than a guess and the claimant personally gave no evidence which would support such a percentage where the factor of "appreciation due to the war" is eliminated.

Counsel for the claimant submits that Sweeney's evidence as to these additions is corroborated by that of Captain I. W. Horton. I have read the latter's evidence very carefully. Captain Horton was at one time a master mariner and since 1937 has been district manager for Fairbanks-Morse for Nova Scotia. He appears to have owned some diesel power motor ships at one time. His firm supplied the engines for the four vessels and while engaged in their installation he made some inspection of the hulls in a general fashion. He was never engaged in the West Indies shipping trade and had no knowledge of profits made in that service. As a shareholder in a company operating ships, he says that on one occasion he had his capital returned in two years, but that period included one year before and one year during the war. How extensive his holdings were or where the vessel operated is not shown. He explains that that was not always the experience of ship operators in that area, that in many cases owners suffered losses. I think Captain Horton's personal knowledge of the financial success or otherwise as to the operation of freighters in pre-war days was so limited that it would be quite unsafe to draw any general conclusion from the one instance he cited.

My recollection of Captain Horton's evidence is that he had practically no experience or personal knowledge of the sale of ships of this or any other type. However, he was asked his opinion as to the method used by the claimant, that of adding the two items of 25 per cent each to the original cost, and he agreed that he would be inclined to

follow the same lines, *basing that opinion entirely on Sweeney's statement that the latter could recover his capital cost in four years.* He said:

> My idea would be that at the time of the sale, today, I would estimate a profit on the sale of 25 per cent roughly. If I could replace the ship today I would still consider that profit on the absolute sale and the other 25 per cent would be caused by the reason that it would take me approximately a year to build another ship and in that year I would lose revenue.

In cross-examination, Captain Horton said that the out of pocket cost to the owner, plus 25 per cent, would be a reasonable quotation for the selling. A little later he said he was basing that on the return of capital during the war. Finally, when asked his opinion of the value of these four ships, he said:

> I haven't anything particular except that I know the value of the machinery which we quoted on, and I have an idea of the value of the hulls, but I have had no reason to place a figure on it.

It will be seen, therefore, that Captain Horton lacked a general knowledge as to profits, had no experience in regard to the sale of ships, and that in cross-examination, he materially altered his original opinion as to value, and finally declined to place any specific value on any of the vessels. I consider therefore that his evidence on these matters does not in any way corroborate or support that of the claimant. The other two witnesses called by the claimant were not asked to place a value on the vessels.

Before considering the question as to what amount, if any, the claimant may be entitled to, in excess of his costs, I think I should state that in this case, where the vessels were acquired from the original owner, that he is entitled to be paid at least the actual cost to him (less proper depreciation, if any), although to some extent the cost of labour and material may have been increased due to war conditions. In determining the value of properties expropriated, the approach should be one which would not tend to victimise the owner. It is not necessary to consider the effect of the Compensation (Defence) Act, 1940, in cases, where, at the time of acquisition, the property had already changed hands at values which were enhanced due to the war. Here the vessels had not been previously sold, except that in two cases they were transferred to com-

1950

SWEENEY v. THE KING

Cameron J.

panies or corporations in which the claimant had the controlling interest. No ships would have been built privately in wartime had they been liable to acquisition at prices less than the actual cost to the builder.

In the Northumberland Ferries case (*supra*), there were no specific claims for loss of profit or profit on sale. Certain general principles were laid down in that case, however, which are of assistance in reaching a conclusion in this case. Kerwin, J. said at p. 485:

> The shipowner is also entitled to be paid the present value of the vessel (as of a date immediately prior to the outbreak of war), including the future advantages of the ship but only in so far as they help to give it that present value.

and at p. 490, he said:

> Under the Expropriation Act, damage to the owner is relevant and even there it is only in exceptional circumstances that it has been awarded: Cripps on Compensation, 8th Edition, pp. 180 and 181. But over and above that, the proviso in subs. 1 of s. 5 of the Compensation (Defence) Act prevents its application. How can the value of a ship be reinstated when the court is prohibited from giving any effect to appreciation due to the war?

In the same case Hudson, J. at p. 495 said:

> With respect, I am of the opinion that this award failed to give due weight to the cost of the vessel to the respondents. It was acquired only a few months before the war, . . . It is true that the price paid by the owner is not necessarily evidence of its value but, under the circumstances here, it seems to me that apart from the offers and counter offers of the parties it is the only real evidence of value which we have. All else is speculative and more or less influenced by war conditions, and excluded under section 5 of the Compensation (Defence) Act.

Rand, J. stated at p. 505:

> But under the enactment with which we are dealing, it is not a matter of damages generally; compensation, it is true, but the precise measure is prescribed: value to the owner. The replacement cost of the same vessel with a deduction for physical depreciation or obsolescence cannot be said to have no relevancy to market value; but it is simply one of the aggregate of elements that determines price. Estimates of market value should be made by those who, through experience or acquaintance with similar or analogous transactions, are capable of judgments cognate with those of prudent purchasers and susceptible of analysis and exposition; but this, though at times difficult, is scarcely satisfied by a melange of notions crowned with a guess. And, as laid down in *Pastoral Finance Assn. Ltd.* v. *The Minister, supra,* the special value to the owner is not a capitalized value of estimated savings or increased profits; it is an addition to the ordinary market price which a prudent purchaser, contemplating all of the risks and circumstances in which his investment and prospective use are to be placed, would, if necessary, be willing to pay.

Kellock, J. said at pp. 509, 510:

The learned trial judge took the view that the principles applicable are those which have been applied in fixing compensation under section 23 of the Expropriation Act, R.S.C. 1927, chapter 64. Whatever may be the position under the Expropriation Act, it is erroneous, in my opinion, to apply the principles applicable under that Act, to a case arising under The Compensation (Defence) Act, 1940, the provisions of which are not the same but narrower in scope.

. . .

Where the value of the thing taken, whether it be land or other property, is being determined without regard to the question of damages suffered by the owner, over and above the value of the thing taken, as in the case at bar, the matter is governed, in my opinion, by those principles. The owner is entitled to the "value to him" of the property taken, as it existed at the date of the taking. There must be taken into consideration all advantages, present or future, which it possesses for other possible purchasers as well as for the owner himself, but there is to be excluded from consideration any special value to the person exercising the power of compulsory taking where that value exists only for him in connection with the scheme for which the property is taken. I am not intending to do anything more than to epitomize what is found in the authorities to which I have referred, as I understand them. Lord Moulton, in delivering the judgment of the Judicial Committee in *Pastoral Finance Association* v. *The Minister*, (1914) A.C. 1083 at 1088, summed up the matter in this way:

> Probably the most practical form in which the matter can be put is that they (the owners) were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it.

It appears, therefore, that damages, as such, are not recoverable in these proceedings, at least to the extent that such damages would add to the actual "value to the owner" of the property; that the claimant is entitled to the "value to him" of the property taken as it existed at the time of the taking (excluding all appreciation due to the war); and that there must be taken into consideration all advantages, present or future, which the property possesses for other possible purchasers as well as for the owner; and that any special value to the owner is not a capitalized value of estimated savings or increased profits. Market value, while perhaps not always conclusive, I consider to be of great importance.

The evidence establishes that in a favourable seller's market, the owner of a vessel, in considering an offer to purchase, would take into consideration a temporary loss of profit, and if he were the builder of the vessel as well, he would also endeavour to secure something in excess of

1950

SWEENEY v. THE KING

Cameron J.

his actual costs. There is no doubt that in 1942 the market value of practically all types of vessels had been greatly increased due to the unusual demand created by war conditions, and I think that had the claimant's vessels not been taken over he would have been able within a short time after their completion to sell them at a substantial profit. Moreover, with his experience and skill in operating, it is probable that with freight rates greatly increased due to the war, he could have operated them profitably.

But such favourable conditions were brought about by the war and prior thereto they were far different. None of the other witnesses had any experience either before or during the war in the operation or sale of vessels of this particular type and size. But the evidence as a whole indicates that under pre-war conditions, the business of carrying freight in that area was depressed, some shipyards were idle, freight rates were low and while some firms made profit, many others sustained losses. One of the claimant's own witnesses stated that with a subsidy he just about broke even. Another witness said that had the war not brought about increased freight rates, he would have gone "broke." Conditions were then far from favourable.

The witnesses, with varying knowledge and experience, endeavoured as best they could to envisage a theoretical market in which the claimant with all his experience, skill and equipment, was the owner and intending vendor of the vessels, and the market was not affected by the impact of the war. Excluding the claimant's own estimate of "value," which I reject as biased and grossly exaggerated, the highest "value" placed by any of the witnesses was that of Horton who, while declining to name any specific figure for any vessel, was of the opinion that such value would be the costs plus an addition of 25 per cent. His opinion to some extent, however, was based on the return of capital during the war.

Mr. Thomas Barrie, a ship surveyor and appraiser, residing in Boston, Mass., gave evidence for the respondent. He has had wide experience in appraising values for underwriters, but while he knew this type of vessel, his experience with wooden vessels generally was quite limited and he

had no personal knowledge of conditions in Nova Scotia. He said that he would not pay more than the actual cost of a vessel ready to go to sea but which had not had a trial run. He said that in 1939, these vessels would not have sold for more than the actual cost of construction and equipment, but, that included in the cost, there would be some profit to the builder-owner on the sale. He added that in 1939 the delay in replacing a vessel which had been sold would not be a factor in fixing the sale price.

Mr. E. R. Huntingdon, Port Warden and Harbour-master of Sydney, N.S., was at one time a qualified ship's master for all types of vessels and later a ship surveyor for many years. He has had considerable experience in valuing ships and was familiar with this particular type. He said that under pre-war conditions, shipping companies anticipated being able, out of profits, to write-off their capital costs in eighteen years, but that many failed to do so. He would be inclined to pay slightly more than the cost to acquire a new vessel ready for sea, but if it had had no trial run, would make a deduction up to 10 per cent.

Mr. W. S. MacDonald, of Halifax, called by the respondent, has had long experience as a ship broker, ship owner and manager. He had no knowledge of the sale of any new wooden vessels in Nova Scotia during the last twenty years. He operated three and four-masted schooners of about 450 tons capacity, and said that in operating such sail vessels it was anticipated that the cost would be recovered out of profits in ten years, but that in many cases it took much longer. Due to the necessity of repairs and maintenance, wooden vessels such as Sweeney's, could not operate more than ten months in a year.

It will be seen, therefore, that there is not a great deal of evidence which would furnish a clear indication of the value of the individual vessels to the claimant. That is doubtless caused by the fact that this type of vessel was somewhat novel and that very few new vessels, if any, had been sold in Nova Scotia in the last twenty years.

After full consideration of all the facts and doing the best I can with the limited evidence available, I have reached the conclusion that the claimant is entitled to include in the "value to him" not only the actual cost

1950

SWEENEY v. THE KING

Cameron J.

of construction and equipment but something additional by way of a sale-profit on vessels which he had constructed, and a further amount attributable to the fact that he would lose some operating profits, which he was reasonably entitled to believe would accrue to him. In the absence of any specific evidence as to what sale profit a builder-owner would be entitled to receive, or what profits Sweeney could have made under normal conditions, it is not an easy matter to determine just what amounts should be added for these items. I think the answer may be found somewhere between the figure of 25 per cent given by Horton, and the actual costs, or something a little above costs, given by the other witnesses. I have reached the conclusion that the addition of 15 per cent to the actual ascertained costs of construction and equipment would give to the claimant compensation equal to the full "value to him" of the two vessels which were practically completed and ready for sea when taken over—namely, the *L. K. Sweeney* and the *W. D. Sweeney*.

For the *J. E. Kinney* I would add a similar percentage. But that vessel had been in use for ten months and I accept the evidence, that for wooden vessels that is the maximum use to which it could be put in one year. I accept also the evidence that it is common practice when selling vessels, to allow a 10 per cent deduction for depreciation for the first year's use, in normal times. Sweeney himself had given evidence to that effect when he appeared before the Advisory Board, although he altered that opinion before me. For the *J. E. Kinney* therefore, there will be a net addition of 5 per cent to the ascertained cost.

Something less, however, should be allowed for the *M. 522*. Its hull was only partially complete, and I am satisfied that a vendor would not expect to receive, and a purchaser would not expect to pay, very much beyond the actual outlay in such a case. I shall allow in this case an addition of 10 per cent.

I am not overlooking the fact that in the case of the *L. K. Sweeney* or the *W. D. Sweeney* (or perhaps both), there had been no trial run, and the evidence is that in such a case a purchaser would be more wary and inclined to pay less. Sweeney himself said that he had never bought

a vessel which had never had a trial run. But all these vessels were later put in service and there is no evidence that there was any defect disclosed, such as might have been discovered on a trial run. Therefore, under all the circumstances, I make no deduction for that factor.

Adding these percentages to the actual total ascertained cost, the following results appear:

Name of Vessel	*Total Cost*	*Additional Added Value*	*Total Value to Claimant*	*Amount Paid to Claimant*
J. E. Kinney	$71,762.64	$ 3,588.13	$75,350.77	$ 79,881.13
L. K. Sweeney	78,235.40	11,735.31	89,970.71	84,085.40
M. 522	17,834.61	1,783.46	19,618.07	18,276.15
W. D. Sweeney	70,879.00	12,631.85	83,510.85	100,850.06

From the above table it will be seen that for the *J. E. Kinney* and the *W. D. Sweeney,* the claimant has already been paid sums in excess of their total value; and that for the other two vessels the "values" exceed the amounts which have been paid—in the case of the *L. K. Sweeney* by $5,885.31 and the *M. 522* by $1,341.92.

In my opinion it is not open to me to consider the payments as a whole but rather in relation to individual vessels.

There will therefore be judgment declaring that as to the *J. E. Kinney* and the *W. D. Sweeney,* the claimant has already received full compensation and is entitled to nothing further in respect thereof; and that he is entitled to be paid for the *L. K. Sweeney* the additional sum of $5,885.31, with interest at 3 per cent from June 29, 1942, and for the *M. 522,* an additional $1,341.92 with interest at 3 per cent from October 14, 1942.

The amounts which I have found as payable to the claimant constitute but a small fraction of his original claims. Much unnecessary time was taken up at the trial with the presentation of the greatly exaggerated claims put forward by him. Under all the circumstances, I think that the respondent should pay only one-half of the taxed costs of the claimant.

At the trial there was some discussion as to the possibility of the Department of National Revenue asserting a claim for sales tax in connection with these vessels, either against the claimant personally or against his builders,

1950
SWEENEY
v.
THE KING
Cameron J.

Messrs. Smith and Ruhland. At the trial it was stated that no such claims now existed as against the claimant personally and I am now advised that no such claims are now asserted as against Smith and Ruhland. For that reason I have not taken the item of sales tax into consideration.

Judgment accordingly.

1950
Sept 21
1951
Jan 10

BETWEEN:

JOHN AINSLIE JACKSON .....APPELLANT;

AND

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

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, s. 3—"Income"—"Any payment out of any superannuation fund or pension fund or plan"—Judges Act, R.S.C. 1927, c. 105, s. 26, 35—"Pension Plan"—"Retired judge" and "a judge who resigns office" entitled to an annuity under Judges Act—Appeal dismissed.

Appellant resigned from his position of a judge of the District Court of the District of Southern Alberta and by Letters Patent issued shortly thereafter under the provisions of s. 26 and s. 26(*a*) of the Judges Act, R.S.C. 1927, c. 105, was granted a life annuity payable by monthly instalments. He received in the taxation year 1945 the sum of $824.35 from this annuity which, though disclosed in his income tax return for that year, he claimed was exempt from taxation. Respondent added that amount to appellant's taxable income and assessed him accordingly from which assessment he appealed to this Court.

Held: That the payments in question fall within the provisions of s. 3(1) (*c*) of the Income War Tax Act and constitute taxable income in the hands of appellant.

2. That the payments received by appellant are payments "out of any superannuation fund or pension fund or plan" as provided in s. 3(1) (*c*) of the Income War Tax Act.

3. That the right of a judge to an annuity arises from his service in office as a judge and does not depend on whether he was retired compulsorily because of age or resigned voluntarily as provided by the Judges Act and such annuity is taxable income in his hands.

APPEAL under the provisions of the Income War Tax Act.

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

R. T. Jackson for appellant.
W. R. Jacket, K.C. and *F. J. Cross* for respondent.

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

CAMERON, J. now (January 10, 1951) delivered the following judgment:

This is an appeal from an assessment to income tax for the taxation year 1945. The only matter in dispute is whether the sum of $824.35 received in that year by the appellant under certain Letters Patent of the Dominion of Canada, dated October 2, 1945, is taxable under the Income War Tax Act, R.S.C. 1927, c. 97, and amendments thereto.

On March 19, 1913, the appellant was appointed judge of the District Court of the District of Lethbridge, Alberta, (Ex. 1 is a certified copy of his commission). He continued to be a judge of that court until August 3, 1935, when, upon the reorganization of the District Courts of Alberta, he was appointed a judge of the District Court of the District of Southern Alberta (Ex. 2). On June 1, 1945, he wrote to the Governor General of Canada (Ex. 4) as follows:

> Pursuant to the provisions of Section 26 and Amendments of Chapter 105 R.S.C. 1927 I hereby resign my office of Judge of the District Court in the Province of Alberta as of July 1, 1945, after more than thirty-two years of service in that Office.

On October 2, 1945, by Letters Patent (Ex. 3) the appellant, under the provisions of section 26 and section 26A of the Judges Act, was granted a life annuity of $3,333.33, payable by monthly instalments out of the Consolidated Revenue Fund of Canada. In the taxation year 1945 the appellant received $824.35 from this annuity and, while he disclosed the receipt of that sum in a schedule attached to his income tax return, he considered it to be exempt from tax and therefore did not include it in his taxable

1950

JACKSON v. MINISTER OF NATIONAL REVENUE

Cameron J.

income. The respondent, however, added that amount to his taxable income and assessed him accordingly. From that assessment an appeal is now taken.

The section of the Judges Act under which the appellant was entitled to resign and did resign, and under which the annuity was granted to him, was, in 1945, as follows:

> 26. Every judge of a county court or of the circuit court of the District of Montreal who has attained the age of seventy-five years shall be compulsorily retired, and any judge of either of the said courts who has continued in office for a period of thirty years or upwards may resign his office; and to any judge who is so retired, or who so resigns, His Majesty may grant an annuity equal to the salary of the office held by him at the time of his retirement or resignation.
>
> 2. The annuity in either of the cases mentioned in this section shall commence immediately after the judge's retirement or resignation, and continue henceforth during his natural life.

Counsel for the appellant submits that the Judges Act (particularly section 26) makes a distinction between judges who have been *retired* upon reaching the age of seventy-five years and those who have *resigned,* like the appellant. He says that a judge who has been *retired* may still quite properly be referred to as a judge—or a retired judge—and that even after his retirement such a judge retains certain powers and may be called upon to again perform the duties of a judge as provided for in section 35 of the Act, which is as follows:

> 35. Any retired county court judge of a province may hold any court or perform any other duty of a county court judge in any county or district of the province on being authorized so to do by an order of the Governor in Council, made at the request of the Lieutenant-Governor of such province; and such retired judge while acting in pursuance of such order shall be deemed to be a judge of the county or district in which he acts in pursuance of the order, and shall have all the powers of such judge. R.S., c. 138, s. 32.

He submits, however, that that is not the case with a judge who has *resigned* under section 26(1); that upon his resignation he ceased in every respect to be a judge, had no powers, duties, rights or responsibilities as a judge; and that not being "a retired judge" he could not be called upon to perform any duties of any sort under section 35, after his resignation. Then he says it must follow that the annuity provided for "judges" in section 26 and "the retiring allowances or annuities of the judges" which are payable out of the Consolidated Revenue Fund of Canada

(section 29(1)) are limited to those judges who have *retired*; that the appellant having resigned on June 1, 1945, had no statutory right to the grant of an annuity and that the annuity granted to him by the Letters Patent of October 2, 1945, was granted to him in his personal capacity, the moneys received by him thereunder being—as his counsel puts it—

> they are a matter of largesse from a benevolent Monarch, completely independent of contract, completely independent of any obligation whatsoever, and completely independent of any right. They are granted pursuant to a permissive discretion and the annuity is granted to John Ainslie Jackson personally—to the person.

Such payments, he submits, are not taxable under any of the provisions of the Income War Tax Act as it was in 1945. He relies on the judgment of MacLean, J. in the case of *Fullerton* v. *Minister of National Revenue* (1), to which reference will later be made.

I cannot agree with the interpretation which counsel for the appellant seeks to place upon section 26. In my view, that section is clear and unambiguous. It provides for the termination of office of the named judges in two ways: (*a*) by compulsory retirement upon reaching the age of seventy-five years; and (*b*) by voluntary resignation where service has continued for thirty years or more. Then provision is made for payment of an annuity which is the same in either case. The section does not in any way attempt to define the status of the individuals concerned *after* they have been retired or have resigned, and there was no need to do so. The whole purport of the section was to require the withdrawal from office of such judges as had attained seventy-five years of age and to permit others who had been in service for thirty years or more (and were still under seventy-five years of age) to withdraw voluntarily from office should they desire to do so, and in either case to provide a pension or annuity. I have no doubt whatever that Parliament in enacting section 26 intended to confer the same right to an annuity on judges who had attained the age of seventy-five years and were retired compulsorily, as upon other judges who had given thirty years' service or over and who voluntarily resigned. The appellant herein at the time of his resignation was a judge of a district

(1) (1939) Ex. C.R. 13.

1950

JACKSON
v.
MINISTER
OF
NATIONAL
REVENUE

Cameron J.

court and therefore, being "a judge . . . who so resigns," became entitled to the same annuity as a "judge who is so retired." The right to the annuity arises from his service in office as a judge and does not depend in any way upon the question as to whether or not he was entitled to the designation of "judge" *after* his resignation.

As I have stated above, appellant's counsel relies on the *Fullerton* case. There it was held that a lump sum payment made by the Canadian National Railways to the appellant after the termination of his office as Chairman of the Board of Trustees of the railways was not an annual net profit or gain or gratuity directly or indirectly received from any office or employment but was a gratuity, personal to Mr. Fullerton, paid to him because he was no longer in office and because of the cessation of his office more than two years before the end of the period for which he was appointed, and was, therefore, not subject to income tax.

That case, in my opinion, is not of assistance to the appellant. There it was sought unsuccessfully to bring the moneys paid to Mr. Fullerton—a lump sum payment—within "the annual net profit or gain or gratuity received from any office or employment." But that is not the case here. It may be noted, also, that the effect of the decision in the *Fullerton* case appears to have been nullified by the introduction of s.s. (8) of section 3 in 1945, which specifically taxed amounts received for loss of office after October 13, 1945, to the extent of one-fifth each year.

In giving his decision on the appeal herein, the respondent affirmed the assessment—

as having been made in accordance with the provisions of the Act and in particular on the ground that the taxpayer has been assessed in accordance with the provisions of subpara. (iv) of para. (*d*) of subsec. (1) of sec. 3 of the Act.

At the hearing, however, counsel for the respondent conceded that the payments made to the appellant would not properly come within "the salaries, indemnities or other remuneration of any judge . . ." as provided by section 3(1) (*d*) (iv). He relied, however, on the general provisions of section 3(1) and particularly on subsection (*c*).

3. "Income"—1. For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of

computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be whether derived from sources within Canada or elsewhere; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source including

(c) any payment out of any superannuation or pension fund or plan: provided, however, that in the case of a lump sum payment out of any such fund or plan which is paid upon the death, withdrawal or retirement from employment of any employee or former employee in full satisfaction of all his rights in any such fund or plan, one-third only of such lump sum payment shall be deemed to be income.

The proviso to s.s. (c) is here of no importance. I have no doubt whatever that the payments received by the appellant fall within the opening words of s.s. (c)—"Any payment out of any superannuation fund or pension fund or plan"—and therefore constituted taxable income in his hands. In the sense in which the two words "superannuation" and "pension" are here used, I do not think it is necessary in this case to draw any distinction between them. The Shorter Oxford English Dictionary (Third Edition) defines "to superannuate" as "to dismiss or discharge from office on account of age; esp. to cause to retire from service on a pension; to pension off"; and "pension" is defined as "an annuity or other periodical payment made, esp. by a government, a company, or an employer of labour, in consideration of past services or of the relinquishment of rights, claims, or emoluments."

An examination of the Letters Patent (Ex. 3) establishes beyond any question that the annuity therein granted to the appellant falls within the above definition of a pension. It provides for payments of an annual amount payable in monthly instalments. It recites the past services of the appellant in his office as District Judge for thirty years and upwards and refers to section 26 of the Judges Act as the authority for granting the annuity upon resignation. Had the services not been rendered there would have been no authorization for the payment of any annuity under section 26.

1950

JACKSON v. MINISTER OF NATIONAL REVENUE

Cameron J.

The payments also were made in accordance with a pension plan. "Plan" is merely a "scheme of action, project, design; the way in which it is proposed to carry out some proceeding," (Shorter Oxford English Dictionary, Third Edition). The Judges Act provided such a scheme or plan for all judges who retired or resigned, varying with the time of appointment, the length of service and the court in which the particular judge had held office, and other matters.

I find, therefore, that the payments in question fall within the provisions of section 3(1) (*c*) of the Act and constituted taxable income in the hands of the appellant.

At the time of the appellant's appointment to office in 1913 the salaries and retiring allowances or annuities of judges were payable "free and clear of all taxes and deductions whatsoever imposed under any Act of the Parliament of Canada" (R.S.C. (1906) c. 138, section 27(3)). In 1917 the Income War Tax Act was enacted. In 1920 the Judges Act was amended by ch. 56-10-11 Geo. V.—and by section 11 thereof the provisions of section 27(3) as to taxes and deductions were thereafter held to be inapplicable to any judge whose salary was increased by ch. 59 of the Statutes of 1919 or by the Act of 1920, and who accepted such increase. It was further declared thereby that as to such judges, their salaries, retiring allowances and annuities "shall be taxable and subject to the taxes imposed by the Income War Tax Act, 1917, and the amendments thereto." It is admitted that the appellant did receive and accept an increase in salary under the Act of 1919. Thereafter, his salary and retiring allowance or annuity were no longer exempt from the provisions of the Income War Tax Act, the statutory exemption in his case having been removed.

It is of some interest, also, to note that in the definition of "earned income" in section 2(*m*) of the Income War Tax Act, "pensions, superannuation allowances, retiring allowances, gratuities and honoraria" are included. While this definition is for the purpose of distinguishing "earned income" and "investment income" under the provisions relating to surtax on investment income, it does indicate

1950

JACKSON v. MINISTER OF NATIONAL REVENUE

Cameron J.

in a general way that pensions and retiring allowances are to be considered as a form of income unless, of course, they be exempted under specific provisions of the Act.

In my opinion, therefore, the appeal must fail. The assessment will be affirmed and the appeal dismissed with costs.

Judgment accordingly.

1949

June 25, 27, 28, 29 and 30

1951

Jan. 3

BETWEEN:

HIS MAJESTY THE KING.....PLAINTIFF;

AND

CHARLES E. MacCULLOCH and THE EASTERN TRUST COMPANY, ... } DEFENDANTS.

Expropriation—Injurious affection—Severance—Loss due to anticipated user of expropriated land—Value of undeveloped building lots not in excess of land taken as acreage.

The Crown in 1946 expropriated land owned by defendants for the purpose of enlarging the Royal Canadian Naval Magazine near Bedford, Nova Scotia. The defendants claim compensation for the value of the land taken, for damages for severance and injurious affection to the remaining land owned by them. Defendant M. in May 1944, had purchased a residence property paying therefor a considerable sum of money and expending a larger amount of money for improvements. For the purpose of protecting this investment, by preventing the construction of any low-class housing, he purchased in 1945 more property adjacent thereto. He also purchased other lands in the vicinity referred to as the Eaglewood and Golf Club properties, the Eaglewood property being shown on a plan as partly in lots. In the expropriation proceedings the Crown acquired parts of both these properties from the defendants. With the exception of the residence property, M. did nothing to develop or improve any of the property acquired by him and except for 10 acres of the Golf Club property, which had been cleared and levelled in part and which was not expropriated, there were no improvements on these properties. From a practical point of view the property at the time of expropriation was completely undeveloped, lacking all roads, electricity and water supply. It was unproductive and totally unsuited for farming purposes. The trees on it had little or no commercial value. M. intended at a later date to develop the property by laying it out in building lots, constructing roads and disposing of the lands in such a way to ensure that any houses he erected thereon would be in keeping with a nearby high class residential district.

1951

THE KING
v.
MACCULLOCH

Cameron J.

Held: That the surveyed land had no value in excess of the rest of the property taken as acreage since they were completely undeveloped, lacked all facilities, were a considerable distance from water and were quite indistinguishable from the rest of the property.

2. That since nothing had been done to implement the proposed scheme of developing the property by subdividing it into building lots and the outcome of such a plan being highly problematical, relatively little should be added to the value of the land on this count.

3. That defendants are entitled to some allowance for injurious affection both for severance and for possible loss in sale value of some of the property retained due to the use to which the expropriated parts might be put as a magazine; the loss due to severance being occasioned by the fact that a road which M. had planned to construct on the southern end of the subdivision could not now be constructed as it was to have been built on the lands taken and due to an escarpment could not now be constructed at all.

4. That apart from the loss sustained by severance, the compensation to which the defendants may be entitled for injurious affection must be limited to the mischief which may arise from the anticipated use of the properties taken from them; that the danger to be anticipated from an explosion from the magazine existed at the time M. purchased the properties and for such hazard then existing he is not entitled to any compensation.

INFORMATION exhibited by the Deputy Minister of Justice to have the value of land expropriated by the Crown determined by the Court.

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

W. C. Dunlop, K.C., L. A. Kitz and *A. J. MacLeod* for plaintiff.

F. D. Smith, K.C. and *R. M. Fielding, K.C.* for defendants.

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

CAMERON J. now (January 3, 1951) delivered the following judgment:—

The Information exhibited herein shows that certain lands owned by the defendants were taken by His Majesty, for the purpose of a public work of Canada under The Expropriation Act, R.S.C. 1927, ch. 64, s. 9, by depositing

of record a plan and description thereof in the office of the Registrar of Deeds for Halifax County on September 13, 1946, as Expropriation No. 750 (Ex. 1). That expropriation included lands other than those of the defendants. Later, a small part of the lands owned by the defendants and originally included in the expropriation were abandoned by Notice of Abandonment filed in the said Registry Office on January 27, 1948, as No. 768 (Ex. 2), Parcel A shown on the plan attached thereto being released to the defendant MacCulloch. No claim is made in respect of the portion so expropriated and subsequently released. Para. 3 of the Information sets out the legal description of the properties which now remain vested in the plaintiff as the result of the said expropriation, and the title to which was formerly in the defendants.

The parties have been unable to agree upon the amount of compensation money to which the defendants are entitled. By the Information the plaintiff offered the sum of $12,523.00 in full satisfaction of all claims of the defendants, including the value of the land taken and any loss or damage suffered by the defendants by reason of the said expropriation, or any loss they might sustain by reason of any use to which the property might be put. The defendants were permitted at the trial to amend para. 2 of the Statement of Defence and as so amended they claim the sum of $49,275.00 as fair compensation for the value of the lands taken, for damages for severance and injurious affection to the land remaining, particulars of which will be given later.

For many years the Crown has owned and used what is known as the Royal Canadian Naval Magazine near Bedford, Nova Scotia. The property, which is several miles long, lies on the northeast side of Bedford Basin and extended from the water's edge to and across the main road leading from Bedford to Dartmouth. An explosion occurred there in 1945 and in 1946 it was decided to acquire an additional 1,300 acres to the north, the lands now in question being a portion thereof.

In view of the nature of the defendants' claims it is necessary to describe both the properties taken and those retained and their location in regard to the magazine area.

1951

THE KING v. MACCULLOCH

Cameron J.

Unfortunately, the only composite plan filed (Ex. D) is admittedly inaccurate in some details and it was admitted for informative purposes only. However, I find it convenient to refer to that plan in attempting an outline of the properties now in question. For purposes of clarity in description I have quite arbitrarily marked the left side of that plan as "north". When referring to Ex. D it must be kept in mind that while it shows lots 1 to 119 according to the Eaglewood Plan (Ex. 3) which will later be referred to, the unnumbered lots penciled thereon were never shown on any plan; and that lots 86 to 99 are much larger than shown there. The fence marked "Magazine Fence," and which runs east and west, was approximately the original northern limit of the magazine. North thereof were the large blocks marked "Curren" and "Harris," both of which were between MacCulloch's property and the magazine and all of which were expropriated at the same time as the defendants' land.

The layout of the properties will be best appreciated by describing in detail the various purchases made by MacCulloch.

In 1916 the Bedford Land Company laid out a plan of Eaglewood Subdivision, all as shown on Ex. 3. In May, 1944, MacCulloch for $16,500.00 purchased the former Winfield residence located on Parker's Cove and comprising lots 3, 4, 5 and 6, and parts of lots 2 and 7 of the Eaglewood Plan. This property will later be referred to as the residence property. About $17,000.00 was expended in repairs and improvements and it is not disputed that the residence property with those lots was worth approximately $35,000 at the date of expropriation. MacCulloch considered it advisable to protect his substantial investment by securing adjacent property and in November, 1944, he purchased lots 30, 31, 32 and 33 for $2,000.00, and parts of lots 28 and 29 for $700.00. With the exception of parts of lots 32 and 33 sold to his brother, he is still the owner of all these lots.

On October 15, 1945, he acquired a large proportion of the remaining part of the Eaglewood Subdivision for $8,225.00. This part I have outlined in red on Ex. D and in doing so I have attempted to follow the description

given by MacCulloch. The boundaries are not in all cases precise, and from it there must be excluded those parts of lots 32 and 33 sold to MacCulloch's brother, and possibly one other lot. I do not think the acreage of this area was ever determined by a survey but MacCuloch indicated that it totalled 140 acres, and together with lots 28 to 33 totalled about 150 acres. I shall refer to this large purchase as the Eaglewood property, and will assume that its area was 140 acres.

In 1945 MacCulloch took steps to acquire lands to the east of the Eaglewood property and which was formerly known as the Bedford Golf and Country Club property. As shown on Ex. D it lay north of the Harris property and extended to and possibly beyond the 20 foot road shown running east and west at the extreme left centre of Ex. D. It is agreed that this property—which I shall call the Golf Club property—consisted of a dilapidated clubhouse of little or no value and 87 acres of land of which 10 acres only had been cleared. MacCulloch acquired an undivided one-third interest in this property for $1,500.00 and later, it is said, entered into certain arrangements to purchase the remaining two-thirds interest for $11,700.00. I shall have occasion later to refer to these negotiations for the purchase of the two-thirds interest therein.

In this expropriation the Crown acquired from the defendants parts of both the Eaglewood and Golf Club properties. Of the latter they acquired 27·6 acres as shown on Ex. D, that part being marked "Charles MacCulloch—Bedford Golf and Country Club." They also acquired all that part of the Eaglewood property lying between the Golf Club property so taken and Bedford Basin, as enclosed in black lines on the plan; but of this parcel MacCulloch owned only to the strip marked "road." There is some uncertainty as to the acreage contained in this Eaglewood portion so taken.

On Ex. 4 it is shown as 65·8 acres but it is not clear as to whether this acreage includes the 15 surveyed lots, each about 1 acre in extent. Other evidence suggested that it was 59 acres, plus 15 acres contained in the surveyed lots. My recollection is that there was general agreement that

1951

THE KING
v.
MACCULLOCH

Cameron J.

the part of Eaglewood so taken from the defendants was 76 acres, including the surveyed lots. In all, therefore, the Crown acquired from the defendants 103·6 acres, of which 27·6 acres were in the Golf Club property and 76 acres were in Eaglewood.

There is also some confusion in regard to the total acreage retained by the defendants. MacCulloch says that, excluding the lots purchased with his residence, he bought 150 acres of Eaglewood property (which includes lots 28 to 33—p. 69 of the evidence) and it is admitted that the total Golf Club property comprised 87 acres—a total of 237 acres. The parts acquired by the Crown totalling 103·6 acres, it would follow that the defendants retained 133·4 acres, not 150 acres as suggested by MacCulloch. This conclusion may not be precisely correct, but inasmuch as the acreage was never ascertained by a survey, I have had to accept the oral evidence on this point.

I think it is agreed, also, that prior to the expropriation the southerly boundary of the Eaglewood and Golf Club properties was distant 2,100 feet from the north limit of the magazine; and that following the expropriation MacCulloch's residence was 2,400 feet from the nearest point of the magazine property.

I turn now to a more general description of the area and the nature of the terrain. Bedford Village is located on Bedford Basin about 10 miles from Halifax with which it is connected by a main provincial highway. A side road leads from Bedford to the bridge at Parker's Cove, shown on Ex. 3, and beyond that bridge lies Eaglewood Subdivision. The immediate area on each side of the bridge is very desirable property and there are a number of very fine homes, some of which are occupied only in the summer, but in other cases for the entire year. It is not seriously disputed that the small group of houses there constitutes one of the most attractive residential areas in the Halifax district. They have many advantages such as their location on or close to the waters of Bedford Basin, close to but not on a main highway, low taxes, a supply of electric power, a good road leading to Bedford Village about one-quarter of a mile away, with access to the shops there, and within thirty minutes' motoring distance of Halifax.

1951

THE KING v. MACCULLOCH

Cameron J.

But while that particular area may quite properly be described as exclusive and desirable and the building lots there of considerable value, the same cannot be said of the remaining parts of the properties purchased by MacCulloch. The main reason for that distinction is that the remaining parts are totally inaccessible due to the lack of roads. Ex. 3—the Eaglewood Park Subdivision—was laid out in 1916 but the "road" marked on the plan is non-existent beyond lot 23 at the end of Long Cove. There are no markings on the ground indicating the lot boundaries. The only lots provided for on the plan were those fronting on the water or on the far side of the "road", the balance remaining unsubdivided. None of the golf property was at any time subdivided. With the exception of two or three summer cottages on property not owned by the defendants, no buildings had been erected on any of the property except in the immediate vicinity of Parker's Cove Bridge. So far as the defendants' lands are concerned, only one lot had been sold, namely, parts of lots 32 and 33. Excluding his residence property, MacCulloch, from the time of his various purchases, did nothing to open up or improve any of the property so acquired; and when he did acquire them there were no improvements whatever except that about 10 acres of the Golf Club property had been cleared and levelled in part.

Accompanied by counsel for both parties I made an inspection of the premises, but due to the nature of the terrain this inspection was of somewhat limited extent. Prior to the expropriation the entire property (excluding the residence) was heavily wooded except for 10 acres on the Golf Club property which had been cleared, the trees being of little or no commercial value. From the rear of MacCulloch's residence the land rises steeply to the east, culminating in Eagle Rock at a height of about 250 feet at the point where "Eagle Rock" is shown on Ex. D, and then falling to the east and south. In addition to the Eagle Rock Ridge, which is totally unfit for building purposes and which is said to be over 200 feet wide, there are several other cliffs and escarpments running through the area with gulleys and marsh in some places. The whole of the property is extremely rough and uneven and much of it is

1951

THE KING v. MACCULLOCH

Cameron J.

covered with heavy boulders, many of which could only be removed by blasting. Substantial parts of it are so uneven that they could never be used as building lots under any circumstances. From a practical point of view, the property at the time of expropriation was completely undeveloped, lacking all roads, electricity and water supply.

Exs. E and C are two aerial photographs which were admitted for general purposes only but not as defining precisely the defendants' properties. On Ex. C the lands enclosed within the white lines indicate roughly all the lands owned by the defendants prior to expropriation; the red line shows the new northern boundary of the magazine property after expropriation; and that part of the property within the white lines and above the red line show the property expropriated from the defendants. I have marked thereon the location of Parker's Cove and MacCulloch's residence. The former magazine property is shown in part at the top right corner of Ex. C. On Ex. E the white lines show approximately the original east and south boundaries of the defendants' property, and the red line indicates the new northern boundary of the magazine property after the expropriation. Both exhibits were made in 1949. It is to be noted that the road running south-east from the rear of MacCulloch's residence and which is shown in a central position on Ex. C, was constructed by MacCulloch in 1949.

Turning now to the matter of compensation I shall consider first the amount to be awarded for the 103·6 acres taken by the Crown. The principles to be followed have been laid down in many cases. They are summarized in the judgment of Locke J. in *Diggon-Hibben Ltd.* v. *The King*, (1), where at p. 724 he states:—

> The principle to be followed in determining the compensation to be paid to an owner whose property is compulsorily taken cannot be more briefly or clearly expressed than in the judgments of the Judicial Committee in *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (1914) A.C. 569, and in *Pastoral Finance Association* v. *The Minister*, (1914) A.C. 1083. It is the value to the owner as it existed at the date of the taking and not the value to the taker which is to be determined. That value consists in all advantages which the land possesses, present or future, and it is their present value that is to be determined. As stated by Lord Moulton in the *Pastoral Finance* case (supra), probably the most practical form in which the matter can be put is that the owner is entitled to be paid what a prudent man in his position would

(1) (1949) S.C.R. 712.

have been willing to pay for the land sooner than fail to obtain it. This formula was applied by Duff J. in *Lake Erie and Northern Railway Company* v. *Bradford and Galt Golf and Country Club*, (1917) 32 D.L.R. 219, 229, and has been consistently followed in the decisions of this Court.

In Nichols on Eminent Domain, 2nd Edition, p. 665, the author states:—

> 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.

In *The King* v. *Elgin Realty Co. Ltd.*, (1), Taschereau, J., after referring to the principles which had been followed by the President of this Court, said at p. 52:—

> All these various factors were examined in view of giving to the property its value at the time of the expropriation. And as to the postponed value of the property over its present market value, the President said that it was:
>
> 'the present worth of that postponed value that is to enter into the computation of the compensation to be awarded.'

He also said:—

> I do not mean to say that the defendant, by reason of the special adaptability of its property for particular purposes on account of its size, shape and location, is thereby entitled to a hypothetical or speculative value which has no real existence, and therefore any remote future value must be adequately discounted.
>
> I believe that this is an accurate statement of the law, for the value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined. The future advantages, therefore, may be taken into account in determining the value of the property, but in so far only as they may help to give to the property its present value. (*Cedars Rapids Manufacturing and Power Co.* v. *Lacoste et al.*, (1914) A.C. 569, at 576.)

Now the property acquired was completely unproductive. It was totally unsuited for farming purposes and the trees thereon had little or no commercial value. MacCulloch's immediate purpose in acquiring it was to protect the large investment he had made in his residence property by preventing the construction of any low class housing. But he also had in mind the possibility at some later date of

(1) (1943) S.C.R. 49.

1951

THE KING v. MACCULLOCH

Cameron J.

developing the property by laying it out in building lots, constructing roads, and then disposing of the lots in such a way to ensure that any houses erected thereon would be of a superior type and in keeping with the residences at Parker's Cove. He said that eventually he thought that when the time became opportune he would develop it as he had other lands. In his opinion this was the most advantageous use to which the property could be put. He felt that with the ample means at his disposal, with his equipment for road building and the experience he had gained in promoting other residential subdivisions, such a scheme would be profitable, particularly as he was also interested in the sale of lumber and building supplies. He did not plan to do anything about the matter until he could develop the area to his own satisfaction as it cost but little to carry it; and, in fact, he did nothing whatever to improve the property in any way between the time of its acquisition and the date of expropriation.

For the expropriated property the defendants' claims are as follows:—

(*a*) 15 surveyed one-acre lots (being lots 86 to 99 plus 1 adjacent lot)	$ 12,000 00
(*b*) 59 acres in Eaglewood Subdivision at $225.00 per acre	13,275 00
(*c*) 27·6 acres in the Golf Club property at approximately $250.00 per acre	7,000 00
	$32,275 00

In support of these claims the defendants relied mainly on the evidence of J. G. DeWolf and Samuel Butler, both of whom have been engaged for over thirty years in Halifax as realtors. Both of these valuators considered first the value to be placed on the surveyed lots which were expropriated, namely, lots 86 to 99. These lots as shown on the Eaglewood Plan contained approximately one acre each. They thought that they could conveniently be sold in lots of one-half acre each, or 30 lots in all. They considered the value of these lots as quite distinct and separate from the remaining acreage which was taken. DeWolf placed a value of $400.00 on each of the 30 lots, which on an acreage basis, would be $800.00 per acre. From that he

made a deduction for grading the roads in front of the lots, thereby reducing the value to $300.00 per lot or $600.00 per acre, a net value of all 30 lots of $9,000.00. Butler valued each of the 30 half-acre lots at $500.00 and after making an allowance for road building placed a value in all of $11,250.00 on the 30 lots, or $375.00 each. Neither one made any deduction for the area which would be taken for the new road which would have had to be built when the acre lots were subdivided, or the cost of any roads leading from these lots to any existing highway or for any lots which might be totally unsuited for building purposes. Neither one in my opinion had any clear idea of the nature of the terrain or how many saleable lots could be produced, or any fair estimate of the cost of development. DeWolf said his inspection was casual, that he got a general idea and nothing more. He said that he did not view it lot by lot or even acre by acre, and that when he looked over the property he was never sure where he was, and that he was never closer than 1,500 feet to some parts. Butler was on the property but once and viewed it only from the top of the new road built by MacCulloch in 1949, and later from the magazine property, taking in all but two or three hours to make his inspection.

On the whole of the evidence I must entirely reject the suggestion that the surveyed lots had any value in excess of the rest of the property taken as acreage. They were shown on the Eaglewood Plan as lots but that gave them no additional value whatever. They were completely undeveloped, lacked all facilities and were quite indistinguishable from the rest of the property. The evidence is that except for the small part of the Golf Club property which had been cleared (but which was not expropriated), all the rest of the property expropriated and retained was of much the same general type. MacCulloch when asked to compare the terrain of the Golf Club property with other lands in that area said that it was very similar and that the area of the Golf Club property taken was of the same general description as the adjacent land, and all wooded. The other evidence amply confirmed that opinion. DeWolf in estimating the value of the expropriated property on the assumption that it could all be divided into

1951

THE KING
v.
MACCULLOCH

Cameron J.

half-acre lots, gave to each of such lots the same value as he had previously given for the surveyed lots. I am of the opinion, therefore, that no special value should be attributed to the surveyed lots; they were not on the water but a distance of 700 to 1,100 feet therefrom. I propose, therefore, to treat them as acreage and as of the same average value as the rest of the property expropriated and retained. The valuators for the Crown, Messrs. Clarke, Gladwyn & McIntosh, all valued the expropriated property on an acreage basis and I think they were right in so doing.

The claim of the defendants for the 103·6 acres expropriated totals $32,275.00, or an average of $310.00 per acre. DeWolf made his estimate of value in two ways. After allowing $9,000.00 as the net value for the surveyed lots, he placed a value of $225.00 per acre (or $19,485.00 in all) on the remaining part—a total of $28,485.00. Assuming, however, that the 86·6 acres could be subdivided into half acre lots, and after making certain deduction for the part taken for roads and the cost of grading, he estimated that these lots could be sold at $400.00 each—a total of $43,250.00. Adding to that figure $9,000.00 for the value of the surveyed lots, he valued the whole of the property taken when subdivided into lots at $52,250.00—*an average of $500.00 per acre.* Butler gave a valuation of $22,750.00 for the 86 acres when subdivided into lots, and adding to that his value of $11,250.00 for the surveyed lots, estimated that the whole of the property taken was worth $34,000.00 or *an average of $265.00 per acre.* It will be seen, therefore, that even among the expert witnesses called for the defendants there is a very substantial difference of opinion as to the value of the property taken. MacCulloch values it at $310.00 per acre. Butler gave an average valuation of $265.00 per acre, while DeWolf, using the same basis, gave a figure of about twice that amount, namely, $500.00 per acre. But the difference of opinion is not at all surprising under all the circumstances. As I have said, both DeWolf and Butler lacked an intimate knowledge of the property itself. They were endeavouring as best they could to envisage a subdivision which had never been laid out and the nature of which they could but guess at. Until a careful and accurate survey was made there could be no

certainty as to the number of lots that would be suitable for building lots, or the length and cost of the roads that would have to be constructed before any sales could be made. Some of these essential matters were estimated in a very rough and incomplete manner and others were entirely overlooked. DeWolf, for example, in estimating the value of the property taken, made no allowance whatever for unsuitable lots or for the area to be taken for roads in the subdivided surveyed lots. But, as to the damages sustained to the property retained by the defendants (of substantially the same type) he conceded that the allowance for road space and unsuitable lots would be 50 per cent. of the whole. Again, in cross examination, he reduced his first estimate of $300.00 per half acre lot to $175.00 after making an allowance for the area for roads, cost of surveys, etc. Moreover, he admitted that he had never sold any property of this type; and that he had no knowledge of the sale of a block of 100 acres covered with trees, where there was no road or water, at a price of $225.00 per acre or anything approaching that figure. Butler admitted that he had had no sales in or near Bedford for a great many years and could not say whether property there was increasing or decreasing in value.

Under the circumstances, I do not feel that I can accept their evidence as of any material assistance in arriving at a conclusion as to the value of the property taken. I have no doubt whatever that in areas concerning which they have a precise knowledge, their opinions as to value would be very helpful, but in this case that knowledge was very incomplete.

As I have noted above, Messrs. Clarke, Gladwyn & McIntosh gave evidence for the Crown. Mr. Clarke is president of the Nova Scotia Trust Company, which company was appointed agent by the Crown to complete the purchase of all expropriated property. While he has had very considerable experience in real estate values in Halifax, he lacked all knowledge of sales of land of this particular type in the Bedford area. He based his value of $100.00 per acre entirely on purchases which he negotiated for the Crown in the other properties expropriated. Mr. Gladwyn has been a realtor in Halifax for thirty years and has had

1951

THE KING v. MACCULLOCH

Cameron J.

very extensive experience in selling and buying all types of property. He has acted as agent for W. D. Piercey who is engaged in the development of new subdivisions as well as in handling builders' supplies. On his behalf, early in 1946 Gladwyn purchased the Crossley property, comprising 300 acres, for $9,000.00, that property lying on the Bedford-Halifax Road directly across the Bedford Basin from the magazine area and having a substantial water front. It was about the same general type of property as that of the defendants. Mr. Gladwyn was engaged with Mr. Clarke in settling claims arising out of the general expropriation, spending about five months in all thereon and going over all the property very thoroughly. While he considered that some parts were better than others, he valued it throughout at $100.00 per acre, both for the part expropriated and that retained. He considered that a good price but was of the opinion that no one could be found who would pay that amount for it, nor would he recommend it to a client as a good investment at that figure. He considered the Harris property to the south to be more valuable. He made his estimate on the basis of his knowledge of what other acreage in the area would sell for.

Mr. C. W. McIntosh, the owner of Acadia Realtors, has been in the real estate business for about thirty years and has had a considerable number of sales in the Bedford area. He inspected the property shortly before the trial and valued the Golf Club property throughout at $100.00 per acre; that of the Eaglewood property taken at $75.00 per acre; and that of the Eaglewood property retained at $100.00 per acre. He expressed the view that when MacCulloch purchased the Golf Club property of 87 acres in October, 1945, for $8,225.00, that was a fair price and represented a proper valuation of the property at that time.

Much of the remaining evidence as to value had to do with sales of small parcels of land in Halifax and the surrounding area, but in my opinion this evidence is of little help in determining the value of the large area here expropriated. In some of those cases the lots were on desirable shore locations; some were on good roads and with electricity available and others were in built-up areas

with all services available. But sale values of those lots bears no relation to the value of the substantial area here taken and which was completely undeveloped and lacked all facilities. However, certain standards of market value are available from sales made at or about the date of expropriation, namely, the sales of the properties here in question and one or two others in the same locality.

In 1922 the Golf Club property, then comprising 128 acres, was sold for $2,800.00 to a local syndicate. A mortgage was placed on the property and in 1940, the Golf Club operation having apparently been unsuccessful, the whole was sold to the Eastern Trust Company for approximately $2,800.00 (or about $14.00 per acre), that company holding it in trust for three of the guarantors of the mortgage, namely, Messrs. Hogan, Winfield and Cobb. Mr. R. V. Harris, K.C., one of the former members of the syndicate and who knew the whole area very intimately, was content at that time to release his interest upon being discharged from his liability as guarantor of the mortgage of $2,200.00, and a nominal payment of $100.00. In 1945 MacCulloch acquired 87 acres of this property by two purchases. From Cobb he purchased a one-third interest for $1,500.00; he negotiated with Winfield for his one-third interest at $6,000.00, but some arrangement having been entered into by which Hogan acquired Winfield's interest for $3,500.00, MacCulloch agreed to purchase the remaining two-thirds interest from Hogan for $11,700.00 under an exchange of letters in March, 1945. This transaction may be open to some question inasmuch as none of the purchase price has been paid or any formal agreement entered into. When the property was expropriated MacCulloch, referring to the purchase of Hogan's interest, said to him, "I would sooner wait to see what was the outcome (of the expropriation)." I have decided, however, that in the light of all the evidence, I should treat this as a bona fide transaction, more particularly as MacCulloch stated that he had originally offered Winfield $6,000.00 for his one-third interest, but that the latter had withdrawn, preferring to deal with Hogan to whom he was under some obli-

1951

THE KING v. MACCULLOCH

Cameron J.

gation. In all, therefore, for the Golf Club property of 87 acres MacCulloch paid $13,200.00—an average of $150.00 per acre.

The Eaglewood property, comprising 250 acres, was purchased for a syndicate by Mr. Harris in 1909 for $2,400.00. The Eaglewood subdivision was laid out in 1916 and many, if not all, of the lots having frontage on the Bedford Basin were sold or distributed to those interested. Finally, all the remaining part of the subdivision—which includes all of the 140 acres purchased by MacCulloch in 1945—was sold in 1916 to Winfield for $1,000.00. MacCulloch's purchase was negotiated through the Eastern Trust Company and there is every indication that it was quite an ordinary sale from a willing vendor to a willing purchaser. Several of the witnesses regarded the purchase price of $8,225.00 as very fair and no one suggested otherwise. The average cost to MacCulloch of these 140 acres was therefore $59.00 per acre. The two blocks purchased by him comprised 227 acres at a total cost of $21,425.00—an average of $94.00 per acre.

In June, 1945, Mr. R. B. Harris for $4,500.00 acquired the large block marked "Reginald Harris" on Ex. D and lying immediately east of the MacCulloch properties. The witness DeWolf acted for him and it was planned to subdivide the property and sell it for building lots, but due to its expropriation this plan was not carried out. The acreage is not at all clear. DeWolf says it contained 220 acres but Harris put it at considerably less. It had a very substantial frontage on Bedford Basin and extended easterly across the new Bedford to Dartmouth Road and also had the advantage of the old road which could have been put in repair by a small expenditure. The average cost per acre was therefore about $20.00, but I think it may be assumed that the part west of the highway was considerably more valuable than that to the east. It was described as very desirable property which could be more easily converted into building lots than the MacCulloch properties. However, the sale was made by the estate of a deceased person who had held it for many years and the sale price may not fully represent its actual value. It does indicate, however, that within a year of the date of expro-

priation a very large acreage suitable for building purposes could be purchased at a fraction of the value suggested by the defendants' witnesses.

Taking into consideration all the sales to which I have referred, I have reached the conclusion that a fair average market value for all the lands of the defendants, whether expropriated or retained (but excluding the surveyed lots immediately in rear of MacCulloch's residence) would not exceed $94.00 per acre, the average price paid for them by MacCulloch. I estimate that to have been the fair market value as of the date of his last purchase, namely, in October, 1945.

It is necessary, however, to consider two other factors. There is some evidence that between October, 1945, and the date of expropriation there was an increasing demand for building lots, particularly in the Halifax area. That would result in some possible increase in the value of the defendants' properties. A further element which I must consider is the additional value as at the date of expropriation of the potentialities of the property if used in the manner in which MacCulloch had planned to use them. In my opinion, relatively little should be added on this account. Nothing whatever had been done to implement the proposed scheme. The outcome of such a plan was highly problematical. It would take about twenty years at least to complete the development and sale of the lots. The cost of this development might well have rendered the scheme prohibitive. As I have said, the main cost would be the construction of the roads concerning which much evidence was given. Mr. Madden, a witness for the defendants, estimated that it would cost $6,000.00 per mile to build a road of the type constructed by MacCulloch in 1949. I accept the evidence of Mr. P. C. Ahern, a consulting engineer of very wide experience and who travelled over that road, that it had been cleared, stumped and bulldozed to the extent of pushing the boulders to the side of the road and that, while passable for vehicles in dry weather, it could not be used in wet weather. He stated that, without ditches, such a road would not last seven months and that MacCulloch in constructing the road had just scratched the surface. Such a road would be quite

1951

THE KING v. MACCULLOCH

Cameron J.

unsuitable for the type of subdivision proposed by MacCulloch. I accept the evidence of Ahern that the minimum cost of a fair road would be at least $3.00 per running foot, or nearly $16,000.00 per mile. To subdivide the whole area would require several miles of roads so that there is very considerable doubt as to whether a development would result in any profit at all. I have no doubt that the excessive cost of development has prevented any work being done on the property since 1916 when the Eaglewood Plan was first made.

Taking all these factors into consideration, I have reached the conclusion that an allowance of $2,600.00—or $25.00 per acre—would be sufficient to provide for any increase in market value after October, 1945, and for any future advantages which the property might have insofar as they gave the property any additional value on September 13, 1946. In the result, therefore, I find that for the 103·6 acres taken from the defendants they are entitled to compensation at the rate of $119.00 per acre—a total of $12,328.40.

I turn now to the claim for injurious affection for which the defendants claim as follows:—

(a) Injurious affection to and severance of other lands remaining (apart from the residence) on the Eaglewood property	$9,000 00
(b) Injurious affection to MacCulloch's residence...	5,000 00
(c) Injurious affection to other lands of the defendants —the Bedford Golf Club property.....	3,000 00
	$17,000 00

At the trial, counsel for the plaintiff admitted that the defendants were entitled to some allowance for injurious affection, both for severance and for possible loss in sale value of some of the property retained, due to the user to which the expropriated parts might be put as a magazine. It is therefore a question of quantum only and again the evidence is very conflicting.

DeWolf's opinion was that no one could tell precisely the extent of the damage sustained by the defendants; some might object and others might not object to purchasing

lots somewhat closer to the magazine area. Admitting that his basis was entirely an arbitrary one, he estimated the loss to the residence at 20 per cent—or $7,000.00, and as to the remaining property at 25 per cent of his estimated value throughout—or $8,437.50 on an acreage basis and $11,250.00 on a lot basis. His values were made at $225.00 per acre and $400.00 per lot. Finally, he said that there was a question in his mind as to whether 10 per cent or 50 per cent should be allowed for injurious affection.

Butler also estimated that the loss to the residence property was $7,000.00; and that on the basis of each lot being worth $300.00, 25 per cent should be allowed for injurious affection, or $9,844.00—a total in all of $16,844.00.

Clarke and Gladwyn agreed that there was some loss due to severance occasioned by the fact that a road which MacCulloch had planned to construct on the south end of the subdivision could not now be constructed inasmuch as it was to have been built on the lands taken and, due to the escarpment, could not now be constructed at all. In their opinion there was no injurious affection to the properties retained by reason of the use to which the enlarged area of the magazine might be put. They had allowed about $3,000.00 for losses sustained by severance.

In MacCulloch's opinion the additional hazard created by the extension of the magazine and its possible use for storage of high explosives, depth charges and the like, would prevent the sale of any lots adjacent to the magazine and would greatly depreciate the value of all the property retained. He was of the opinion that as explosions had previously occurred, builders would be afraid to purchase lots in his subdivision or, in any event, would offer less than they would have paid prior to the expropriation.

The danger to be anticipated from an explosion at the magazine existed at the time MacCulloch made his purchases and for the hazard then existing he is, of course, not entitled to any compensation. Moreover, he is not entitled to any compensation for any additional danger which might arise by the extension and use of the magazine

1951

THE KING
v.
MACCULLOCH

Cameron J

on the Curren and Harris properties. In the case of *Sisters of Charity of Rockingham* v. *The King* (1), Lord Parmoor in giving the judgment of the Judicial Committee of the Privy Council said at p. 328:—

> The limitation of the amount of compensation to the anticipated construction of authorized works upon lands actually taken from the appellants has a special importance in a case like the present, where the shunting yard has been largely laid out on land which has not been taken from the appellants, and which has never been part of their property. This limitation, which is plainly expressed in all the leading English decisions, is again restated in *Horton* v. *Colwyn Bay Urban Council*, (1908) 1 K.B. 327, in which it was held that as the acts of user, the contemplation of which caused the depreciation, would be done on lands not the property of the claimant, the claimant was not entitled to any compensation.
>
> The problem of applying the above principles in a case where the mischief complained of has arisen partly on lands taken from the claimants, and partly on other lands outside their property, can only be settled by a consideration of all the circumstances in a particular case Clearly in this case the appellants are entitled to a less amount of compensation than if all the lands taken in the laying out of the shunting yard had belonged to them, but on the other hand, the fact that other lands are comprised in the scheme in addition to the lands taken from the appellants, does not deprive the appellants of their right to compensation, so long as their claim is not extended beyond mischief which arises from the apprehended legal user of the two promontories as part of a railway shunting yard.

Apart, therefore, from any loss sustained by severance, the compensation to which the defendants may be entitled for injurious affection must be limited to the mischief which may arise from the anticipated user of the properties taken from them.

It is agreed that up to the date of the trial no buildings had been constructed upon the lands taken from the defendants, or, in fact, on any of the 1,300 acres expropriated in 1946, nor had any use been then made of such lands which would increase the hazard previously existing. G. M. Luther, Director of Armaments Supply, who had the magazine under his direct supervision, gave evidence for the plaintiff. He states that the exact cause of the 1945 explosion was not known but that it was found that an unusually large quantity of explosives had been stored in the open. It was decided that the then area was too cramped because of the existence of administrative buildings and repair shops or laboratories within the storage area, and

(1) (1922) 2 A.C. 315.

that additional lands should be acquired in order to remove these buildings from the immediate storage area, thereby rendering the general operations less hazardous. He pointed out that the safety precautions had been revised and improved, that the property was entirely surrounded by fences, that guards checked and supervised all those entering the magazine property, and that in 1949 the explosives on hand were less than half of those in 1945 and none were stored outside. The explosives are now stored in about twenty buildings in such a way that, if an explosion should occur in one, it is anticipated that the others would not be affected. Each storage building is protected by cement or earth flash-walls somewhat higher than the buildings themselves and designed so as to localize the effect of any accidental explosion. Mr. Luther considered that under conditions existing at the time of the trial there was much less hazard than in 1945 and that when the proposed additions were completed, the hazard would be still less. He stated that some of the employees (there are about 140 in all) and their families resided on the magazine property itself and that, knowing the conditions as he did, he would have no hesitation in residing in a house quite close to it. He admitted, however, that while every possible precaution had been taken, there was always the possibility of failure to observe the regulations and therefore a potential hazard. He could not speak of the future plans for the magazine but indicated that in the event of a war it is probable that full use would be made of the entire area and that much larger quantities of explosives would be stored than at present. This is not the main Naval magazine but merely a "ready use" magazine for the Fleet based on Halifax. Mr. Luther admitted that there was always the potential hazard to life and property in handling explosives and that the results of an explosion are freakish and unpredictable. He was of the opinion, however, that the progress of an explosion would be deflected upward by the presence of any hills such as existed at Eagle Ridge.

There is a good deal of evidence which would indicate that building in the Bedford area and the Parker Cove area has not been affected in any material way by the

1951

THE KING
v.
MACCULLOCH

Cameron J.

extension of the magazine property and that land values there have not decreased. MacCulloch's brother constructed a very substantial residence on lots 32 and 33 after the expropriation. Harold Lightfoot lives in Bedford about one-quarter of a mile from MacCulloch's residence and his property is a very substantial and valuable one. He went there first in 1946 as a tenant but expects to purchase the property and has made the owner an offer. Mrs. Black in 1946 bought a lot next to Lightfoot and in 1949 constructed a house valued at $10,000.00. Harry Barnes purchased a lot in that area in 1947 with knowledge of the 1946 expropriation but not its full extent and he has made substantial improvements to the property. He is somewhat concerned about the safety of his family and a possible lessening of the value of his property, but may sell or possibly enlarge the building and reside there. Ronald Shaw bought a lot adjacent to Barnes in 1944 and erected a substantial residence thereon, selling it in 1948 for $17,000.00. He said that the construction and enlargement of the magazine did not affect him in any way. This property was again sold in 1949 for $18,000.00. Mr. E. Ford in 1944 purchased lot 36, paying $2,500.00 for the lot and the summer cottage. It is within a very short distance of MacCulloch's residence. He intended to build a substantial home thereon but due to the high cost of construction, the necessity of living in Halifax during the winter, and having some concern about the proximity to the magazine, he has not as yet done so. He did make some improvements to the property in 1948. He says that he would not sell his property and wants to live there if it is reasonably safe.

Other evidence would indicate that a great deal of building—both residential and otherwise—has taken place since 1946 in or near Bedford and all along the road leading from Bedford to Halifax, including properties on that road fronting on the Bedford Basin and directly across from the magazine area. Some of these buildings are large churches and schools. Butler said that notwithstanding the 1945 explosion there was more building of more valuable properties in that area than previously.

Taking all the evidence into consideration, I have come to the conclusion that the defendants are entitled to some compensation for injurious affection to the lands retained, but that they have failed to establish that such damages are in any way substantial. It is indeed a difficult matter to assess such damages in any precise manner, limited as they must be to the mischief which may arise by the anticipated user of the magazine on the properties taken from the defendants. It is reasonably clear that some loss in value may be anticipated in connection with the area immediately adjacent to the new magazine boundary. On the other hand, I am satisfied that as to the residence property and the lands immediately in rear thereof—all admittedly of much greater value than the other portion of the retained area and all protected to some extent by the existence of the hill property to the rear—the injury to be anticipated is practically negligible. On the whole, and taking all the factors into consideration, I am of the opinion that an award of $6,000.00 for all damages and loss occasioned to all of the properties retained by the defendants, and whether occasioned by severance or by the apprehended user of the property acquired, or otherwise, would be fair and reasonable compensation. In all, therefore, the compensation to which the defendants are entitled amounts to $18,328.40.

The amount now awarded to the defendants being in excess of that set out in the Information, the defendants would normally be entitled to 5 per cent interest from September 13, 1946, to this date (sec. 32 of The Expropriation Act). I am informed, however, that at some later date an amount in excess of that mentioned in the Information was tendered to the defendants and refused, but I am not informed as to the amount of such tender. As to interest, therefore, my ruling must be that if the amount so tendered is less than the sum I have awarded, the defendants are entitled to be paid interest at the rate of 5 per cent per annum from September 13, 1946, on $18,328.40 to this date; but if the amount so tendered be equal to or in excess of $18,328.40, then the defendants will be entitled to interest at 5 per cent on that sum from September 13, 1946, to the date of such tender only. If there be any difficulty about this matter it may be spoken to.

1951

THE KING v. MACCULLOCH

Cameron J.

A similar disposition must be made as to costs. If the amount of the tender so made is less than $18,328.40, the defendants are entitled to their full costs, after taxation; but if the amount so tendered is equal to or in excess of $18,328.40, the defendants will be entitled to their taxed costs up to the date of such tender and the plaintiff will be entitled to taxed costs thereafter.

There will therefore be the usual judgment declaring that the expropriated lands described in para. 3 of the Information are vested in His Majesty the King as from September 13, 1946. There will also be a declaration that the amount of compensation money to which the defendants are entitled is the sum of $18,328.40, with interest and costs as hereinbefore provided; and that the defendants are entitled to be paid the said sums upon providing such necessary releases and discharges of all claims either in respect of the expropriated lands or in respect of the compensation money as counsel for the plaintiff may require. This latter provision is made because of some uncertainty as to the actual interest of Hogan, Winfield and Cobb in the Golf Club property. The Eaglewood property was registered in the name of the defendant MacCulloch and the Golf Club property in the name of the Eastern Trust Company, that company apparently being trustees for Hogan, Winfield and Cobb. At some date after the expropriation, Hogan indicated that he still had an interest therein but at the trial he stated that he had notified the Eastern Trust Company that his interest had been assigned to MacCulloch. In view of the uncertainty as to the exact situation, I think the plaintiff is entitled to receive such releases as counsel may require.

Judgment accordingly.

BETWEEN:

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

1950 Feb. 17

1951 Feb. 28

AND

ALD (CANADA) LIMITED, ... DEFENDANT.

Revenue—Seizure—Forfeiture—The Foreign Exchange Control Act, S. of C. 1946, c. 53, ss. 2(1) (p), 15(a), 26, 56(1), 60—Foreign Exchange Control Regulations, s. 43B—Order in Council P.C. 5215, dated December 19, 1946—Order in Council P.C. 4678, dated November 12, 1947,—Civil Code of Quebec, Art. 1241—Forfeiture of goods under The Foreign Exchange Control Act an independent consequence of breach of the Act or Regulations—Acquittal on a charge of importing goods without a permit not a bar to proceedings for forfeiture of goods.

On December 5, 1947, the defendant imported goods from the United States, the importation of which was prohibited by section 43B of the Foreign Exchange Control Regulations as amended by Order in Council P.C. 4678, dated November 12, 1947, unless they had been shipped or were in transit to Canada on November 17, 1947, or the Minister of Finance had directed the grant of a permit for their importation. The goods were not in such transit and there was no direction by the Minister of Finance for the grant of a permit for their importation, but the defendant did obtain Foreign Exchange Control Board permits from a customs officer. Notwithstanding the issue of these permits the goods were seized by the Foreign Exchange Control Board. Subsequently the defendant was tried on a charge of having imported the goods without a permit and acquitted by a judgment of the Court of King's Bench of Quebec Notwithstanding such acquittal proceedings were taken for a declaration of forfeiture of the goods.

Held: That the forfeiture authorized by section 60(1) of The Foreign Exchange Control Act is not conditional or dependent on the imposition of any other penalty under the Act but is a separate and independent consequence of breach of the Act or Regulations regardless of whether any other penalty has been imposed or not and whether any prosecution in relation thereto has been commenced or not.

2. That the fact that the defendant was acquitted in another court on a charge of importing the goods without a permit from the Foreign Exchange Control Board is not a bar to proceedings in this Court for forfeiture of the goods and cannot free them from liability thereto if their importation was contrary to the Act or Regulations. Whether they were so imported is for this Court to determine.

3. That since the goods were not in transit to Canada on November 17, 1947, it was essential to their lawful importation that the Minister of Finance should have directed the grant of a permit for their importation, that it was within the sole discretion of the Minister of Finance to give such a direction and that permits granted by a customs officer without such direction were invalid and that since there had been no such direction by the Minister the goods were unlawfully imported and are liable to forfeiture.

1950

THE KING v. ALD (CANADA) LIMITED

Thorson P.

ACTION for a declaration of forfeiture under section 60 of the Foreign Exchange Control Act.

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

John Ahern K.C. for plaintiff.

A. Watt for defendant.

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

The PRESIDENT now (February 28, 1951) delivered the following judgment:

These proceedings are brought for a declaration that certain goods imported by the defendant be forfeited to His Majesty.

The facts are not in dispute. On December 5, 1947, the defendant, which has a place of business in Montreal in Quebec, imported from the United States of America at the customs port of Lacolle in Quebec 80 Westinghouse Laundromat washing machines of the declared value of $12,688 and 65 coinometers of the declared value of $1,388. These goods had been delivered to a warehouse in New York City for transportation to the defendant in Montreal by truck and left there on December 3, 1947. They reached the customs port of Lacolle on December 4, 1947, and were cleared through customs, subject to amendment, the following day. On the arrival of the goods at Lacolle the defendant by attorney applied in the usual way to a customs and excise officer at Lacolle for Foreign Exchange Control Board permits to import the goods and permits on what is called Form E were issued by Mr. J. E. Boudreau, a customs and excise officer at Lacolle, purporting to act for the Foreign Exchange Control Board. Notwithstanding the issue of these permits the Foreign Exchange Control Board seized 70 of the washing machines and all of the coinometers on the ground that their importation had been contrary to section 26 of The Foreign Exchange Control Act, Statutes of Canada, 1946, chapter 53, and section 43B of the Foreign Exchange Control Regulations, as

amended by Order in Council P.C. 4678, dated November 12, 1947, Statutory Orders and Regulations, 1947—885, *Canada Gazette*, Vol. 81, Part II, page 2190.

Section 26 of the Act provides, subject to subsection three thereof, which is not applicable here, that no person shall import any goods into Canada except in accordance with a permit. By section 2(1) (*p*) "permit" means "permission given by or on behalf of the Board to do any act or thing for which a permit is required under this Act". Section 15(*a*) provides:

15. Subject to the provisions of this Act and the regulations and instructions of the Board,

(*a*) every Customs Officer shall act as agent of the Board to grant permits for exports and imports of property;

Section 35 provides for regulations by the Governor in Council for certain purposes and the Foreign Exchange Control Regulations were established by Order in Council P.C. 5215, dated December 19, 1946. By Order in Council P.C. 4678, dated November 12, 1947, passed in order to ensure that Canada's foreign exchange resources should not be dissipated for purposes disadvantageous to Canada as a whole, the Regulations were amended in several respects, one of which was by the addition of section 43B which provided:

43B. No permit shall be granted for the import of goods listed in Appendix VII unless the goods have been shipped and are in transit to Canada on November 17, 1947; provided that nothing contained in this section shall prohibit the issue of a permit in cases which in the opinion of the Minister of Finance involve unusual circumstances or might, if a permit were not granted, involve particular hardship, if the Minister in his sole discretion directs that a permit be granted.

Appendix VII sets out a list of goods for which a permit for their importation should not be granted otherwise than by a direction of the Minister of Finance, including goods under the following tariff item numbers:

ex 415 *b*—Washing Machines, domestic, with or without motive power incorporated therein.

ex 362 *c*—. . . locks and lockers, coin, disc, or token operated.

The evidence establishes that the imported goods fall within the above classes of goods and that there was no direction by the Minister of Finance for the grant of a permit for their importation.

1950

THE KING v. ALD (CANADA) LIMITED

Thorson P.

After the importation of the goods an information and complaint was laid against the defendant that it had imported them without a permit contrary to the Foreign Exchange Control Act and Regulations. The information and complaint was laid on July 13, 1948, by Isaie Savard, a customs officer in the district of Montreal, before René Théberge, a judge of the Court of Sessions of the Peace for the District of Montreal. It was in the following terms:

I am credibly informed and I verily believe that Ald Canada Limited, a corporation doing business in the City and District of Montreal, did:

On or about the 5th of December 1947, import without permit from the United States into Canada at Lacolle, in the Province of Quebec, 80 washing machines and 65 coin cases of the value of $11,263, the importation of which was prohibited, thereby committing an offence against the provisions of the Foreign Exchange Control Act and regulations made thereunder.

On the trial it was proved by the Crown that the goods had been imported from the United States by the defendant but that Mr. J. G. Boudreau, a customs officer at Lacolle, had granted the defendant permits for their importation, that he was an officer of the Foreign Exchange Control Board and authorized to sign for it, but that he had not had any direction from the Minister of Finance to grant the permits. On this evidence the Court of Sessions of the Peace dismissed the charge. On an appeal to the Superior Court of Quebec, Mr. Justice Lazure heard additional evidence, namely, that the goods were not in transit to Canada on November 17, 1947, and that the permits granted by Mr. Boudreau were unlawful and found that the defendant had committed a breach of the Foreign Exchange Control Act and imposed a fine of $200. From this conviction the defendant appealed to the Court of King's Bench of Quebec which, by a majority decision of 3 to 2, allowed the appeal, reversed the judgment of Mr. Justice Lazure and restored that of the Court of Sessions of the Peace dismissing the charge against the defendant.

Notwithstanding this judgment the plaintiff brought these proceedings for a declaration of forfeiture of the goods, relying on Section 60 of The Foreign Exchange Control Act which provides:

60.(1) Any property of any kind which any person exports or attempts to export from Canada or imports or attempts to import into Canada contrary to this Act or the regulations, or which any person buys or sells

or in any way deals with or attempts to buy or sell or in any way deal with contrary to this Act or the regulations, or the possession, ownership or control of which any person fails to declare as required by this Act, may, in addition to any other penalty which may have been imposed on any such person or to which any person may be subject with relation to such unlawful act or omission, and whether any prosecution in relation thereto has been commenced or not, be seized and detained by any Inspector or Officer and shall be liable to forfeiture at the instance of the Attorney General of Canada upon proceedings in the Exchequer Court of Canada or in any Superior Court, subject, however, to a right of compensation on the part of any innocent person interested in such property at the time it became liable to forfeiture or who acquired an interest therein subsequent to such time as *bona fide* transferee thereof for value without notice, which right may be enforced in the same manner as any other right against His Majesty.

(2) In any proceedings for forfeiture instituted under subsection one of this section the burdens of proof, which under subsection one of section fifty-six of this Act rest upon the person charged, shall rest upon the defendant.

Section 56 (1) of the Act reads as follows:

56. (1) Where any person is charged with an offence under this Act, if it is established that the said person did any act or omission for which a permit is required under this Act, it shall not be necessary to establish that the person charged did not possess a permit or had not been exempted from the applicable provisions of this Act, and the burden of proof that he possessed the necessary permit or had been exempted from the applicable provisions of the Act shall be upon the person charged.

If the defendant could have shown that the goods in question had been shipped and were in transit to Canada on November 17, 1947, or that the Minister of Finance had directed that a permit be granted for their importation it would have had a defence to these proceedings. But it cannot establish any such defence, and since the goods are otherwise within the prohibitions of section 43B of the amended Regulations they are liable to forfeiture under section 60 of the Act unless some reason to the contrary can be shown.

There is no allegation in the statement of defence that the imported goods had been shipped and were in transit to Canada on Novmber 17, 1947, but even if there had been such an allegation the onus of proof thereof would have been on the defendant and it could not have discharged it. On the contrary, although the exporter's invoices for the goods were dated November 15, 1947, the fact is that they were not "in transit" to Canada until December 3, 1947, when they left the truck company's

1950

THE KING v. ALD (CANADA) LIMITED

Thorson P.

warehouse in New York, or only a short time prior thereto, when they were sent from the exporter's plant at Corona, New York, to the truck company's warehouse for transportation to the defendant in Montreal. And it might also be noted in this connection that Mr. Boudreau stated, on cross-examination, that he had made no enquiry whether the goods were in transit on or before November 17, 1947, before issuing his permits. It was not his "trouble" to know whether they were in such transit or not.

Nor is there any contention that the goods were of a class that was not covered by the Order in Council.

The only submissions for the defendant were on points of law. It was urged, in the first place, that section 60 (1) of the Act authorized a forfeiture of property only "in addition to any other penalty which may have been imposed" and that since no penalty had been imposed on the defendant there could not be any forfeiture of its property. I am unable to place such a restricted construction on the enactment. In my opinion, the forfeiture authorized by the section is not conditional or dependent on the imposition of any other penalty under the Act but is a separate and independent consequence of breach of the Act or Regulations regardless of whether any other penalty has been imposed or not and whether any prosecution in relation thereto has been commenced or not.

The main objection to the plaintiff's claim was that all the issues between the parties were raised in the proceedings before the Court of Sessions of the Peace and the subsequent appeals and were finally determined in favor of the defendant by the judgment of the Court of King's Bench of Quebec and so became *res judicata* or "chose jugée" within the meaning of Article 1241 of the Civil Code of Quebec which provides:

> 1241. L'autorité de la chose jugée est une présomption *juris et de jure;* elle n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement, et lorsque la demande est fondée sur la même cause, est entre les mêmes parties, agissant dans les mêmes qualités, et pour la même chose que dans l'instance jugée.

There are several reasons for not giving effect to this objection. The identities required by the article and inherent in the concept of *res judicata* are not all present in this case. The information and complaint against the

defendant in the Court of Sessions of the Peace was not the same as the basis for forfeiture of the goods in the present proceedings. In the former the charge was that of importing the goods without *a* permit, whereas in the latter the basis of the claim for forfeiture is that the goods were imported without *the necessary* permit, that is to say, a permit the granting of which had been directed by the Minister of Finance. It is, I think, impossible to read the reasons for judgment of the majority of the judges of the Quebec Court of King's Bench as reported in *Ald Canada Ltd.* v. *Savard* (1) without concluding that they were mainly concerned with the charge as laid, namely, importing the goods without *a* permit, and considered that, since there had been a permit, the charge as laid could not stand and that on such charge it was not permissible to look behind the permits that had been issued or question their validity. It is not for this Court to express any opinion on this judgment but it is permissible to say that if the information and complaint had been that of importing the goods without a permit granted pursuant to the direction of the Minister of Finance as required by section 43B of the amended Regulations the judgment would not necessarily have been the same. The "cause" in the two proceedings is, in my view, not the same. Nor were they brought for the same thing. In the former proceedings the Court of Sessions of the Peace had no jurisdiction to declare a forfeiture of the goods. It was concerned only with whether the defendant had committed the offence with which it was charged and was confined to the imposition of a penalty if it was found guilty. It could do nothing about the goods. On the other hand, this Court is concerned only with whether the goods are liable to forfeiture. Since it is thus clear that two of the identities required to make a judgment "chose jugée" within the meaning of Article 1241 of the Civil Code or *res judicata* as that expression is understood in the Common Law provinces are not present here, it is not necessary to consider whether the two proceedings were between the same parties acting in the same qualities.

(1) (1949) B.R. 607.

1950

THE KING v. ALD (CANADA) LIMITED

Thorson P.

Furthermore, the words of section 60 (1) of the Act are explicitly against the defendant's contention.

Thus the fact that the defendant was acquitted in another court on a charge of importing the goods without a permit from the Foreign Exchange Board is not a bar to proceedings in this Court for forfeiture of the goods and cannot free them from liability thereto if their importation was contrary to the Act or Regulations. Whether they were so imported is for this Court to determine. The weight of judicial authority affords support for this view: vide *La Foncière Compagnie d'Assurance de France* v. *Perras et al* (1); *McLean* v. *Pettigrew* (2); *Bureau* v. *The King* (3); *The King* v. *Pacific Bedding Company Limited* (4); *The King* v. *Davis* (Ex. C. February 25, 1950, unreported).

Counsel for the defendant also challenged the jurisdiction of this Court to look behind the permits granted by Mr. Boudreau or question their validity. It was argued that someone had to determine whether the goods were covered by the Order in Council and whether they had been shipped and were in transit on November 17, 1947, and decide accordingly whether a permit should be granted, that Mr. Boudreau, a customs and excise officer at the port of entry, was, under section 15 of the Act, the proper agent of the Foreign Exchange Control Board for that purpose, that if the permits granted by him were invalid they were revocable only by the Board, but that until such revocation they must be considered valid, that the administration of the Act and Regulations was a matter for the Board through its officers, and not for the Court, that the Court could not review the reasons that moved Mr. Boudreau to grant the permits, that he had evidence, namely, the exporter's invoices, from which he might have concluded that the goods were in transit on November 17, 1947, and that he might have decided that the goods were not on the prohibited list. This argument is very similar to that which prevailed with the majority of the Court of King's Bench of Quebec. But whatever force such an argument may have had in respect of the information and complaint that was before that court, I am unable to accept it in

(1) (1943) S.C.R. 165.
(2) (1945) S.C.R. 62.
(3) (1948) Ex. C.R. 257; (1949) S.C.R. 367.
(4) (1950) Ex. C.R. 456.

1950

THE KING v. ALD (CANADA) LIMITED

Thorson P.

these proceedings. Here, as I have pointed out, the issue is not simply whether the defendant imported the goods without a permit but rather whether the importation was within the prohibitions of section 43B of the amended Regulations. In my judgment, the answer to this question is plainly in the affirmative. The goods were of a class whose importation was prohibited by the section unless one of the conditions exempting them from such prohibition was present and no such condition was present. The goods were not in transit on November 17, 1947, and Mr. Boudreau did not, as a matter of fact, even purport to decide that they were. Moreover, it was not for Mr. Boudreau to decide whether a permit should be granted. It was within the sole discretion of the Minister of Finance to direct that a permit should be granted and there was no such direction. Consequently, the permits granted by Mr. Boudreau were issued without authority and are invalid. The statutory conditions for a lawful importation of the goods were thus wholly absent. It could not have been intended that goods the importation of which was prohibited except with a permit directed by the Minister of Finance should be lawfully imported through the grant of a permit by a customs officer without any such direction. The language of section 43B of the amended Regulations is incapable of any construction leading to such a result. The express prohibitions of the section could not be defeated by the unauthorized act of a customs officer. Since the goods were not in transit to Canada on November 17, 1947, it was essential to their lawful importation that the Minister of Finance should have directed the grant of a permit for their importation and there was no such direction. That being so, the goods were unlawfully imported and are liable to forfeiture, and the Court must so declare. Under the law as it stood under section 43B of the amended Regulations the Court has no discretion to do otherwise.

There will, therefore, be judgment declaring that the goods described in the Information are forfeited to His Majesty and that His Majesty is entitled to costs.

Judgment accordingly.

1950
March 14, 15 and 16
1951
Feb. 7

BETWEEN:

J. ANATOLE LATOUR.....PLAINTIFF;

AND

LAURENT CYR *et al*.....DEFENDANTS.

Copyright—Infringement—Copyright Act, R.S.C. 1927, c. 32, ss. 2 (o) and 4 (1)—Word "compilation" in the Act applies to a directory, an almanac of address, a diary, an annual or any other compilation—Relative originality in the work required—Work must attest effort of creation whatever its literary value may be.

Plaintiff published annually since 1932 a compilation in the nature of a city directory called "Le Bottin du Commerce de la Cité de Salaberry de Valleyfield", copyright therein having been registered in 1932. In 1948, defendants advertised the publication of a compilation of a similar nature to be known as "Index Valleyfield" which, in fact, was published in April 1949. By his action plaintiff claimed infringement of his copyright and sought an injunction and damages. The Court found that defendants had infringed plaintiff's copyright, granted the injunction and ordered a reference to the Registrar to determine the damages or loss of profit suffered by the plaintiff.

Held: That the word "compilation" in the Copyright Act applies to a directory, an almanac of addresses, a diary, an annual or any other compilation. The work must be original. The Copyright Act does not require a character of novelty as does the Patent Act; it is a question of relative originality. The work must attest an effort of creation whatever its literary value may be.

ACTION for alleged infringement of copyright.

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

Maurice Huot and *Louis Lemay*, for plaintiff.

Albert Lemieux, for defendants.

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

ANGERS J. now (February 7, 1951) delivered the following judgment:

Le demandeur, se déclarant l'auteur d'une œuvre littéraire originale et périodique intitulée "Le Bottin du Commerce de la cité de Salaberry de Valleyfield", poursuit les défendeurs pour contrefaçon de son droit d'auteur et pour dommages en résultant.

Dans son exposé de réclamation le demandeur déclare en substance ce qui suit:

il est citoyen britannique et l'auteur d'une œuvre littéraire originale et périodique: "Le Bottin du Commerce de la Cité de Salaberry de Valleyfield", qu'il publie annuellement depuis 1932;

le droit d'auteur du demandeur sur l'œuvre susdite a été enregistré en son nom sous le numéro d'ordre 25794 dans le registre des droits d'auteur le 28 juin 1932;

l'œuvre littéraire en question est originale en ce sens qu'elle combine la publication d'une liste alphabétique des citoyens de la cité de Valleyfield et des alentours, leurs adresses et occupations respectives, avec celle d'une liste des numéros civiques de chaque rue en regard du nom des résidents;

ce travail est complété par une nomenclature des associations paroissiales et commerciales avec mention des officiers et un grand nombre d'illustrations et photographies d'un intérêt général pour la cité de Valleyfield;

depuis 1932 le demandeur s'est imposé de lourds sacrifices de temps et d'argent pour publier chaque année, avec les corrections et additions nécessaires, ledit bottin;

les défendeurs annoncent la publication imminente, soit en novembre 1948, d'une œuvre similaire qu'ils intitulent "Index Valleyfield", qui n'est qu'une contrefaçon, au sens de la loi, de l'œuvre originale du demandeur et une reproduction illicite de cette œuvre;

à cette fin les défendeurs sollicitent illégalement la vente de leur contrefaçon, au préjudice du demandeur, et distribuent à profusion une circulaire annonçant leur production, qui est ainsi conçue:

INDEX VALLEYFIELD

A qui de droit:

La présente lettre a pour but de vous annoncer la publication prochaine d'un "Index Valleyfield", qui sera, pour les commerçants et hommes d'affaires, un guide et un documentaire très précieux.

Cet "Index" contiendra:

1. Une liste alphabétique des citoyens de la ville de Valleyfield (16 ans et plus) avec leurs adresses respectives.
2. Une liste des adresses de chaque rue de la ville avec leurs résidents.
3. Un recensement des citoyens (16 ans et plus) des municipalités suivantes: Grande-Île, Ste-Cécile, St-Stanislas, St-Louis de Gonzague, St-Timothée Village, St-Timothée Paroisse.

1951

LATOUR
v.
CYR *et al.*

Angers J.

4. Une liste des numéros de téléphone par ordre ascendant (à partir du numéro 1..... jusqu'à la fin).
5. Une nomenclature des diverses associations paroissiales, commerciales, agricoles, de chaque localité, avec mention des officiers.
6. Une table des matières des annonces parues dans l'"Index".
7. Un grand nombre d'illustrations qui ajouteront à l'intérêt du manuel.

Cet "Index" sera tiré à 5,000 exemplaires et vendu au prix de 25 sous, de façon à permettre à toutes les familles du district de se le procurer.

C'est dire que l'"Index Valleyfield" est la meilleure occasion jamais offerte aux commerçants et hommes d'affaires de Valleyfield et des municipalités avoisinantes de se faire une excellente publicité annuelle à un prix modéré.

M. J.-Alfred Landry, publiciste régional, a été préposé à la vente et à la sollicitation des annonces de l'"Index". Pour tous renseignements publicitaires, on pourra communiquer avec M. Landry, ou avec l'éditeur soussigné.

C'est l'intention de l'éditeur de publier cet "Index" au mois de novembre de chaque année. La première édition sera publiée en novembre 1948, et couvrira la période de temps qui durera jusqu'en novembre 1949. Le recensement est en date du 15 août 1948.

LAURENT CYR, *éditeur.*

de fait des clients du demandeur, trompés par la contrefaçon des défendeurs, leur ont confié des contrats d'annonces et autres;

le demandeur est bien fondé à réclamer une ordonnance de cessation contre les défendeurs;

le demandeur a souffert à date et souffrira à l'avenir des dommages généraux considérables qu'il consent à réduire à la somme de $2,000;

par leurs agissements les défendeurs portent le public à croire que le demandeur a discontinué sa publication, lui causant ainsi un grave préjudice;

le demandeur requiert:

a) une ordonnance de cessation interdisant aux défendeurs de donner suite à leur projet de publier, éditer et vendre au public leur "Index Valleyfield", dont ils ont déjà commencé l'exécution;

b) une condamnation en dommages pour violation de droit d'auteur et, vu les faits allégués, une indemnité de $2,000;

c) un ordre de la Cour, adressé à ses officiers, de saisir tous les exemplaires sous presse ou déjà imprimés de l'"Index Valleyfield" entre les mains des défendeurs ou autres personnes, à toutes fins que de droit;

d) les frais.

Dans sa défense amendée le défendeur Cyr plaide en substance ce qui suit:

il ignore ou nie les allégations de l'exposé de réclamation;

il est éditeur depuis septembre 1947, ayant sa place d'affaires en la cité de Salaberry de Valleyfield;

il est domicilié à Boischatel, district de Québec, depuis plus d'un an;

la lettre circulaire relatée au paragraphe 7 de l'exposé de réclamation n'est qu'une annonce et elle n'oblige pas le défendeur à publier ledit "Index Valleyfield"; en fait, ledit Index a été publié en avril 1949;

l'action du demandeur et sa requête pour obtenir une ordonnance de cessation sont prématurées et mal fondées en faits et en droit;

l'"Index Valleyfield" édité par le défendeur diffère sensiblement dans l'ensemble du "Bottin du commerce de la cité de Salaberry de Valleyfield";

"Le Bottin du commerce de la cité de Salaberry de Valleyfield" ne contient qu'une partie des renseignements et autres détails publicitaires énumérés dans la circulaire produite par le demandeur;

l'"Index Valleyfield" n'est pas une contrefaçon au sens de la loi ni une reproduction illicite du "Bottin du commerce de la cité de Salaberry de Valleyfield", dont le demandeur serait propriétaire;

ledit bottin n'est pas une œuvre littéraire originale au sens de la loi; de fait il n'est qu'une liste d'adresses et comme tel ne peut faire l'objet d'un droit d'auteur;

un grand nombre d'éditeurs ont publié et vendu au public des compilations ou almanachs d'adresses semblables audit bottin dans plusieurs villes de la province de Québec;

le défendeur n'a jamais induit le public à croire que le demandeur avait discontinué la publication de son bottin;

le demandeur n'a subi aucun dommage des faits et gestes du défendeur; la requête du demandeur en vue d'obtenir une ordonnance de cessation ainsi que des dommages est prématurée et mal fondée en faits et en droit.

Dans sa réponse à la défense du défendeur Cyr le demandeur allègue:

il nie ou déclare ignorer la plupart des allégations d'icelle, spécifiant que ledit défendeur a commencé depuis longtemps à exploiter l'annonce de son Index de Valleyfield;

1951

LATOUR v. CYR et al.

Angers J.

il demande acte de l'admission du défendeur qu'il se proposait d'incorporer dans son Index de Valleyfield une partie des renseignements et autres détails publicitaires provenant du "Bottin du Commerce de la cité de Salaberry de Valleyfield";

Je crois opportun de récapituler brièvement la preuve.

[Here the learned judge reviews the evidence and proceeds]:

Le cas qui nous occupe est régi par l'article 4 de la Loi du droit d'auteur, dont le premier paragraphe, le seul pertinent, est ainsi conçu:

4. Subordonnément aux dispositions de la présente loi, le droit d'auteur existe au Canada, pendant la durée mentionnée ci-après, sur toute œuvre originale littéraire, dramatique, musicale ou artistique, si, à l'époque de la création de l'œuvre, l'auteur était sujet britannique, citoyen ou sujet d'un pays étranger ayant adhéré à la Convention et au Protocole additionnel de cette même Convention, publiés dans la seconde annexe de la présente loi, ou avait son domicile dans les possessions de Sa Majesté;...

Une définition de l'"œuvre littéraire", plutôt sommaire, se trouve au paragraphe *o*) de l'article 2 de la loi:

o) "œuvre littéraire" comprend les cartes géographiques et marines, les plans, tableaux et compilations;

S'agit-il en l'espèce d'une œuvre littéraire? C'est là la question à déterminer.

Le mot "compilation" a un sens très large. Il est défini dans les principaux dictionnaires français comme suit:

Littré—

Ouvrage composé d'extraits de divers auteurs.

Bescherelle—

Recueil de plusieurs choses réunies en corps d'ouvrage.

Hatzfeld et Darmesteter—

Recueil de documents sur une matière, empruntés à diverses sources.

Larousse du XX^e siècle—

Recueil d'ouvrages ou de morceaux de divers auteurs.

Quillet—Dictionnaire Encyclopédique—

Recueil formé de morceaux pris çà et là, dans un seul ou dans plusieurs auteurs.

Quillet—Dictionnaire de la Langue Française—

Ouvrage composé de morceaux, de documents pris dans divers auteurs.

Le même mot est employé dans le texte anglais de la loi. L'on trouve dans les dictionnaires de la langue anglaise les plus usités ces définitions:

The Imperial Dictionary of the English Language—
A book or treatise drawn up by compiling.

Shorter Oxford English Dictionary—
A literary work or the like formed by compilation.

Webster's New International Dictionary—
A book or document composed of materials gathered from other books or documents.

Funk and Wagnalls—New Standard Dictionary of the English Language—
Book made up of materials gathered from other books.

Je crois que le mot "compilation" s'applique à un bottin, un almanach d'adresses, un agenda, un annuaire ou toute autre compilation. L'œuvre doit être originale. La loi n'exige pas un caractère de nouveauté comme le fait la loi des brevets d'invention; il s'agit d'une originalité relative. L'œuvre doit témoigner d'un effort de création quel que soit son mérite littéraire. Il me semble néanmoins convenable d'examiner la doctrine et la jurisprudence sur le sujet.

Mignault (3 Thémis, p. 15) exprime l'opinion suivante:

Un ouvrage original est celui dont le fond, ou bien la forme, ou enfin l'arrangement est le résultat d'un travail indépendant de l'auteur.

Notre législation sur le droit d'auteur a été pratiquement calquée, comme en maints autres cas, sur la loi anglaise (Imperial Copyright Act—1 et 2 Geo. V, chap. 46). L'on peut inférer de là que la doctrine et les arrêts anglais prévalent.

Dans "The Canadian Law of Copyright" Fox exprime l'opinion suivante (p. 90):

Compilations are included within the definition of "literary work". The law protects not only works of genius, science and art, but also mere compilations of matters and of facts taken from the public domain, such as dictionaries and directories. The law does not prohibit the making of similar compilations, provided they be the result of the labour of the author and not the copy of those that are protected. It is the original work of the author which is protected and not that which he has taken from common sources in the public domain. Thus, in a directory, the names, occupations, addresses, are public property, but the compilation of those names accompanied by other information, presupposes a work of research, of information, taken at the home of each person, and whoever copies the first directory in place of imposing upon himself this labour is guilty of piracy.

Dans une cause de *Underwriters Survey Bureau Limited et al.* v. *American Home Fire Assurance Company et al.* (1)

(1) (1939) Ex. C.R. 296.

1951

LATOUR
v.
CYR *et al.*

Angers J.

il a été décidé par le juge Maclean que les manuels émis par Canadian Automobile Underwriters Association, contenant des instructions aux agents pour l'émission des polices d'assurances, sont protégés par la Loi du droit d'auteur. Je crois utile de citer quelques extraits du sommaire du jugement, qui est compréhensif et exact:

The action is one for infringement of copyright, and conversion of infringing copies, in certain unpublished literary works known as Canadian Underwriters Association 1935 Rate Manual for the Provinces of Ontario and Quebec. The plaintiffs are the Underwriters Survey Bureau Ltd., owner of the copyright by way of assignment from the original registered owner, and some 170 insurance companies most of them members of the Canadian Automobile Underwriters Association, and unincorporated association of insurance companies writing automobile insurance...

The manuals are booklets issued by the Canadian Automobile Underwriters Association to serve as instructions to agents in writing automobile insurance business.

The alleged infringing manual was issued by the defendant, American Home Fire Insurance Company, and distributed by the other defendant, Central Fire Office Incorporated, as its agent. ...It was not disputed that this alleged infringing manual was printed and distributed by the defendants.

Held: That there is subject-matter for copyright in the manuals of the plaintiffs, and there has been infringement and conversion by the defendants.

Voir Church v. *Linton* (1).

Copinger and Skone James—Law of Copyright, 8e éd., soutiennent la même opinion. A la page 95 on trouve les commentaires suivants:

On the other hand, it has been held that in the case of a compilation in the nature of a directory the compiler of the work is the author of the actual entries although these may have in fact been in the first place written down at his request by the persons to whom they refer. To take a single contribution from a collective work is not necessarily an infringement of the collective work.

Plus loin ils ajoutent (p. 199):

Of course, insofar as he is the owner of the copyright in the arrangement of the compilation he may sue for any infringement of his arrangement and, in the case of contributions to a directory, although the entries may be written by the persons referred to, the editor has been treated as the author of the complete set of contributions.

Dans la cause de *A. and C. Black Limited* v. *Claude Stacey, Limited* (2) il appert du rapport que les demandeurs étaient les éditeurs d'une œuvre de références: "Who's Who" et que les défendeurs publiaient une œuvre intitulée

(1) (1903) 2 Comm. L.R. 176. (2) (1929) 1 Ch. 177.

"Men of the West", contenant les noms de personnages distingués de quelques comtés anglais et des informations sur leurs carrières. Les demandeurs, dans leur action, alléguaient que les défendeurs avaient violé leur droit d'auteur dans l'œuvre "Who's Who" en éditant "Men of the West", contenant plusieurs biographies qui étaient des reproductions, totales ou partielles, de celles incluses dans "Who's Who". Il a été jugé que, lorsqu'une information est donnée à un compilateur, la personne qui la lui fournit n'en est pas l'auteur aux termes de la Loi du droit d'auteur.

Drone, dans "Treatise on the law of property in intellectual productions", traitant des compilations, déclare ceci (p. 152):

The doctrine is well settled in England and the United States, that existing materials selected from common sources, and arranged and combined in an original and useful form, become a proper subject of copyright. This is equally true whether the compilation consist wholly of selected matter, or of such matter combined with original composition; and, in either case, it is immaterial whether the materials are obtained from published or unpublished sources, or whether the selections are used bodily, or their substance is given in the language of the compiler. Such works are often the result of industry, learning, and good judgment, and are useful and valuable contributions to knowledge. They are entitled to, and will receive, the same protection extended to productions wholly original.

Et plus loin (p. 153):

The compilation may consist of common facts and information which the compiler himself has reduced to writing, as in the case of a catalogue or a directory; of materials obtained from manuscripts, as a collection of statistics taken from unpublished official records or of selections made from published works. But in all cases the compiler must have a right to use the materials constituting his compilation. They must be gathered from common sources; ...

Voir sur le même sujet: *Shortt—The law relating to works of literature and art, embracing the Law of copyright*—(p. 192); *Halsbury's Laws of England,* 2e éd., t. 7, p. 521, par. 824.

Dans la cause de *Morris* v. *Wright* (1) le jugé, substantiellement correct, se lit, en partie, comme suit (p. 279):

The Plaintiff, who was the publisher of a trades directory, filed a bill against the Defendant, who was preparing for publication a new directory, charging him with using slips cut from the Plaintiff's work in obtaining materials for the new directory, and with copying from such slips. The Plaintiff having moved for an interlocutory injunction, the Defendant filed an affidavit, in which he admitted that at first he had used slips from the Plaintiff's work in obtaining materials for his own;

(1) (1870) L.R., 5 Ch. App. 279.

1951

LATOUR v. CYR et al.

Angers J.

but having discovered that it was illegal to do so, he had discontinued the practice; and he denied having copied any of such slips. In the absence of satisfactory evidence of the actual contents of the new directory, which was not yet published, the Court refused the injunction.

Dans la cause de *Lamb* v. *Evans* (1) le sommaire du jugement contient, entre autres, cette déclaration:

A trades directory consisted of advertisements furnished by tradesmen classified under headings denoting the different trades, which headings were composed by the Plaintiff, the registered proprietor, or by persons paid by him to compose them; but there was no express evidence that they were composed on the terms that the copyright should belong to him.

Held, by the Court of Appeal, that the Plaintiff had a copyright in the headings, and that though it was necessary under 5 and 6 Vict. c. 45, s. 18, that they should have been composed on the terms that he should have the copyright, this condition was satisfied because the fair inference from the circumstances of the case was that they had been composed on those terms.

And *semble,* that although the Plaintiff could not have copyright in a single advertisement, inasmuch as the advertiser must be at liberty to insert it elsewhere, the Plaintiff had copyright in the mass of advertisements as arranged.

La même doctrine prévaut aux États-Unis.

Amdur, dans son traité "Copyright Law and Practice", parlant de compilations et d'almanachs d'adresses, fait ces observations (p. 105):

Directories and other compilations were considered copyrightable even prior to the Act of Mar. 4, 1909, in which they are expressly specified under the term "books" (sec. 5a, supra sec. 1).

L'auteur cite ensuite et analyse brièvement certaines décisions qui sont pertinentes et méritent considération.

Dans la cause de *Sampson & Murdock Co.* v. *Seaver-Radford Co.* (2) le deuxième paragraphe du sommaire du jugement est ainsi conçu:

Complainant published a general directory of the city of Boston in July, 1903, purporting to give facts as they existed in the spring of that year, and which was duly copyrighted.

In February, 1904, defendant published a general directory of the city, which purported to give the facts as they existed just prior to that time. After completing its original canvass for names, defendant copied on slips from complainant's directory such names there printed as it had not obtained in its own canvass, with the information given about them, and with such slips as a guide it verified them by sending canvassers to the addresses given therein, and, when found correct, reprinted the same without alteration in its own directory.

Held, that such republication was an infringement of complainant's copyright.

(1) (1893) L.R. 1 Ch. 218. (2) (1905) 140 Fed. Rep. 539.

Dans une autre cause concernant un almanach d'adresses, savoir *Jewelers' Circular Publishing Company* v. *Keystone Publishing Company* (1) il a été jugé:

1. A directory of the jewelry trade, containing the names and addresses of jewelers, with their respective trade-marks, illustrated by cuts made from sketches or photographic copies of the trade-marks, held subject to copyright; ...

2. A copyright of a trade directory containing cuts of trade-marks held infringed by a defendant, which clipped therefrom the cuts and, after submitting them for approval to the owners of the trade-marks, reproduced them in another similar publication.

Dans la cause de *New Jersey Motor List Co.* v. *Barton Business Bureau* (2) il a été décidé, entre autres, ceci:

Lists of applicants for motor vehicle registrations, copied from records of state commissioner of motor vehicles, may be copyrighted.

Les mêmes principes sont en vigueur au Canada. Dans son Cours de droit industriel Léon-Mercier Gouin dit (p. 168) que la loi protège les compilations (art. 2, par. *o*)) parce que l'auteur a fait preuve d'originalité ou d'effort créateur en cherchant les matériaux et en les classant. Plus loin il ajoute qu'un dictionnaire historique, biographique et géographique, renfermant des articles traitant, d'une manière originale, des sujets tirés du domaine public, peut constituer, lorsqu'il est enregistré, une propriété privative. Il appuie son opinion sur l'arrêt de la Cour du Banc du Roi dans la cause de *Beauchemin* v. *Cadieux* (3), où ladite Cour, infirmant le jugement du juge Taschereau (le juge White dissident), émet cette opinion. Le juge en chef Sir Alexandre Lacoste a fait les observations suivantes (p. 270):

En accordant un droit d'auteur la loi n'entend pas attester le mérite littéraire d'un livre. Ce qu'elle veut protéger c'est l'œuvre, l'ouvrage, le travail de l'auteur, afin qu'un autre ne s'en empare pas pour lui faire une concurrence déloyale. Voilà pourquoi la protection ne s'étend pas seulement aux œuvres du génie, de la science et de l'art, mais aussi à de simples compilations de matières et de faits pris dans le domaine public, comme des dictionnaires, des almanachs d'adresses. La loi ne défend pas de faire des compilations semblables, pourvu qu'elles soient le fruit du travail de l'auteur et non la copie de celles qui sont protégées.

De son côté, le juge Blanchet a exprimé cette opinion (p. 277):

Il est vrai que le dictionnaire des appelants contient des renseignements sur l'histoire, la géographie et la biographie, ou, comme le déclare le jugement, une compilation de faits, de dates et de statistiques appartenant depuis longtemps au public, mais ce recueil et cette compilation ne

(1) (1921) 274 Fed. Rep. 932.
(2) (1931) 57 Fed. Rep. (2d) 353.
(3) (1901) R.J.Q. 10 B.R. 255.

1951

LATOUR
v.
CYR et al.

Angers J.

sont pas le résultat d'un procédé purement mécanique. Ils ont, au contraire, une particularité importante, c'est que les appelants leur ont donné une forme nouvelle et originale, différente et facile à distinguer de celle des ouvrages où ils peuvent les avoir puisés.

En effet, si le travail de leurs compositeurs n'a consisté d'abord qu'à choisir les sujets qui devaient être traités, à les classer par ordre alphabétique et à grouper ensuite sous chacun de ces titres un certain nombre de faits, d'événements et de dates, il leur a fallu nécessairement consacrer beaucoup de temps et de travail à coordonner cette masse de renseignements et d'informations et à leur donner la tournure et le style qui conviennent à un dictionnaire biographique, géographique et historique, où les actes, les choses et les faits les plus marquants doivent être relatés et décrits succinctement et à grands traits, de manière à intéresser le lecteur et à frapper son esprit.

Puis le juge Blanchet ajoute (p. 278):

Les appelants soutiennent que la forme dont ils ont revêtu et paré les différentes matières contenues dans leur dictionnaire constitue un travail d'auteur, et que, s'ils n'ont pas inventé le fond de leurs articles, ils sont néanmoins propriétaires de la rédaction qu'ils leur ont donnée et qui constitue une œuvre distincte et individuelle, susceptible de propriété privée.

Les auteurs et la jurisprudence sont unanimes à reconnaître cette distinction.

Le savant juge cite alors les opinions de *Drone,* de *Copinger,* de *Shortt* et de *Pouillet* ainsi que celles contenues dans *Sirey,* 88.2.20, et les *Pandectes Françaises,* vis *Propriété littéraire,* n^{os} 853, 862 et 863; aussi les décisions dans les causes de *Lamb* v. *Evans* et *Kelly* v. *Morris* (ubi supra).

Je suis d'avis qu'il y a lieu de consulter avec avantage le jugement du vice-chancelier Wood in re *Kelly* v. *Morris* (1) et la décision de la Cour d'appel du Manitoba dans la cause de *Pasickniak* v. *Dojacek* (2). Voir, en sens contraire, *Bain* v. *Henderson* (3).

La même opinion a été généralement adoptée en France. Voir sur ce sujet les auteurs suivants: *Pouillet, Traité théorique et pratique de la propriété littéraire et artistique,* n^{os} 22 et 27, pp. 33 et 35; *Juris-Classeur Civil, Annexes,* t. 3, fasc. C, s. V, n° 81; *Ruben de Couder, Dictionnaire de droit commercial,* t. 6, p. 60, n^{os} 561 et 562; *Renouard, Traité des droits d'auteurs,* t. 2, p. 97, n° 48; *Poinsard, La Propriété artistique et littéraire,* p. 17, vo almanachs; *Bry, La Propriété industrielle littéraire et artistique,* p. 574, n° 686.

(1) (1866) L.R. 1 Eq. Cas., 697.
(2) (1928) 2 D.L.R. 545.
(3) (1911) 16 B.C.R. 318.

Il me semble opportun de citer un extrait de cet auteur concernant les "almanachs" et "éphémérides":

> Il ne faut même pas refuser d'appliquer le principe de la propriété littéraire à ces compilations qui nous apparaissent sous la forme d'almanachs ou d'éphémérides, si leurs éléments, bien qu'empruntés à des publications antérieures, sont choisis avec discernement et disposés dans un ordre nouveau. Il en sera de même des annuaires, composés pour un département ou pour une ville, des tarifs, des albums contenant des légendes et des dessins dans un but même purement industriel, pourvu qu'il y ait toujours un caractère original résultant des plans et des dispositions.

La preuve révèle clairement, à mon avis, que le droit d'auteur du demandeur a été violé par la publication de l'"Index Valleyfield". La reproduction dans l'"Index Valleyfield" d'erreurs dans les noms et les adresses de plusieurs personnes mentionnées dans le bottin me semble rendre la violation manifeste et indiscutable: *Beauchemin et al.* v. *Cadieux et al.* (1); *Trow Directory Printing and Bookbinding Company* v. *United States Directory Company et al.* (2); *Cartwright* v. *Wharton* (3); *Investment Service Company* v. *Fitch Publishing Company* (4); *Deeks* v. *Wells* (5); *Hartfield* v. *Peterson et al.* (6).

Dans les circonstances je crois qu'il y a lieu d'accorder au demandeur l'ordonnance de cessation requise dans son exposé de réclamation, interdisant aux défendeurs d'éditer et vendre leur "Index Valleyfield": *Baily* v. *Taylor* (7); *Kelly* v. *Hooper* (8); *Bell* v. *Whitehead* (9); *Sweet* v. *Maugham* (10); *Campbell* v. *Scott* (11); *Tinsley* v. *Lacy* (12); *Smith* v. *Johnson* (13); *Grace* v. *Newman* (14); *Maple & Company* v. *Junior Army & Navy Stores* (15); *Borthwick* v. *Evening Post* (16); *Williams* v. *Smythe et al.* (17)

Après avoir entendu les témoignages avec attention, lu les notes abondantes recueillies à l'enquête, pris connaissance du certificat du Commissaire des Brevets relativement à l'enregistrement du droit d'auteur du demandeur le

(1) (1901) R.J.Q. 10 B.R. 255; (1901) 31 S.C.R. 370.
(2) (1903) 122 Fed. Rep. 191.
(3) (1912) 20 O W.R. 853; (1912) 25 O.L.R. 357.
(4) (1923) 291 Fed. Rep. 1010.
(5) (1931) O.R. 818, 840.
(6) (1937) 34 U.S.P.Q. 305.
(7) (1830) 1 Russ. & My. 73.
(8) (1839) 4 Jur. 21.
(9) (1839) 8 L.J. Ch. 141.
(10) (1840) 11 Sim. 51.
(11) (1842) 11 Sim. 31.
(12) (1863) 1 H. & M. 747.
(13) (1863) 33 L.J. Ch. 137.
(14) (1875) L.R. 19 Eq. Cas. 623.
(15) (1882) L.R. 21 Ch. D. 369.
(16) (1888) 37 Ch. D. 449.
(17) (1901) 110 Fed. Rep. 961.

1951

LATOUR
v.
CYR *et al.*

Angers J.

28 juin 1932 sur "Le Bottin du Commerce de la Cité de Salaberry de Valleyfield", examiné "Le Bottin du commerce et des adresses de la cité de Salaberry de Valleyfield" 1947-1948 (pièce 2), l'édition 1949-1950 du même bottin (pièce 7) et l'"Index Valleyfield" (pièce 4) et étudié la doctrine et la jurisprudence canadienne, anglaise, américaine et française, j'en suis venu à la conclusion que l'action du demandeur est bien fondée, que le demandeur est titulaire du droit d'auteur du Bottin du commerce et des adresses de la cité de Salaberry de Valleyfield, que les défendeurs ont violé ce droit d'auteur et qu'ils doivent être tenus responsables des dommages que la publication de leur œuvre "Index Valleyfield" a pu causer au demandeur, qu'il y a lieu d'accorder à ce dernier une ordonnance de cessation interdisant aux défendeurs d'éditer et vendre au public leur "Index Valleyfield" et d'ordonner la saisie de tous les exemplaires imprimés ou sous presse dudit Index entre les mains des défendeurs ou d'autres personnes.

Vu que la preuve des dommages ou de la perte de profit, s'il y en a, n'est pas satisfaisante, il y aura renvoi de la cause au registraire, conformément aux dispositions de la règle 177 des règles et ordonnances de cette Cour, afin d'établir le montant de tels dommages ou perte de profit et de faire rapport à la Cour incessamment. Les frais de ce renvoi sont réservés pour adjudication ultérieure.

Le demandeur aura droit à ses frais d'action contre les défendeurs.

Judgment accordingly.

BETWEEN:

1951

Jan. 25

HARRY GOLD, ...CLAIMANT;

AND

Mar. 9

HIS MAJESTY THE KING .....RESPONDENT.

Revenue—Seizure, Forfeiture—The Customs Act, R.S.C. 1927, c. 42, ss. 176, 193(1) (2)—Automobile used to pilot motor truck containing refrigerators smuggled into Canada and to direct driver of said truck—Motor vehicle "made use of" in "subsequent transportation" of goods liable to forfeiture under the Customs Act—Claim of owner dismissed.

1951

GOLD
v.
THE KING

Angers J.

Some time in July, 1949, one L., who owned a motor truck, undertook to transport to Montreal, P.Q., eight refrigerators which had been smuggled into Canada from the United States. By arrangement L. was to be met at the Montreal side of the Jacques-Cartier bridge by a man in an automobile bearing Quebec licence number 67-708. Upon his arrival there L. was met by the driver of the said automobile, Harry Gold, the claimant. After speaking to L. Gold drove his car a short distance, when he alighted and made a telephone call. The truck followed Gold's car to that point. Gold then proceeded ahead of L. and piloted him until the truck and its load were seized. Subsequently Gold's car was seized and declared forfeited by the Minister of National Revenue on the ground that it was "made use of" in the "subsequent transportation" of goods liable to forfeiture under the Customs Act. The Minister, on being advised by the claimant that his decision was not accepted, referred the matter to this Court.

Held: That Gold assisted in the transporting of the refrigerators which were, to his knowledge, liable to forfeiture under the Customs Act.

REFERENCE by the Minister of National Revenue under section 176 of the Customs Act.

The reference was heard before the Honourable Mr. Justice Angers at Montreal.

J. J. Penverne, K.C. for claimant.

Georges Reid for respondent.

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

ANGERS J. now (March 9, 1951) delivered the following judgment:

By his action the claimant claims a judgment declaring illegal, null and void the seizure and subsequent forfeiture of his automobile and ordering the Department of National Revenue (Customs) to release and return to him the said automobile, with costs.

In his statement of claim the claimant alleges:

he is the owner by conditional deed of sale of an automobile which was declared forfeited on September 29, 1949, by the Department of National Revenue (Customs);

he gave notice to the said Department by letter dated October 18, 1949, that he did not accept the decision of forfeiture:

1951

GOLD
v.
THE KING

Angers J.

he was served on January 21, 1950, with a notice from an agent for the Attorney-General of Canada that the Minister of National Revenue referred the decision of forfeiture to the Exchequer Court of Canada for adjudication;

his automobile was seized subsequent to the seizure by Customs of several refrigerators found in a motor truck driven by a third party;

his automobile was not used in the importation, unshipping, landing, removal or transportation of goods liable to forfeiture under the Customs Act;

the seizure of the said automobile is illegal, null and void;

the subsequent decision of forfeiture of the said automobile is also illegal, null and void;

the claimant is a salesman and needs his automobile for his livelihood and that of his family;

he is entited to demand judgment ordering the return of his said automobile.

In his statement of defence the respondent pleads:

he admits that the claimant gave notice to the Department of National Revenue (Customs) by letter dated October 18, 1949, that he did not accept its decision of forfeiture;

he admits that he was served on January 21, 1950, with a notice from an agent for the Attorney-General of Canada that the Minister of National Revenue referred the decision of forfeiture to the Exchequer Court of Canada;

he denies or ignores the other allegations;

on or about July 18, 1949, the claimant was a party and one of the principals who arranged for unlawful importation of eight refrigerators from the United States of America and their subsequent transportation to Montreal;

members of the Royal Canadian Mounted Police seized the eight refrigerators on a truck operated by one Henri Lamoureux and also seized the truck;

a decision of forfeiture of the eight refrigerators under the Customs Act has been rendered in re Customs seizure number 38041/23583;

claimant was a party to the arrangements that the said eight refrigerators illegally imported from the United

1951

GOLD
v.
THE KING

Angers J.

States be delivered to a point near the residence of one Frank Bellingham, district of Bedford, Quebec, not far from the international boundary;

in fact the said eight refrigerators were delivered to the agreed upon place and from there the said Frank Bellingham transported them in his truck to the home of said Henri Lamoureux, Saint-Césaire, Quebec;

the said eight refrigerators were transferred to Lamoureux's motor truck and he transported them to Montreal;

by arrangement Lamoureux was to be met at the Jacques-Cartier bridge by a man in an automobile bearing Quebec licence number 67-708;

on the same day, to wit July 18, 1949, Lamoureux proceeded to Montreal as understood and arrived at approximately ten o'clock in the forenoon; as soon as he had left Jacques-Cartier bridge the car expected arrived and the driver thereof walked over to him and told him to follow his automobile, which Lamoureux did up to a certain street intersection;

the driver of the said automobile was Harry Gold, the claimant;

from the first street intersection the claimant had the truck follow his automobile to another point, where some goods were unloaded;

later on the same day and still using the aforesaid automobile, the claimant directed the truck driver to another street intersection and finally to the point where the seizure of the said eight refrigerators was made on the said truck;

the said automobile, driven by the claimant and used to pilot the truck containing the said eight refrigerators seized and also to direct the driver of the said truck, was "made use of" in the "subsequent transportation" of goods liable to forfeiture under the Customs Act;

claimant assisted and was concerned in the importation, unshipping, landing, removal and subsequent transportation of goods liable to forfeiture under the Customs Act, to wit the aforesaid eight refrigerators seized, in whose control or possession the same came without lawful excuse;

the Minister of National Revenue was justified in passing the decision of September 29, 1949, in the matter of the seizure report number 38114/23566 of the Department of

1951

GOLD
v.
THE KING

Angers J.

National Revenue, whereby the said automobile, being a green Studebaker Sedan, model 1948, which claimant claims as his property, was declared forfeited in virtue of the powers vested in the Minister of National Revenue by section 176 of the Customs Act;

the claimant's statement of claim is ill-founded in fact and in law.

In his reply the claimant, after praying act of the admissions contained in the statement of defence, admits the transportation of refrigerators to Montreal by Lamoureux and his meeting him at Jacques-Cartier bridge, ignores or denies the other allegations thereof and avers specifically:

the decision referred to is unlawful, unjustified and an abuse of power in that the essential facts in seizure report number 38114/23566, which are denied, fail to disclose that the automobile was ever used to carry, move, remove, transport or land physically any of the refrigerators aforesaid or parts thereof;

the conclusions of the statement of defence are unfounded in law and in fact;

the claimant further avers:

he admitted being a party to an offence under the Customs Act, pleaded guilty and paid the penalty imposed by law and he is justified in pleading that the decision of forfeiture is an "abus de droit" and a deliberate and unlawful attempt to punish him twice for the same offence.

The matter was referred to this Court by the Minister of National Revenue on December 29, 1949, by virtue of the powers vested in him by section 176 of the Customs Act. The reference contains, among others, the following statements:

WHEREAS, by a decision dated the 29th day of September, 1949, in the matter of Seizure Report No. 38114/23566 of the Department of National Revenue (Customs) (a copy of which is attached hereto), it was decided that 'the automobile be forfeited';

AND WHEREAS, by a letter dated the 18th day of October, 1949, (a copy of which is attached hereto), the claimant gave notice that such decision would not be accepted;

In a letter dated October 18, 1949, the claimant wrote to the Department of National Revenue acknowledging

receipt of its letter of September 30 advising him that his automobile had been forfeited and giving notice that its decision was not accepted.

Admissions were made at the trial by Gold:

that some time in July 1949 he was concerned in the illegal importation into Canada of eight refrigerators with other persons;

that the arrangements included the transportation of refrigerators by one Lamoureux, in his truck, to the city of Montreal;

that subsequently the claimant met Lamoureux at the Montreal side of the Jacques-Cartier bridge;

that pursuant to the offence committed against the Customs Act a charge was brought against claimant before the Courts of criminal jurisdiction in Montreal, the charge being, briefly, one of illegal importation into Canada of goods liable to customs;

that claimant pleaded guilty to the charge;

that the charge was:

I am credibly informed, and do verily believe, that Harry Gold—of Montreal, Quebec, on or about the 18th day of July, 1949, in Montreal, District of Montreal, committed an indictable offence by assisting, or was otherwise concerned, in the importing, unshipping, landing, or removing, or subsequently transporting, or in harboring American goods, in whose control or possession the same came without lawful excuse, to wit: American Refrigerators, on which the value for Duty was over $200, contrary to Section 193(3) of the Customs Act, Chapter 42 R.S.C. 1927, and its amendments, whereby I pray for justice, and sign. . . .;

that subsequent to a plea of guilty claimant was sentenced by the Court to the payment of a fine and costs and that claimant paid them.

A brief recapitulation of the evidence seems apposite.

[Here the learned Judge reviews the evidence and proceeds:]

The facts are simple and may be summarized briefly. On July 18, 1949, the claimant, who owned a Studebaker Sedan, went to see Henri Lamoureux, a truck-man, whom he did not know, at his residence in Saint-Césaire, and asked him to transport eight refrigerators, which had been smuggled into Canada from the United States. Lamoureux undertook to transport the refrigerators in question. It was agreed that he would meet Gold at the Montreal side

1951

GOLD
v.
THE KING

Angers J.

of the Jacques-Cartier bridge. The former arrived at the bridge alone in his automobile and waited some time before Lamoureux reached the Montreal end of the bridge in his truck, in which were eight refrigerators. Gold got out of his automobile, approached the truck and spoke to Lamoureux. He then went back to his car, got into it and drove a short distance, when he alighted and made a telephone call. The truck was at a standstill when he left in his automobile, but it followed him to the place where he had telephoned. Gold proceeded ahead of Lamoureux and piloted him until the truck and its load of refrigerators were seized.

I have been unable to find any pertinent decisions, notwithstanding a thorough investigation. I may note that counsel admitted having failed to come across any precedents.

The case is governed by paragraphs 1 and 2 of section 193 of the Customs Act. The relevant part of section 193 reads thus:

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.

(2) Every person who assists or is otherwise concerned in the importing, unshipping, landing or removing or subsequent transporting, or in the harbouring of such goods, or into whose control or possession the same come without lawful excuse, the proof of which shall be on the person accused, shall, in addition to any other penalty, forfeit a sum equal to the value of such goods, which may be recovered in any court of competent jurisdiction, . . .

Regarding the meaning of the words "made use of" in paragraph 1 of section 193 reference may be had to *Words and Phrases judicially defined, Roland Burrows,* volume 3, page 303, and *Western Trust Company* v. *City of Regina* (1).

I am inclined to believe that the question involved herein has never been decided.

The deposition of Gold is incoherent and replete with reticences, hesitations and contradictions and the witness' credibility is thereby considerably lessened.

(1) (1916) 30 D.L.R. 548, 551.

1951

GOLD
v.
THE KING

Angers J.

Considering the admissions made at the trial, the claimant's testimony and the version of Lamoureux, I have reached the conclusion that Gold assisted in the transporting of the eight refrigerators which were, to his knowledge, liable to forfeiture under the Customs Act.

There will be judgment dismissing the claimant's statement of claim and declaring good and valid the decision of the Minister of National Revenue dated November 29, 1949, in the matter of the seizure report number 38114/23566 of the Department of National Revenue (Customs), whereby the claimant's automobile bearing the Quebec licence number 67-708 for the year 1949, being a green Studebaker Sedan automobile, model 1948, was declared forfeited, and maintaining the forfeiture of the said automobile.

Respondent will be entitled to his costs against claimant.

Judgment accordingly.

1951

Mar. 16

Apr. 12

BETWEEN:

ROWLAND & O'BRIEN ..... PETITIONER;

AND

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

Trade Mark—The Unfair Competition Act, 1932, 22-23 Geo. V. c. 38 ss. 2(m), 26(1) (c) (d), 29(1)—Word "Taystee" a corruption or misspelling of word "Taysty"—Word "Tasty" not only descriptive but laudatory when used in reference to foods—Corruption or misspelling of a word cannot change its character—Purely laudatory words or any corruption or misspelling thereof cannot be subject to registrability as a word mark under s. 29 of the Unfair Competition Act—Application for a declaration under s. 29(1) of the Act dismissed.

Petitioner is a partnership carrying on a bakery business in Windsor, Ontario, and distributing its products—bread, doughnuts, cakes, rolls etc.—throughout that city and other municipalities in the County of Essex. On March 28, 1950, suppliant applied to the Registrar of Trade Marks for registration of the single word "Taystee" for use on bakery products manufactured from wheat flour. That application was refused by the Registrar under s. 26(1) (*c*) (*d*), and also under s. 2(*m*) of The Unfair Competition Act, 1932. Thus the present application under s. 29 of the Act.

1951

ROWLAND AND O'BRIEN v. THE REGISTRAR OF TRADE MARKS

Cameron J.

Held: That the corruption or misspelling of a word cannot change its character. *C. Fairall Fisher* v. *British Columbia Packers Ltd.* (1945) Ex. C.R. 128 followed.

2. That the word "Taystee" is a corruption or misspelling of the descriptive word "Tasty".

3. That the word "Tasty" is not only a descriptive word, but also, when used in reference to foods, it indicates something that is particularly palatable or pleasing to the taste, falling, therefore, within the category of laudatory words.

4. That the purely laudatory word "Tasty", or any corruption or misspelling thereof such as "Taystee" cannot be made the subject of a declaration of registrability as a word mark under section 29, no matter what the extent of its use may be and regardless of the extent to which the evidence may indicate that it has lost its primary meaning and acquired a secondary meaning.

5. That the application for a declaration under s. 29 of the Unfair Competition Act, 1932, must be dismissed as the evidence falls far short of establishing the "general recognition" required by the section.

APPLICATION for a declaration under s. 29 of the Unfair Competition Act.

The application was heard before the Honourable Mr. Justice Cameron at Windsor, Ontario.

W. P. Harvie for suppliant.

No one appeared for respondent.

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

CAMERON J. now (April 12, 1951) delivered the following judgment:

This is an application under section 29 of The Unfair Competition Act, 1932, for a declaration "that it has been proved to the satisfaction of this Court that the word mark 'Taystee' has been so used by the petitioner, Rowland & O'Brien, as to have become generally recognized by dealers in and/or users of bakery products manufactured from wheat flour as indicating that the said petitioners assume responsibility for the character or quality of the products of wheat flour produced and manufactured by them and for their place of origin." At the hearing of the motion, counsel for the petitioner asked that if such

declaration were made, registration should be limited to the geographical area within the limits of the County of Essex, Province of Ontario.

It was established that notice of filing of the petition for registration had been given in the *Canada Gazette,* that pursuant thereto no statement of objections had been filed or served and that due service had been made upon the Minister under Rule 36. The Registrar of Trade Marks, although duly served with notice of the hearing, was not represented thereat.

The petitioner is a partnership carrying on a bakery business in Windsor, Ontario, and distributing its products —bread, doughnuts, cakes, rolls, etc.—throughout that city and other municipalities in the County of Essex. On the 17th of June, 1940, it registered in Canada the word mark "Rowland & O'Brien's Taystee." A copy of that registration was not available at the hearing but I assume that it was applied to bakery products. On March 28, 1950, the applicant applied to the Registrar of Trade Marks for registration of the single word "Taystee" for use on bakery products manufactured from wheat flour. That application was refused by the Registrar under section 26(1) (*c*) (*d*), and also under section 2(*m*) of the Act. Thereupon the present application was launched.

Mr. Rowland, one of the partners of Rowland & O'Brien, stated that his firm was anxious to secure a word mark that would be attractive and distinctive in the bakery trade, one that would be short and easy to remember; that he or someone in the firm had seen the word "Taystee" in use in the United States, and as it appeared to meet these requirements they had adopted it for use on their products some time prior to June, 1940, when they registered the words "Rowland & O'Brien's Taystee." For two or three years thereafter they did not use the word "Taystee" by itself, but as "Rowland & O'Brien's Taystee." They found it was somewhat cumbersome in that form, and about 1942 or 1943 began the use of the single word "Taystee," using it in various forms on the packaging of their bread, rolls, cakes, etc., as shown in Exhibits E, F, H, I, J, K and L; and also on show cards such as Exhibit D and on their delivery trucks and wagons. On all of the packages and

1951

ROWLAND AND O'BRIEN v. THE REGISTRAR OF TRADE MARKS

Cameron J.

cards the firm name of "Rowland & O'Brien" was also prominently featured. The bakery is a large one, its products being sold at the bakery itself, by delivery trucks and wagons and to retail stores. No other bakery business in the area uses the word or any similar word in connection with its products. Mr. Rowland stresses the point that in originally choosing the word "Taystee" he did not have in mind the idea that it had the usual connotation of the common word "Tasty."

A number of witnesses gave oral evidence on behalf of the petitioner. All were familiar over varying periods with the petitioner's extensive use of the word "Taystee" on its labels and packages. Mr. George Topp for nine years has been the Windsor Manager of Canada Bread Company, a competitor of the petitioner. He stated that throughout the industry "Taystee" was recognized as the word mark of Rowland & O'Brien and was not descriptive of their products as a whole; that to him the word was distinctive of their products. Mr. C. Niskasari is a baker employed by a retail confectioner and bakery in Windsor and which for many years has sold bread manufactured by the petitioner under the name "Taystee." To him "Taystee" meant the product of Rowland & O'Brien and he did not think of it as having the meaning of "Tasty." Mr. R. Vermette operates a confectionery shop in Tecumseh and has purchased and sold the petitioner's products in packages marked "Taystee" for about six months. When customers ask for a loaf of "Taystee" bread he supplies them with the petitioner's products, that being the only bread sold by him under that name. Mr. George Bain, a merchant has used the petitioner's products for about fifteen years, occasionally purchasing them himself; he states that he never asks for them under the name "Taystee." Mr. E. Beaudoin operates a garage and refreshment stand in the County of Essex and uses the petitioner's products in "Taystee" packages in his sandwiches, hamburgers, and the like. On occasions he would sell a few loaves of bread, a cake or doughnuts. I found his evidence somewhat confused for on one occasion he said that customers would ask for "a loaf of 'Taystee' bread"; and later he stated that they would never ask for it as "Taystee" bread but as

"Rowland & O'Brien's." Mr. R. MacCallum for many years had carried on a retail grocery business in Windsor but is now retired. He sold the petitioner's products bearing the mark "Taystee" and stated that when customers asked for a loaf of "Taystee" bread or a "Taystee" cake, he understood them to mean the petitioner's products.

Now, quite obviously "Taystee" is a corruption or misspelling of the common English word "Tasty"—a descriptive word in everyday use. It is defined in the Shorter Oxford English Dictionary as:

1. Pleasing to the taste; appetizing, savoury.
2. Tasteful, elegant. (Now rare).

In my opinion, "Tasty" is not only a descriptive word, but also, when used in reference to foods, it indicates something that is particularly palatable or pleasing to the taste. It falls, therefore, within the category of laudatory words and it is well settled that such a word in Canada cannot be brought within the requirements of section 29(1) of The Unfair Competition Act, which is as follows:

29. (1) Notwithstanding that a trade mark is not registrable under any other provision of this Act it may be registered if, in any action or proceeding in the Exchequer Court of Canada, the court by its judgment declares that it has been proved to its satisfaction that the mark has been so used by any person as to have become generally recognized by dealers in and/or users of the class of wares in association with which it has been used, as indicating that such person assumes responsibility for their character or quality, for the conditions under which or the class of person by whom they have been produced or for their place of origin.

And what I have said in reference to the word "Tasty" applies also to the word "Taystee," for the corruption or misspelling of a word cannot change its character. In this connection, reference may be made to the case of *C. Fairall Fisher* v. *British Columbia Packers Ltd.* (1). In that case the President of this Court held that the word mark "Sea-lect" used in connection with the sale of canned fish was merely a corruption or misspelling of the laudatory epithet "Select" and as such was incapable of distinctiveness and should not have been registered as a trade mark. He held, also, that a laudatory epithet such as "Select," including any corruption or misspelling of it such as "Sea-lect," should not be made the subject of a declaration of registrability as a word mark under section 29, no matter

(1) (1945) Ex. C.R. 128.

1951

ROWLAND AND O'BRIEN v. THE REGISTRAR OF TRADE MARKS

Cameron J.

what the extent of its use may be. Further, he held that the corruption or misspelling of a descriptive word cannot change its character (*Kirstein Sons & Co.* v. *Cohen Brothers* (1); and *The "Orlwoola" Trade Mark Application* (2)followed).

In the "Sea-lect" case, the President said at p. 140:

In my judgment, however, this case falls outside section 29 altogether. If a word were merely descriptive of quality and nothing more, or a corruption or misspelling of such a word, the Court would have to decide whether it should, having regard to the evidence of user placed before it, exercise the discretion vested in it. The section provides for the registration of a trade mark and it is implied that the mark has acquired, although it may have lacked it originally, the quality of distinctiveness and has become "adapted to distinguish." The *Perfection* case, (1909) 26 R.P.C. 837, decided that laudatory epithets are incapable of distinctiveness and cannot be adapted to distinguish no matter how much evidence of user has been adduced. Farwell, L.J. put the matter in a striking way when he said, at page 862:

> "My own opinion is that no amount of user could possibly withdraw the word "Perfection" from its primary and ordinary meaning and make it mean 'Crossfield's' instead of 'Perfect'"

The authority of that case should be followed and it should be held that a laudatory epithet such as "Select" including any corruption or misspelling of it such as "Sea-lect," should not be made the subject of a declaration of registrability as a word mark under section 29, no matter what the extent of its user may be. Such an epithet is incapable of being or becoming a word mark. The petitioner's application under section 29 must, therefore, be dismissed.

In the case of *Registrar of Trade Marks* v. *G. A. Hardie & Co. Ltd.* (3), it was held:

That the compound word "Super-weave" is a laudatory epithet of such common and ordinary usage that it can never become adapted to distinguish within the meaning of s. 2(*m*) of The Unfair Competition Act, 1932. It being impossible to bring the word within the meaning of "trade mark" as defined by s. 2(*m*), an application under s. 29 cannot succeed.

In that case, Kerwin, J. said at p. 488:

The result is that the compound word "Super-weave" clearly indicates and describes textiles that have a superior or superfine weave, an attribute that is unquestionably much desired by purchasers and users of such wares and, therefore, an attribute which a trader in textiles would naturally wish to emphasize in offering his wares for sale. Such a word may not be commandeered by one manufacturer and registered under The Unfair Competition Act so as to prevent others from claiming the same quality in their merchandise and using the same or a similar expression to describe it . . .

It was not contended that if the Court came to the conclusion that 'Super-weave' was an ordinary laudatory expression the application should

(1) (1907) 39 S.C.R. 286.
(2) (1909) 26 R.P.C. 850.
(3) (1949) S.C.R. 483.

succeed, but, in view of the argument addressed to us, it is advisable to state what appears to be the proper construction of section 29 of the Act. The opening words of subsection 1 'notwithstanding that a trade mark is not registrable under any other provision of this Act' require one to examine the definition of trade mark in section 2(*m*). That definition states that 'trade mark' means a symbol 'which has become adapted to distinguish.' While this wording differs from section 9 of the English Act in question in the Perfection Case, since in section 9 'distinctive' is stated to mean 'adapted to distinguish,' no distinction should be drawn between the uses of the different tenses. Turning again to section 29, while the Court is empowered to grant the declaration mentioned, notwithstanding that a trade mark is not registrable under any other provision of the Act, the original idea underlying such legislation, as it has been developed in England, should be followed here, with the result that, if a word is held to be purely laudatory, no amount of use or recognition by dealers or users of words as indicating that a certain person assumes responsibility for the character or quality of the merchandise would be sufficient to take such an expression out of the common domain and enable the user thereof to become registered as the owner of a trade mark under The Unfair Competition Act.

And at p. 509, Estey J. said:

The compound word "super-weave" contains the well-known, commonly used laudatory epithet "super" and the equally well-known word "weave" commonly used to describe the texture or method of manufacture. It is a well-founded principle recognized in both the authorities and statute law that such words (subject to a descriptive word becoming "generally recognized" as in s. 29) should remain the common property of dealers and users and the public generally and no person or corporation should be granted the exclusive right to or a monopoly in the use of such words such as registration of a trade mark bestows upon the applicant.

When these words are joined to form the compound word "super-weave" it means, as stated by the learned trial Judge, "a better quality of weaving," and, with respect, I think would be so understood and commonly used by dealers and users, and as such properly classified as a laudatory epithet.

Applying the principles above laid down to the facts in this case, I have reached the conclusion that the purely laudatory word "Tasty," or any corruption or misspelling thereof such as "Taystee," should not be made the subject of a declaration of registrability as a word mark under section 29, no matter what the extent of its use may be and regardless of the extent to which the evidence may indicate that it has lost its primary meaning and acquired a secondary meaning. "Tasty" when applied to foods is an attribute much desired by users of food and therefore an attribute which any dealer in bakery products would wish to use in offering his goods for sale. Such a word should remain available for the use of all desiring to use it in describing their products and no one should be given

the exclusive right to its use, as would be the case if the declaration of registrability here sought were granted. For these reasons the application must be dismissed, but without costs.

In disposing of the matter on the ground that the word mark applied for is a mere misspelling of a laudatory word, it has not been necessary to consider the evidence adduced in support of the application. Even had I been of the opinion that the word was not laudatory but merely descriptive, I would not have found the evidence sufficient to meet the strict requirements of section 29. Exclusive of Mr. Rowland, six witnesses gave evidence for the petitioner. Four of these were dealers in bakery products who purchased them from the petitioner, and to them and to Mr. Topp (the manager of a competing firm) the word would necessarily be associated with the origin of the goods. The evidence of the remaining witness, Mr. Bain, was not in any way helpful to the petitioner. Inasmuch as there were a great many grocers selling the petitioner's products and many thousands who used them, the evidence falls far short of establishing the "general recognition" required by section 29. In this connection reference may be made to the judgment of Rand, J. in the *Hardie* case (*supra*) at p. 493.

Judgment accordingly.

1951

Mar. 20

Apr. 27

BETWEEN:

PHYLLIS BOUCK ..... APPELLANT;

AND

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

Revenue—Income—Income War Tax Act, R.S.C. 1927, c. 97, s. 3—Money directed by testator to be paid into an account to be under "the sole control" of appellant or to be used as a guardian "in her sole discretion" may determine is income—Appeal dismissed.

A testator directed his trustee to pay into an income account certain money annually until all of his children attained the age of twenty-five years and provided "the moneys to the credit of the account shall be

under the sole control of my wife" and in the event of the death of his wife before the children shall have attained the age of twenty-five years the guardian of the children to have the control of such moneys "as the said guardian in her sole discretion may from time to time determine".

Appellant is the widow of the testator and in 1944 received a certain sum of money from the estate of her late husband. Respondent assessed appellant for income tax on the whole of the said sum so received. From such assessment an appeal was taken to this Court.

Held: That the control over the moneys received by appellant was sufficiently absolute in its nature to constitute income and the appeal must be dismissed.

APPEAL under the Income War Tax Act.

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

R. A. MacKimmie and *C. Johnston* 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.

GRAHAM D.J. now (April 27, 1951) delivered the following judgment:

This is an appeal by (Mrs.) Phyllis Bouck from her assessment for income tax for the year 1944.

The facts are not in dispute. The appellant is the widow of the late Charles Bouck of Calgary, in the Province of Alberta, who died on the 19th of July, 1944.

Clause 5 of the last will and testament of the said Charles Bouck reads as follows:

5. To pay to the credit of an "income Account" all the net revenue of the trust hereby created (after payment of the cost of administration and the said income taxes) in every year until all of my children shall have attained the age of twenty-five (25) years. The moneys to the credit of the said account shall be under the sole control of my wife to be used by her to maintain a home for herself and my children, for the maintenance of my wife and my children for the proper education of my children and otherwise for the benefit of my wife and my children as my wife in her sole discretion may from time to time determine. In every such year in which the said net revenue is less than the sum of Ten Thousand ($10,000) Dollars, my Trustee shall pay to the credit of the said income account out of the capital of the trust an additional sum which with the revenue for such year will equal the said sum. If through any unforeseen cause the sum above mentioned

1951

BOUCK v. MINISTER OF NATIONAL REVENUE

Graham D.J.

should in any such year or years prove insufficient for the said purposes, then my Trustee may in its discretion pay in to the said income account such additional moneys out of the capital of the trust as may be reasonably required for the said purposes. Any moneys from time to time to the credit of the said income account and not required by my wife for the purposes aforesaid, may be taken by my Trustee and shall become part of the capital of the trust hereby created.

Provided that in the event of my wife remarrying before both of my children shall have attained the age of twenty-five (25) years, then my Trustee shall pay to my wife in each such year thereafter, in monthly instalments without power of anticipation, one-third of the net income in each such year of the trust hereby created, for her own use, and the amount so paid shall be deducted from the amount payable in each year to the credit of the said income account, and the moneys to the credit of the said income account shall thereafter be used exclusively for the maintenance, education and benefit of my children.

Provided further that in the event of my wife dying before all of my children shall have attained the age of twenty-five (25) years the above mentioned guardian of my children shall have the control of the moneys from time to time to the credit of the said income account to the extent required to provide for the maintenance, education and benefit of my children as the said guardian in her sole discretion may from time to time determine, in the same manner as my wife if living. Provided that the said guardian shall in each year first obtain the approval of my Trustee of the amount to be expended in such year for the said purpose.

It is admitted that under this provision the appellant received in the year 1944 the sum of $3,797.26 from the estate of her late husband.

The said Charles Bouck left surviving him two infant children, both of whom resided with their mother and were during the year in question supported by her.

In assessing the appellant for income tax the Minister of National Revenue ruled that the whole of the sum of $3,797.26 was income in the hands of the appellant and therefore subject to tax.

The appellant submits that under the terms of the will and particularly under the terms of clause 5 of the will the moneys so paid to the appellant are paid to her on behalf of herself and her two children and that as a result a portion only of the amount should be considered income accruing to her as defined by The Income War Tax Act.

This appeal involves an interpretation of the testator's intention as expressed in the above referred to clause 5 of his will.

A number of authorities on this point were submitted during the course of argument and it is by no means an easy task to reconcile them. Some hold that under clauses

of a somewhat similar nature the widow is a trustee for herself and the children. Others, notably *Lambe* v. *Eames* (1) and *Singer* v. *Singer* (2), reject this view and hold that the income belongs to the widow absolutely subject only to an obligation to provide, in her discretion, for the support and maintenance of the children. I have no doubt that in part the conflict of opinion is caused by the subject matter of the dispute before each Court and the actual words used by the testator. Here I have to decide only the question as to whether the amount received by the appellant is income in her hands under the provisions of the Income War Tax Act.

Having this in mind and the use of the words "the sole control" and "in her sole discretion" in clause 5 of the will, I have adopted the conclusion reached by Middleton J., in *Singer* v. *Singer, supra,* that the testator Charles Bouck had unbounded confidence in his wife and that his dominant intention was until the children attained the age of 25 years and so long as she remained his widow she should occupy substantially the same position towards the children as he had himself occupied.

This being so, the control over the moneys received by the appellant was sufficiently absolute in its nature to constitute income, as defined by Section 3 of The Income War Tax Act, received by her in the 1944 taxation year.

I might point out that the Act recognizes the position of a taxpayer who is supporting dependent children by increasing the basic exemption over that of a single person and by allowing a deduction for the support of each child. It recognizes therefore the obligation of the parent to provide support and maintenance for the dependent children. The appellant in this regard is in exactly the same position as was her late husband. The appellant may find some comfort in the fact that if she succeeded in her appeal she would be taxed under the provisions of the Act as a single person.

The appeal is therefore dismissed with costs.

Judgment accordingly.

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(1) (1871) L.R. 6 Ch. App. 597. (2) (1915) 52 S.C.R. 447.

1951
Jan. 22 & 23
Mar. 12

BETWEEN:

HIS MAJESTY THE KING.....PLAINTIFF;

AND

PLANTERS NUT AND CHOCOLATE COMPANY LIMITED..... } DEFENDANT.

Revenue—Sales Tax—Excise Tax Act, R.S.C. 1927, c. 179, s. 86(1), 89 and Schedule III—"Fruit"—"Vegetables"—Salted peanuts and cashew nuts not fruits or vegetables within Schedule III, Excise Tax Act—Words used in Excise Tax Act to be construed as they are used in common language and not as applied to any particular science or art.

Held: That Parliament in enacting the Excise Tax Act Part XIII and Schedule III was not using words which were applied to any particular science or art and therefore the words used are to be construed as they are understood in common language.

2. That what constitutes a "fruit" or "vegetable" within the meaning of the Excise Tax Act is what would ordinarily in matters of commerce in Canada be included therein and not what would be a botanist's conception of the subject matter.

3. That as products and as general commodities in the market neither salted peanuts nor cashews, or nuts of any sort, are generally denominated or known in Canada as either fruits or vegetables, and that salted peanuts and cashew nuts do not fall within the exceptions provided for fruit and vegetables in Schedule III of the Excise Tax Act.

INFORMATION exhibited by the Attorney General of Canada to recover from defendant money alleged owing for sales tax.

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

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

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 (March 12, 1951) delivered the following judgment:

This is an Information in which the plaintiff claims from the defendant payment of the sum of $265,196.92 for sales tax in respect of sales of salted peanuts and cashew nuts in

the period May 19, 1948, to September 30, 1949, penalties for non-payment thereof, and costs. The defendant carries on business in Canada and has its head office at Toronto.

The defendant admits that during the said period it was a producer or manufacturer of salted peanuts and cashew nuts and that such were sold and delivered in Canada. It denies, however, that it is liable to payment of any tax, on the ground that salted peanuts and cashew nuts are (*a*) vegetables, or, alternatively, (*b*) fruit, within the meaning of Schedule III of The Excise Tax Act, and are, therefore, exempt from tax.

A commission or sales tax of 8 per cent on the sale price *of all goods* produced or manufactured in Canada is imposed by section 86(1) of The Excise Tax Act, ch. 179, R.S.C. 1927, and Amendments. It is not disputed that if the defendant is liable therefor, the amount now claimed for tax is the amount payable by the defendant.

Section 89 of that Act is as follows:

89. The tax imposed by section eighty-six of this Act shall not apply to the sale or importation of the articles mentioned in Schedule III of this Act.

Schedule III includes a large number of articles under various classifications, and under the heading "Foodstuffs" there appear, *inter alia,* the following:

Fruit, fresh, canned, frozen, dried or evaporated . . . Vegetables, fresh, canned, frozen or dehydrated, not including pickles, relishes, catsup, sauces, olives, horseradish, mustard, and similar goods.

The first question for determination, therefore, is whether or not salted peanuts and cashew nuts fall within the category of either "fruit" or "vegetables."

Dr. Marvin Bannan, B.A., Ph.D., Assistant Professor in the Department of Botany at the University of Toronto, gave evidence on behalf of the defendant. His work as Departmental Plant Anatomist and Morphologist has to do with the form and structure of plants. Technically and strictly from the botanical point of view, he said that a vegetable is any plant, but that in more common parlance "vegetable" refers to edible plants or the parts of edible plants. Again, in a botanical sense, he said that "fruit" was a division of the larger field of "vegetable" and that a fruit is a mature ovary together with such tissue as may be intimately associated with it. Fruits, again, are divided into

1951

THE KING v. PLANTERS NUT AND CHOCOLATE COMPANY LIMITED

Cameron J.

dry fruits and fleshy fruits, the latter being again subdivided into twenty or more categories depending upon the nature of the envelope, internal structure, etc. Peas and beans have a fruit of a type termed a legume or pod. The peanut plant, known as *arachis hypogaea* is a member of the pea family, its fruits being legumes or pods. Its pod is a one-celled ovary which usually splits along two sutures and contains two or more seeds, and, as in the case of other members of the pea family, a slight pressure of the fingers will open the pod. Speaking as a botanist, therefore, he was of the opinion that the peanut was within the general category of "vegetable" and fell also within the special category of "fruit."

Again, he said that from a botanical point of view the peanut is not a nut. He said that a "nut" is a different type of fruit. It has a very hard outer covering, does not split unless pressure is applied mechanically during the later growth processes of the seedling, and inside the hard covering there is a single seed. Examples of "nuts" are the acorn, beechnut, pecan, walnut and filbert. He pointed out that from the technical point of view there was no difficulty in differentiating between "fruits" and "vegetables," but that in popular usage the terms were used quite loosely in that one person might call a tomato a "fruit," and another term it a "vegetable"; and that, therefore, it was difficult to erect a precise definition of either as the terms are used by different people. Speaking, however, of edible plants, he said that if the meaning of "fruit" were confined to its strictly botanical sense, the term "vegetable" would apply to the stems, leaves and roots. From that point of view he would include as vegetables, the potato, beets, lettuce, rhubarb, celery, etc.; and in the category of fruits the tomato, apples, peaches, pears, plums and the like. On that basis the peanut, in his opinion, would be a "fruit."

Dr. Bannan knew of the cashew nut only from botanical texts. Botanically it has a structure akin to the type of fruit known as a dry drupe, like the coconut. A drupe is a fruit derived from an ovary which is one-celled and has one seed in it. The peach is an example of a fleshy drupe. In describing the cashew nut Dr. Bannan said:

> Well, the fruit in the cashew is rather unique. It has first of all the association of the fleshy stalk with the ovary proper, such as occurs in some fruits, as for instance an apple, but in the apple of course the

fleshy part surrounds the core. There is no special botanical name for the type of compound fruit such as occurs in the cashew, as is the case with the apple and some other types. As to the terminal portion, the so-called nut, it does not fall within the category "nut", because during their early development nuts are derived from ovaries which have more than one cell and usually more than one ovule or seed, and in those respects the cashew nut does not fall within the category "nut"; it is more similar to the drupe, the dry drupe, where the ovary is initially one-celled and where the ovary is, as we say botanically, superior, that is, on the end of the stalk or above the point of insertion of the other floral parts. Because of those characteristics the terminal portion is more in the nature of a drupe than a nut.

He distinguished the cashew from the true "nut" in that the latter, while also having only one nut at maturity, had in the earlier stages of development more than one.

From the botanical point of view, therefore, the evidence indicates that both the peanut and the cashew nut are vegetables in the wider meaning of that word, that each is a "fruit," the former belonging to the same class as peas or beans and the latter to the dry drupe classification like the coconut, and that neither is a "nut." This evidence is not disputed.

The only other witness at the trial was P. J. McGough, who since 1930 has been vice-president and managing-director of the defendant corporation, and who prior to that date was associated with the parent company at Suffolk, Virginia, for many years. He described the planting and harvesting of peanuts, the growth of the plant and development of the peanut. He also described the uses to which the peanut is put by the farmers who grow them; that when harvested they can be used in the same way as green peas. They can also be used in many other ways, for example, in soups, and also can be baked in the same way as beans.

He described the process of making salted peanuts. After harvesting and threshing the vines are sold as cattle feed. The peanuts are then cleaned, shelled and graded. About 15 per cent are used for oil, the smaller ones are used for peanut butter and the remainder are used for salted peanuts. The latter process involves blanching, and boiling in oil for the purpose of sterilizing and preserving them and also to create and preserve a nutritious flavour. Later, butter and salt are added and, for merchandising purposes, they are packed in vacuum packed tins and in glaseen airtight bags to preserve the special flavour.

1951

THE KING
v.
PLANTERS NUT AND CHOCOLATE COMPANY LIMITED

Cameron J.

For many years the defendant has widely advertised its peanut product as "the nickle lunch" in order to convey to the public the fact that it has food value. It stresses the fact that peanuts contain proteins, carbohydrates, vegetable oils and minerals. The defendant imports shelled peanuts from the United States and other countries and processes them in Canada as I have above described. About 70 per cent of the defendant's sales are of peanuts in 5 and 10 cent bags, the remainder being sold in tins of varying sizes.

While not disagreeing with Dr. Bannan's opinion that, from a botanical point of view, peanuts are fruits, Mr. McGough considered them to be vegetables and in his thirty-five years' experience has considered them to be such.

The words "fruit" and "vegetable" are not defined in the Act and so far as I am aware they are not defined in any other Act in *pari materia*. They are ordinary words in every-day use and are therefore to be construed according to their popular sense. In Craies on Statute Law, 4th Ed., p. 151, reference is made to the judgment of Lord Tenterden in *Att.-Gen.* v. *Winstanley* (1), 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 understood in common language." The author referred also to *Grenfell* v. *I.R.C.* (2), 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 to it."

In *Cargo ex. Schiller* (3), 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."

(1) (1831) 2 D. & Cl. 302.
(2) (1876) 1 Ex. D. 242, 248.
(3) (1877) 2 P.D. 145, 161.

Reference may also be made to *Milne-Bingham Printing Co. Ltd.* v. *The King* (1), 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* (2), 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* (3), 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. 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* (4), per Story, J.)

A perusal of the consumption or sales tax sections of the Act (Part XIII) and of the list of exemptions set out in Schedule III is sufficient to indicate that Parliament, in enacting the sections and the schedule, was not using words which were applied to any particular science or art, and that, therefore, the words used are to be construed as they are understood in common language. To the words "fruit" and "vegetables," therefore, there must be given the mean-

(1) (1930) S.C.R. 282, 283.
(2) (1935) S.C.R. 614, 616.
(3) (1847) 1Ex. 281.
(4) (1824) 9 Wheaton (U.S.) 435.

1951

THE KING
v.
PLANTERS NUT AND CHOCOLATE COMPANY LIMITED

Cameron J.

ing which they would have when used in the popular sense —that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it. Now the statute affects nearly everyone, the producer or manufacturer, the importer, wholesaler and retailer, and finally, the consumer who, in the last analysis, pays the tax. Parliament would not suppose in an Act of this character that manufacturers, producers, importers, consumers, and others who would be affected by the Act, would be botanists. The object of the Excise Tax Act is to raise revenue, and for this purpose to class substances according to the general usage and known denominations of trade. In my view, therefore, it is not the botanist's conception as to what constitutes a "fruit" or "vegetable" which must govern the interpretation to be placed on the words, but rather what would ordinarily in matters of commerce in Canada be included therein. Botanically, oranges and lemons are berries, but otherwise no one would consider them as such.

I think it can be asserted that in Canada both the peanut and cashew nut are considered by almost everyone (except possibly by botanists) as falling within the category of "nuts." Like other nuts such as the walnut, hickory, pecan and almond, they have a pod or shell enclosed in which is the edible seed. They are bought, sold and used in the same manner and can be found in any of the numerous "nut shops."

The following definition of "nut" appears in Webster's New International Dictionary and in my opinion correctly describes the word as it is generally understood in Canada:

> A hard shelled dry fruit or seed having a more or less distinct separable rind or shell and interior kernel or meat. Also the kernel or meat itself, loosely used, and including many kinds, as almonds, *peanuts*, brazil nuts, etc. . . . not botanically true nuts.

And in Vol. 16 of the Encyclopaedia Britannica at p. 645, "nut" is defined, and then follows an enumeration of the more important nuts and of products passing under that name and used either as articles of food or as sources of oil; included in that enumeration are both the peanut and the cashew.

It is equally clear to me that when in Canada the words "fruit" and "vegetables" are used, their obvious and popular

meaning would not include "nuts" of any sort, or the peanuts, salted peanuts or cashews sold by the defendant. Counsel for the plaintiff suggested a test which I think apposite. Would a householder when asked to bring home fruit or vegetables for the evening meal bring home salted peanuts, cashew nuts or nuts of any sort? The answer is obviously "no."

Vegetable has been defined in many ways. In the World Book it is defined as follows:

> In the usual sense, the word vegetable is applied to those plants whose leaves, stalks, roots or tubers are used for food, such as lettuce, asparagus, cabbage, beet and turnip. It also includes several plants whose fruits are the edible portions, as peas, beans, melons and tomatoes.

In the Concise Oxford Dictionary, Third Edition, p. 1365, it is defined as:

> Plant; esp. herbaceous plants, used for culinary purposes or for feeding cattle, e.g., cabbage, potato, turnip, bean.

Again, in Webster's International Dictionary, vegetable is defined as:

> A plant used or cultivated for food for man or domestic animals, as the cabbage, turnip, potato, bean, dandelion, etc.; also, the edible part of such a plant, as prepared for market or the table.
>
> Vegetables and fruits are sometimes loosely distinguished by the usual need of cooking the former for the use of man, while the latter may be eaten raw; but the distinction often fails, as in the case of quinces, barberries, and other fruits, and lettuce, celery, and other vegetables. Tomatoes if cooked are vegetables, if eaten raw are fruit.

In the Encyclopaedia Britannica, Vol. 23, vegetable is defined as:

> A general term used as an adjective in referring to any kind of plant life or plant product, viz. "vegetable matter." More commonly and specifically, in common language, the word is used as a noun in referring to those generally herbaceous plants or any parts of such plants as are eaten by man. The edible portions of many plants considered as vegetables are, *in a botanical sense,* fruits. The common distinction between fruits and vegetables is often indefinite and confusing, since it is based generally on how the plant or plant part is used rather than on what it is.

And fruit is defined in the Encyclopaedia Britannica. Vol. 9, as:

> Fruit, in its popular sense is any product of the soil that can be enjoyed by man or animals; in the Bible the word is often extended to include the offspring of man and of animals . . . More often it is employed to denote a group of edible parts of plants, as contrasted with another group termed "vegetable." But the term is a loose one, including, e.g., the stalks of the rhubarb.
>
> In its strict botanical sense the fruit is developed from the ovary of the flower as a result of fertilization of the contained ovule or ovules.

1951

THE KING v. PLANTERS NUT AND CHOCOLATE COMPANY LIMITED

Cameron J.

It will be noted that none of these definitions of "fruit" and "vegetable" (except in the strictly botanical sense) include "nuts" of any sort.

It is of considerable interest, also, to note that in the tariff rates under The Customs Act (which, as a revenue Act, I consider to be in *pari materia*), separate items are set up for fruits, for vegetables, and also for "nuts of all kinds, not otherwise provided, including shelled peanuts." This would seem to indicate that in the minds of the legislators, nuts were not included in the categories of fruits or vegetables, and also that peanuts fell within the category of nuts. I do not think that their view of the matter differs at all from the common understanding of the words.

My finding must be that as products and as general commodities in the market, neither salted peanuts nor cashews, or nuts of any sort, are generally denominated or known in Canada as either fruits or vegetables. I think it may be assumed, therefore, that if Parliament had intended to include "nuts" among the exempted foodstuffs, the word "nuts" would have appeared in the schedule. That being so, it must follow that salted peanuts and cashew nuts, which as I have said above are considered generally in Canada to be within the category of "nuts," do not fall within the exemptions provided for fruit and vegetables in Schedule III.

I have not overlooked the argument advanced by defendant's counsel that "peanuts" are used as food and may be used and at times are used in the form of soups or vegetables, or as substitutes for meat, and that, therefore, they are "foodstuffs." But while the heading of this part of Schedule III is "Foodstuffs," it is quite apparent that not all foodstuffs are included therein. In general, it would seem that the exemption from tax, insofar as it applies to foodstuffs, is confined to those articles of food which are commonly in use as, or are used in the preparation of, ordinary staple table foods. Condiments such as are derived from vegetables are particularly excluded from the exemption. Nor do I need to consider the question as to whether the defendant's products were "canned," having found that they were neither "fruit" nor "vegetables" within the meaning of those words in Schedule III.

1951

THE KING v. PLANTERS NUT AND CHOCOLATE COMPANY LIMITED

Cameron J.

In the result, the plaintiff is entitled to judgment against the defendant in the amount claimed for sales tax, namely, $265,196.92; for penalties for non-payment thereof up to December 31, 1949, the sum of $16,767.55; for such additional sums as may have accrued for penalties thereon after December 31, 1949, to this date, as provided for in section 106(4) of The Excise Tax Act, and for costs to be taxed. The penalties provided for in section 106(4) are mandatory in the event of non-payment within the time provided for in section 106(3) and there is no power in the Court to waive such penalty.

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1951

Feb. 28

Mar. 7

BETWEEN:

WILLIAM ROBINSON LIMITED.....PLAINTIFF;

AND

STEAMSHIP *STROMBOLI* .....DEFENDANT.

Shipping—Carriage of Goods by Sea Act of the United States 1936, s. 4(2) and s. 4(2) (c)—Cargo shipped in good condition and under a clean bill of lading damaged en route—Onus on plaintiff discharged—Onus on defendant to bring itself within one or more exceptions in the Act —No inherent defect in containers—Damage not due to peril of the sea.

Held: That where goods have been shipped in good condition under a clean bill of lading and there is no evidence that damage was due to a peril of the sea the conclusion is justified that damage to such goods was due to bad stowage for which the defendant is liable to the plaintiff for the loss suffered by him.

ACTION for damages suffered to goods during a sea voyage.

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

C. C. I. Merritt for plaintiff.

V. R. Hill and *J. Cunningham* for defendant ship.

1951

WILLIAM ROBINSON LIMITED v. STEAMSHIP *Stromboli*

Sydney Smith D.J.A.

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

SMITH, D.J.A. now (March 7, 1951) delivered the following judgment:

This is an action against the defendant ship claiming damages for injury to 72 barrels of cherries, the property of the plaintiff, on a voyage from Genoa in Italy to Vancouver, B.C. The bill of lading showed that the shipment had been received on board in apparent good order and condition. On discharge at Vancouver however it was found that most of the barrels had been stove in, that brine had escaped, and that the cherries for the most part were unfit for human consumption. The barrels were stowed in No. 4 lower hold, fore and aft, on each side of the tunnel, and on top of barrels of lemons shipped at a previous port. Above the barrels of cherries were 15 tons of marble chips in bags and on top of these cartons of cork. The bill of lading was subject to the Carriage of Goods by Sea Act of the United States 1936.

It is common ground that the onus is on the plaintiff to prove that its goods were shipped in apparent good order and condition, and discharged in a damaged condition (both of which I find established), and that the onus then shifts to the defendant to bring himself within one or more exceptions in the Act. The case for the defendant here is that the evidence establishes that it is within the exception as to inherent defect, quality or vice of the barrels containing the cherries (Sec. 4, Subsec. 2), or the exception as to perils of the sea (Sec. 4, Subsec. 2 (*c*)), or both of them.

As to inherent vice: the barrels of cherries were shipped under a "clean" bill of lading, so the defendant is estopped from proving that they were not externally to all appearances in good condition. (Scrutton on Charter-parties, 15th Ed. p. 169.) Apart from this there was documentary evidence from the point of origin that the barrels were in good condition and "adequate for this kind of transport". I think this can only refer to the voyage in question. The contention therefore fails.

1951

WILLIAM ROBINSON LIMITED v. STEAMSHIP *Stromboli*

Sydney Smith D.J.A.

With respect to "perils of the sea"; the vessel encountered some heavy weather during the voyage, but it was not of an unusual nature, and there would appear to have been nothing fortuitous in connection with it. It is mere speculation to say that this damage was due to a peril of the sea, as that term is defined in the authorities. There was no evidence of other cargo having been damaged. The likelihood is just as great, indeed I think greater, that it was due to bad stowage, the evidence as to which was vague and unsatisfactory. *Canadian National Steamships* v. *William Bayliss* (1); *Donaldson Line Ltd.* v. *Hugh Russell & Sons Ltd.* (2); *Keystone Transports Limited* v. *Dominion Steel and Coal Corporation Limited* (3) and *N. E. Neter & Co. Ltd.* v. *Licenses and General Insurance Co. Ltd.* (4).

In these circumstances there will be judgment for the plaintiff with costs. I do not imagine there should be much difficulty in agreeing upon the quantum of damage, but if so it may be referred to the learned Registrar for assessment.

Judgment accordingly.

BETWEEN:

DAME ELIZABETH CORNELL OAKES ..... } PETITIONER;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1951

Feb. 19 & 20

May 17

Crown—Exchequer Court Act R.S.C. 1927, c. 34, s. (1) (c) and 50(A)—Pension Act R.S.C. 1927, c. 157, s. 11(1) (b), 18, 18(a) and 18(b)—Receipt of pension under provisions of Pension Act does not bar proceedings against the Crown under s. 19(1) (c) of the Exchequer Court Act.

Held: That the receipt of pension under the provisions of the Pension Act R.S.C. 1927, c. 157, is not a bar to proceedings against the Crown under s. 19(1) (c) of the Exchequer Court Act R.S.C. 1927, c. 34. *Bender* v. *The King* (1947) S.C.R. 172 followed.

(1) (1937) S.C.R. 261.
(2) (1940) 3 D.L.R. 693.
(3) (1942) S.C.R. 495.
(4) (1944) 1 All. E.R. 341.

1951

OAKES
v.
THE KING

Cameron J.

PETITION OF RIGHT to recover from the Crown damages for death of suppliant's husband alleged caused by the negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

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

S. Leon Mendelsohn, K.C., Jean Martineau, K.C. and *Stanley Goldner* for suppliant.

Albert Theberge, K.C. and *Paul Fontaine, K.C.* for respondent.

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

CAMERON J. now (May 17, 1951) delivered the following judgment:

This is a petition of right in which the suppliant claims damages from the respondent. On June 5, 1945, George Walsh Oakes, then an airman in the Royal Canadian Air Force, was a passenger in a motor vehicle owned by the respondent; that vehicle was struck by a train of the Canadian National Railways in Montreal East, and Oakes was killed. At the trial it was admitted that L.A.C. Oakes was then on duty, that the motor vehicle was operated by L.A.C. R. E. Hitsman, a member of the Air Force of Canada and then acting within the scope of his military duties, and that the said accident occurred because of the fault and negligence of the said Hitsman.

The suppliant is the widow of the said G. W. Oakes, having married him on February 14, 1942. There were two children of the marriage, namely, George Stephen Oakes, born June 5, 1943, and Ross Bryan Oakes, born May 8, 1944, both of whom are still living. On May 28, 1946, the suppliant was duly appointed tutrix of the said two minor children. On June 3, 1946, she filed this petition of right claiming damages for the death of the said G. W. Oakes, both on her own behalf and in her quality as tutrix to the two minor children.

Under the provisions of the Pension Act, R.S.C. 1927, c. 157, as amended, the Pension Commission ruled that the death of L.A.C. Oakes was directly connected with Air Force Service. Upon the application of the suppliant, pensions were awarded to her and to the children at current rates with effect from June 6, 1945. That awarded to the widow was then at the rate of $60 per month, but on October 1, 1947, it was increased to $75 per month, and up to January 31, 1951, she had received a total of $4,670. The pension awarded to the elder child, George Stephen Oakes, was at the rate of $15 per month until October 1, 1947, when it was increased to $19 per month, and up to January 31, 1951, such payments totalled $1,177.50. The pension awarded to the other son—Ross Bryan Oakes—was at the rate of $12 per month up to October 1, 1947, when it was increased to $15, such payments totalling $934 up to January 31, 1951.

Under the provisions of the Pension Act and regulations thereunder, the pensions applicable to the children terminated at the age of sixteen; and as to the widow the pension is payable for life except upon her re-marriage, in which event she is paid a bonus of one year's pension and the pension then ceases. Should, however, her second husband die within five years of her re-marriage, the Pension Commission has a discretion to revive the pension.

The suppliant's claim is based on section 19(1) (*c*) and section 50A of the Exchequer Court Act, R.S.C. 1927, ch. 34 as amended, as follows:

> 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.
>
> 50A. For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

Before considering the amount of any damages sustained by the widow and minor children, it is necessary to determine the main issue between the parties. For the

1951

OAKES
v.
THE KING

Cameron J.

suppliant it is contended that her husband's death, having been occasioned by the negligence of an officer or servant of the Crown acting within the scope of his duties or employment, a claim for damages will lie against the respondent notwithstanding the fact that at the time of his death her husband was an enlisted man in the military forces of Canada, and notwithstanding, also, that she has been in receipt of a pension for herself and her children, which pension has been paid by the respondent as a result of her husband's death. For the respondent it is submitted that the suppliant has no recourse for damages following the death of her husband; and that if she has any recourse by reason thereof, it could only be in pursuance of the Pension Act.

At the trial certain admissions were made (Ex. 1) as follows:

> LAC G. W. Oakes, a member of the air forces of Canada, died on June 5, 1945, whilst on duty in Canada; that said G. W. Oakes was a passenger in a motor vehicle operated in the service of His Majesty and in charge of and driven by LAC R. E. Hitsman, a member of the air forces of Canada, acting within the scope of his military duties; being ordered by technical officer L. K. Kennedy at No. 12 E.D. in Montreal East with three men, one of whom was LAC G. W. Oakes, to go to the Pratt & Whitney Plant to have some equipment identified; that the death of said G. W. Oakes is attributable to an accident, which occurred on said date, when this motor vehicle came into collision with a Canadian National Railways train, at a level crossing, in the city of Montreal; that said accident happened through the fault and negligence of said R. E. Hitsman.

It will be noted that while the respondent admits that the death of L.A.C. Oakes was occasioned by the negligence of L.A.C. Hitsman, a member of the air forces of Canada while the latter was acting within the scope of his military duties, he does not admit that at the time Hitsman was an officer or servant of the Crown within the intendment of section 50A. His other contention is that inasmuch as the Pension Act provides a pension for the widow and dependents of servicemen who die or are killed while on duty, it could not have been the intention of Parliament to provide a further recourse against the Crown by way of damages when, as in this case, the death of one serviceman was occasioned by the negligence of another serviceman while on duty.

In my view, the matter is to be determined by considering the scope of section 19(*c*) of the Exchequer

Court Act, and the effect thereon of the enactment of section 50A of that Act, keeping also in mind the provisions of the Pension Act.

Section 19(1) (*c*) of the Exchequer Court Act was enacted in its present form by c. 28, Statutes of Canada, 1938, s. 1. The former section was repealed and the new section was identical with the former section except that the concluding words of the former section "upon any public work" were dropped. The history of the section and the scope of the new section enacted in 1938 were considered by the President of this Court in *McArthur* v. *The King* (1), in which he held:

> 6. That a person who enlists in an active unit of the Canadian Army for the duration of the present emergency and thereby becomes a member of the Non-Permanent Active Militia of Canada on active service is not an "officer or servant of the Crown" within the meaning, intent or purpose of section 19(*c*) of the Exchequer Court Act and the Crown is not liable for the negligence of such a person.

It is common ground that as a result of that decision, section 50A (*supra*) was enacted by c. 25, Statutes of Canada, 1943, s. 1, and since that date the words "servant of the Crown" in section 19(1) (*c*) have included a person who since June 24, 1938, has been a member of the naval, military, or air forces of His Majesty, in right of Canada, for the purpose of determining liability in any action or other proceeding by or against His Majesty. There is no doubt, therefore, that had the deceased Oakes been a civilian (and not in government employment), who had been run over and killed by a service vehicle of the respondent, the suppliant would have had a right of action against the respondent under the provisions of section 19(1) (*c*), in view of the admissions made by the latter. Has the suppliant, the widow of a serviceman, and receiving the benefits of the Pension Act, the same rights as a civilian?

The only reported case in which the matter has been directly considered is that of *Meloche* v. *The King* (2). In that case the father of a soldier in the Active Army of Canada, who allegedly had died from injuries occasioned by the negligence of another servant of the Crown (the

(1) (1943) Ex. C.R. 77.

(2) (1948) 4 D.L.R. 828.

1951

OAKES
v.
THE KING

Cameron J.

driver of an Army ambulance) took proceedings to recover damages under section 19(1) (*c*) and section 50A. The headnote in that case is as follows:

A member of the armed forces on active service who is injured through the negligence of another servant of the Crown is not entitled to recover damages against the Crown under ss. 19(1) (*c*) (am. 1938, c. 28) and 50A (enacted 1943-44, c. 25) of the Exchequer Court Act, R.S.C. 1927, c. 34, since provision is made for him (or for his dependents) in such a case under the Militia Act, R.S.C. 1927, c. 132 and the Pension Act, R.S.C. 1927, c 157. Where a special remedy is provided by statute it prevails as against the provisions of general legislation.

In the *Meloche* case, Angers, J. said at p. 831 ff.:

Counsel for respondent expressed the opinion that the fact that the Crown adopted special legislation namely the *Militia Act* and the *Pension Act,* shows that indicates that the soldier, wounded or killed on Active Service has no other recourse against the Crown than that provided by these Acts. This opinion seems well founded to me. When special recourse is decreed by an Act, the recourse provided by the general Act must yield precedence to it. This doctrine is adopted by the following authors: Craies on Statute Law, 4th ed., p. 318; Maxwell on the Interpretation of Statutes, 9th ed, p. 183; Potter's Dwarris, General Treatise on Statutes, p. 131; Vattel's Rules, Rule No. 40.

And at p. 832:

The same doctrine prevails in the United States, as is shown by the judgment of the N.Y. Court of Appeal: *Goldstein* v. *New York,* (1939) 281 N.Y. 396, in which Hubbs J. at p. 403 makes the following observations: 'The statement that the State may be made liable in damages to a soldier or his dependents, because of injuries inflicted upon him through the negligence of a brother soldier or officer, except as provided in the Military Law, is rather startling. We think that the general understanding has always been that for injuries suffered by a soldier in active service the government makes provision by way of a pension. That this State has done in the Military Law (paras. 220-224), wherein it is provided when an allowance may be made, for what it may be made, the procedure to be followed and the amount that may be allowed. In fact, a complete system is set up for handling such claims. To justify a decision that another concurrent remedy has been created whereby the State may be made liable in unlimited amounts requires a statute to that effect, the meaning and intent of which is unmistakable. "Statutes in derogation of the sovereignty of a State must be strictly construed and a waiver of immunity from liability must be clearly expressed." (*Smith* v. *State,* (1920) 227 N.Y. 405, 410).'

And at p. 830 he said:

Counsel for the respondent put forward that there is no recourse against the Crown without a formal text in an Act opening the way for it. The doctrine and jurisprudence on this point are unanimous and I do not believe there is any reason to linger over it. It seems evident to me that the provisions of s. 19(1) (*c*) of the Exchequer Court Act would apply to a soldier as well as to any other person *if a special Act* creating a special recourse in favour of a soldier and taking away the general recourse provided by the Exchequer Court Act did not exist.

1951

OAKES
v.
THE KING

Cameron J.

Counsel for the suppliant submits that the judgment of Angers, J. was right insofar as it determined that section 19(1) (*c*) would apply to a soldier as well as to any other person; but that the judgment was erroneous in its finding that the special recourse provided by the Pension Act took away the general recourse provided by section 19(1) (*c*) of the Exchequer Court Act. He also submits that the *Goldstein* case cited by Angers, J. had no application to the *Meloche* case inasmuch as in the State of New York there was no Act containing provisions comparable to those found in section 50A.

Counsel for the respondent submits that on the principles laid down in the *Meloche* case, the suppliant herein has no right of action. Counsel for the suppliant, however, refers to and relies on the case of *Bender* v. *The King* (1) (which affirmed the judgment of the President of this Court reported in 1946, Ex. C.R. 529). In that case it was held that:

An employee of the Crown (Dom.) who has, under the Government Employees Compensation Act (R.S.C. 1927, c. 30, as amended in 1931, c. 9), claimed and received compensation for personal injuries by accident arising out of and in the course of his employment is not thereby barred from pursuing a claim for damages against the Crown for such injuries under s. 19(*c*) of the Exchequer Court Act (R.S.C. 1927, c. 34).

The said enactments are not repugnant to each other; they deal with two entirely different matters; s. 19(*c*) of the Exchequer Court Act applies only where negligence is shown, while the Government Employees Compensation Act applies whether or not negligence on anyones' part is proved; the right thereunder arises, not out of tort, but out of the workman's statutory contract.

Under the Government Employees Compensation Act as it was at the time of the *Bender* case, certain employees of His Majesty (but not including persons who were members of the permanent forces), who were injured by accident arising out of and in the course of their employment, and the dependents of such employees whose death resulted from such accident, were entitled to be paid compensation by the Dominion Government at the same rate as provided for such employees or their dependents under the law of the province in which the accident occurred.

(1) (1947) S.C.R. 172.

1951

OAKES
v.
THE KING

Cameron J.

In the *Bender* case, Kerwin, J. in referring to the Exchequer Court Act and the Government Employees Compensation Act said at p. 177:

> At whatever stage the two enactments are compared, it is clear that they are dealing with two entirely different matters, since the Exchequer Court Act applies only where negligence is shown, while the Government Employees Compensation Act applies where negligence on anyone's part is proved or not.

And at p. 179 he said:

> The two enactments are dealing with entirely different matters since, as Viscount Haldane pointed out in connection with the British Columbia Workmen's Compensation Act in *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.*, (1920) A.C. 184 at 191, the right under the Compensation Act arises, not out of tort, but out of the workman's statutory contract. Separate and distinct rights are conferred and the present claim is not barred.
>
> An alternative submission by the appellant was that, assuming that claims under both Acts did exist, the suppliant was put to his election, and having claimed and received compensation under one Act, he had waived any right he might have under the other. However, while there is but the one injury, the causes of action are different and the doctrine of election does not apply.

It is of interest to note that following the decision in the *Bender* case, the Government Employees Compensation Act, R.S.C. 1927, c. 30, was repealed and by c. 18, Statutes of Canada, 1947, the Government Employees Compensation Act, 1947, was enacted. That Act has no application to the members of the Royal Canadian Navy, the active forces of the Canadian Army, the Royal Canadian Air Force (Regular) or the Royal Canadian Mounted Police. Section 9(5) thereof is as follows:

> 9(5). No employee or dependent of such employee shall have a claim against His Majesty or any officer, servant or agent of His Majesty except for compensation under this Act, in any case where an accident happens to such employee in the course of his employment under such circumstances as entitle him or his dependents to compensation under this Act.

Under the new Act, therefore, an employee or a dependent of an employee entitled to compensation thereunder would have now no other recourse against His Majesty, and could not, if so entitled, where the injuries or death were occasioned by the negligence of a servant of His Majesty, invoke the provisions of section 19(1) (*c*).

I turn now to the Pension Act, R.S.C. 1927, c. 157, as amended. The pension payable to the suppliant herein was paid under the provisions of section 11(1) (*b*) thereof, as follows:

11. (1) In respect of military service rendered during World War I or during World War II and subject to the exception contained in subsection two of this section:

(*b*) pension shall be awarded in accordance with the rates set out in Schedule B to this Act in respect of members of the forces who have died when the injury or disease or aggravation thereof resulting in death in respect of which the application for pension is made was attributable to or was incurred during such military service.

It is to be noted at once that there is nothing in that Act comparable to the provisions of section 9(5) of the Government Employees Compensation Act, 1947, which I have just quoted. In the Pension Act, therefore, there is nothing which specifically deprives a pensioner thereunder from asserting a claim against the Crown under the provisions of sections 19(1) (*c*) and 50A of the Exchequer Court Act. Sections 18, 18A and 18B of the Pension Act do provide for the manner in which the Pension Commission, in determining the amount of pension to be awarded, shall take into consideration any amounts recovered by or on behalf of the pensioner by way of damages, or under the provisions of any provincial workmen's compensation Act, which sections are as follows:

18. (1) Where a death or disability for which pension is payable is caused under circumstances creating a legal liability upon some person to pay damages therefor, if any amount is recovered and collected in respect of such liability by or on behalf of the person to or on behalf of whom such pension may be paid, the Commission, for the purpose of determining the amount of pension to be awarded, shall take into consideration any amount so recovered and collected in the manner hereinafter set out.

(2) In any such case the Commission may require such person or anyone acting on his behalf, as a condition to the payment of any pension, to take all or any steps which it deems necessary to enforce such liability and for such purpose shall agree to indemnify such person or anyone acting on his behalf from all or any costs incurred in connection therewith.

18A. Where a disability or death for which pension is payable is caused under circumstances by reason of which compensation is payable in respect of such disability or death under any Provincial Workmen's Compensation Act or legislation of a similar nature either in the place of, or as additional to, or apart altogether from any amount which is recovered or collected in respect thereof under the last preceding section, if any compensation is awarded to or on behalf of any person to or on behalf of whom such pension may be paid, the Commission, for the

1951

OAKES
v.
THE KING

Cameron J.

purpose of determining the amount of pension to be awarded, shall take into consideration any compensation so awarded in the manner hereinafter set out.

18B. (1) Where any amount so recoverable and collected or the capitalized value of any compensation so awarded, or both, is greater than the capitalized value of the pension which might otherwise have been payable under this Act, no pension shall be paid.

(2) Where any amount so recovered and collected or the capitalized value of any compensation so awarded, or both, is less than the capitalized value of the pension which might otherwise have been awarded under the provisions of this Act, a pension in an amount which, if capitalized, equals the difference between such amount or the capitalized value of such compensation, or both, and the capitalized value of the pension which might otherwise have been payable under this Act, may be paid.

(3) If any amount so recovered and collected, or any part thereof, is paid to His Majesty, a pension which, if capitalized, equals the amount so paid but is not in any event greater than the total pension which, apart from this section, would be payable under this Act, may be paid. 1919, c. 43, s. 19; 1941, c. 23, s. 10.

I have quoted these paragraphs in order to point out that particularly in section 18(1) it is clearly indicated that the right of action for damages, if death is caused for which a pension is payable under circumstances also creating a legal liability to pay damages therefor, is not by that Act done away with; nor is the Crown subrogated to the rights of the pensioner to recover such damages. The extent of such recovery and its payment over to His Majesty are matters which may affect the quantum of the pension, but there is no requirement that any amount so recovered *shall* be paid to the Crown.

The Pension Act, it will be observed, provides pensions for dependents of a member of the forces whose death was attributable to or was incurred during military service (subject to certain limitations such as those found in section 11(1) (*f*) and section 12, which are not here relevant), such pension being payable whether the death was occasioned by enemy action, the negligence of a fellow serviceman or otherwise. In enacting the Pension Act, Parliament gave special consideration to the maintenance of servicemen who were incapacitated by illness or injury during military service and to the dependents of those who died or were killed during such military service. It would seem to me that having already given its attention to the particular subject and having provided for it, it could not be readily assumed that in enacting section 50A

of the Exchequer Court Act to broaden the meaning of "servant," as contained in section 19(1) (*c*) of that Act, Parliament intended to confer upon servicemen (or, in case of their death, upon their dependents) an additional recourse in the nature of an action for damages when both pension and damages would be payable by the respondent. There is nothing in section 50A which would indicate that in enacting it the attention of Parliament had been drawn to the Pension Act or that it intended to include in the general provisions of section 50A a second recourse for those who already were entitled to the special benefits of the Pension Act. Moreover, I would have been inclined to take into consideration the fact that section 50A was enacted to amend the law as laid down in the *McArthur* case (*supra*), in which there was no claim by a serviceman or his dependents entitled to the benefit of the Pension Act, to a claim for damages as well. In *Att. Gen.* v. *Metropolitan Electric Supply Co. Ltd.* (1), Farwell, J. said at p. 31:

> No doubt one is entitled to put oneself in the position of the legislature at the time the Act was passed in order to see what was the state of knowledge, what were the circumstances brought before the Legislature, and what it was the Legislature was aiming at.

Were it not for the principles laid down in the *Bender* case (*supra*), I would in this case have reached the conclusion that inasmuch as the suppliant and her children were entitled to the benefit of the Pension Act, they were debarred from asserting a claim under section 19(1) (*c*) and section 50A of the Exchequer Court Act. I would have read these general sections as silently excluding from their operation the cases which had been provided for in the special Act, namely, the Pension Act.

Notwithstanding the fact that since the *Bender* case was decided Parliament has re-enacted the Government Employees Compensation Act in the form I have above mentioned, the principles laid down in that case are binding upon me. Counsel for the respondent endeavoured to distinguish that case from the present one, but while the facts differ in some respects, the principles upon which that case was decided cannot, in my view, be distinguished from the ones which I must apply to this case. As I have

(1) (1905) 1 Ch. 24.

1951

OAKES
v.
THE KING

Cameron J.

said above, that case decided that receipt of benefits under the former Government Employees Compensation Act did not deprive a claimant of his remedy under section 19(1) (*c*) of the Exchequer Court Act. There it was decided that the Exchequer Court Act and the Government Employees Compensation Act were not repugnant to each other but that they dealt with two entirely different matters; that the former applied only where negligence was shown while the latter applied whether or not negligence on anyone's part was proved; and that the right under the latter Act arose not out of tort, but out of the "workmen's Statutory contract." It was held that separate and distinct rights arose under these two Acts. In my opinion, the same situation exists in the present case for, as I have said above, the pension applicable to dependents under the Pension Act is payable whether or not negligence on anyone's part is proven. The Government Employees Compensation Act, prior to its re-enactment in 1947, was entitled "An Act to provide compensation where employees of His Majesty are killed or suffer injuries while performing their duties." Moreover, rights under the Pension Act arise not out of tort but out of the "servicemen's statutory contract," entitling him in the event of injury or illness, and his dependents in the event of his death, to the payments provided in the Act. In the *Bender* case, the Government Employees Compensation Act was held to be a "workmen's statutory contract," and, while perhaps a serviceman cannot be said to be a "workman" in the sense in which the word is used there, I consider the Pension Act as being just as much a statutory contract for "servicemen" as the Government Employees Compensation Act is a statutory contract for "workmen" or employees.

That being so, and finding as I do that the suppliant and her children were entitled to the provisions of the Pension Act, and that the driver of the respondent's vehicle at the time of the accident was a servant of the respondent within the intendment of section 50A, it must follow that the plaintiff is entitled to invoke the provisions of section 19(1) (*c*) of the Exchequer Court Act and therefore, on the admitted facts, is entitled to damages.

I am not unaware of the possible results of the finding which I have made. Instead of granting a speedy settlement under the Pension Act, it may be necessary before a pension is awarded to closely investigate the cause of every injury to or death of a serviceman, to consider the question of contributory negligence, and in many cases to await the result of protracted litigation. But with such matters the Court is not concerned. That is a matter for Parliament to consider.

In the case of *Miller* v. *Salomons* (1), Pollock, C.B. said at p. 560:

> I think, where the meaning of a statute is plain and clear, we have nothing to do with its policy or impolicy, its justice or injustice, its being framed according to our views of right, or the contrary. If the meaning of the language used by the legislature be plain and clear, we have nothing to do but to obey it—to administer it as we find it; and I think to take a different course is to abandon the office of judge, and to assume the province of legislation.

The suppliant personally claims $20,000 damages "as a result of the loss of support she would have been receiving from her husband had he lived;" and, as tutrix to her minor children she claims a further sum of $10,000 for each "as a result of the loss of support, comfort, succour and guidance of their father." Both the suppliant and her husband were approximately twenty-five years of age at the time of the latter's death. The two children were then approximately one and two years of age. At the time of his death Oakes was in perfect health. Prior to his enlistment he was an assistant purchasing agent at Fairchilds Aircraft Ltd. of Montreal, and when he enlisted in April, 1943, was earning approximately $45 to $49 per week. The amount of his wages is not definitely established due to the destruction of the company records but there is no doubt that it was within that bracket. He had graduated from high school and had attended technical school for one year. He was a careful and efficient employee and had he returned to his employment upon discharge from the services, would probably have received promotion and increases in salary. The evidence is that had he continued his employment up to the present time he would now be in receipt of a salary of about $55 per week or more for the

(1) (1852) 7 Ex. 475.

1951

OAKES
v.
THE KING

Cameron J.

same job; but had he made the normal progress expected of him, and received promotion, his salary might be approximately $80 per week.

His life expectancy at the time of his death was forty-six years and that of his wife forty-eight years. It is in evidence that the cost of a life annuity of $2,600 per year (the approximate annual income of the deceased at the time of his enlistment) on the life of the deceased would be $61,240. That figure is arrived at by adding the cost of a Government annuity of $1,200 per annum (the maximum purchasable from the Dominion Government) to the cost of an annuity of $1,400 purchased from an insurance company—all on the basis of the cost as of the date of Oakes' death. It is also shown that on the basis of the Government actuarial tables the cost of an annuity for life of $900 to Mrs. Oakes (based on her present monthly pension of $75), at the time of Mr. Oakes' death was $18,360; and also that the present values of the monthly amounts of $19 and $15 now paid to the infant children under the Pension Act, as of the date of the father's death and payable until each attained the age of sixteen years were, respectively, $2,745.87 and $2,055.00.

In order to maintain her family and support herself, the suppliant has taken employment as a key punch operator. Her evidence is that *at the present time* it costs her $804 per annum to maintain each child, that amount representing the cost of their clothing, food, medical, dental and other incidentals; that her other expenses, for rent telephone, light, gas, her own food and clothing and other incidentals, total $1,680 per year.

Where a claim for compensation to families of persons killed through negligence is made, the right to recover is restricted to the amount of the actual pecuniary benefit which the family might have expected to enjoy had the deceased not been killed. The difficulty arises not in the statement of the principle but in its application to a case in which the extent of the actual pecuniary loss is largely a matter of estimate, founded on probabilities, of which no accurate forecast is possible. It is advisable, of course, to assess the total amount and then to apportion it. (*Royal Trust Co.* v. *C.P.R.* (1))

(1) 67 D.L.R. 518.

In fixing the amount of damages sustained, it is necessary, to take into consideration the life expectancy of both the deceased and his widow, and also the ages of the two children as well as the amounts which the deceased would likely have contributed to their support had he lived. But such consideration must also take into account the ordinary exigencies of life, such as the possible early death of the husband, his incapacity through illness, loss of employment, a reduction in wages, and other similar matters. The award should not be based on a perfect and complete indemnity but must be reasonable under all the circumstances; the extent of the loss depends upon data which cannot be ascertained with certainty and must necessarily be a matter of estimate, and, it may be, partly of conjecture.

Taking all these and other relevent matters into consideration, I have reached the conclusion that the sum of $30,000 would fairly represent the total amount of the loss sustained. I would apportion that amount as follows —to the widow in her personal capacity the sum of $18,000; and to each of the two children the sum of $6,000.

There is also a claim by the suppliant for $104 made up of disbursements for mourning apparel, hire of cars for funeral, and the publishing of death notices. While she may have considered it advisable to expend these sums at the time of her husband's death, I do not think they are claims for which the respondent is liable and they will be disallowed.

The petition of right also claims interest on such amount as may be awarded for damages. It is well settled, however, that interest may not be allowed against the Crown unless there is a statute or contract providing for it—*The King* v. *Carroll* (1). That condition does not exist here and the claim for interest will be disallowed.

In the result there will be judgment declaring that the suppliant in her personal capacity is entitled to be paid by the respondent the sum of $18,000; and in her capacity as tutrix to her two infant children, the sum of $6,000 in respect of each of such children—being part of the relief sought in the petition of right. The suppliant is also entitled to be paid her costs after taxation.

Judgment accordingly.

(1) (1948) S.C.R. 126.

BETWEEN:

HUNTTING MERRITT SHINGLE CO. LTD. ..... } APPELLANT;

AND

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

1951
Apr. 9
May 14

Revenue—Excess Profits Tax Act 1940, 4 Geo. VI, c. 32, s. 6(1) (b), and 6(3)—Reserve—Depreciation—Minister's decision is based on facts as at time decision rendered—Appeal allowed.

Appellant had been made an allowance before 1947 for expected depreciation in its inventory or stock, pursuant to s. 6(1) (*b*) of the Excess Profits Tax Act. In 1947 it claimed a large allowance for reserve to meet expected depreciation on stock during 1948 calculated on the same basis as that approved for the earlier period. In 1949 the respondent disallowed the claim and taxed the whole of the profits received in 1947 together with the amount which had been allowed earlier. On January 2, 1948 the company sold all its assets at a profit and in June 1948 went into liquidation. An appeal was taken from this decision.

Held: That the Minister was justified in refusing to allow any deduction for depreciation suffered in 1948 as at the time of his ruling in 1949 it had become apparent that there would be no depreciation and the fact that he could not have foreseen this at an earlier date and might have ruled differently is irrelevant; his ruling must be judged at the time it was made and it was then right.

2. That since the amount allowed as depreciation before 1947 had not been taken from the reserve and used during 1947 or left in the reserve after the end of 1948 it was not taxable and in this respect the appeal must be allowed and it is irrelevant that there actually was no depreciation in 1947.

APPEAL under the provision of the Excess Profits 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.
Dougald Donaghy, K.C. and *F. J. Cross* for respondent.

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

1951

HUNTTING MERRITT CO. LTD. v. MINISTER OF NATIONAL REVENUE

Sidney Smith D.J.

SIDNEY SMITH D.J. now (May 14, 1951) delivered the following judgment:

This case turns on the question whether the appellant company's profits for 1947 subject to Excess Profits Tax were or should have been reduced by an amount which it claimed should be allowed to meet future depreciation in its "inventory," under Sec. 6 (1) (*b*) of the Excess Profits Tax Act. This section gives a right to set aside a reserve for the purpose, if the Minister "allows" it, and the amount so set aside is deductible from the profits taxable in that year.

The material facts are as follows: The appellant had been made an allowance of $17,228.38 before 1947 for expected depreciation in its "inventory" or stock. In 1947 in its return of profits it claimed a large allowance for "reserve" to meet expected depreciation on stock during 1948. This claim is said, without dispute, to have been calculated on the same basis as that approved for the earlier period. The Minister, however, by no act either allowed or disallowed the claim until 1949 when he disallowed it *in toto* and taxed the whole of the profits earned in 1947. He also taxed with these the $17,228.38 referred to.

Amendments to the Excess Profits Tax Act passed in 1947 announced that the tax would not be in force after that year. Transition provisions were included for dealing with depreciation reserve that still existed. Before 1947 the Act had provided that any reduction made in the reserve would be taxable in the year of reduction. The changes passed in 1947 that are relevant to the appellant company (whose fiscal year was the calendar year) provided that any reductions in reserve made in 1948 should be treated as 1948 profits and not subject to Excess Profits Tax. See Sec. 6(3).

On 2 January 1948 the company sold all its assets at a profit and in June 1948 went into liquidation, its funds being apparently all distributed in 1948.

The company claims that the allowance which it claimed in 1947 for reserve must be treated as having been "allowed" and having gone into the reserve so as to reduce the 1947 taxes *pro tanto*. The argument is that the Minister was

1951

HUNTTING MERRITT CO. LTD. v. MINISTER OF NATIONAL REVENUE

Sidney Smith D.J.

bound to allow this setting aside, and the situation must be treated as though he had done his duty. Then it is said that the distribution of assets by the liquidator in 1948 reduced the reserve to nil, so that by Sec. 6 (3) this was not taxable. The 1947 profits would be reduced by the amount allowable for reserve and taxes lessened proportionately.

All this is based on the premise that the depreciation claimed was "allowed" or should have been allowed. The Crown denies both alternatives.

This denial is put on several grounds. I understood the Crown to go so far as to claim that the allowance lay entirely in the discretion of the Minister; he never allowed any, and that is said to be the end of the matter. I cannot accept this view. The decision in *Pioneer Laundry & Dry Cleaners Ltd.* v. *Minister of National Revenue* (1), makes it clear that the Minister's discretion is quasi-judicial and not arbitrary but subject to review.

Next the Crown said that even so, the sale of the company's assets at a profit disproved any depreciation, so that the Minister was right in making no allowance. I cannot agree that this was proof. It may have been due to depreciation that the profit on sale was not twice as large as it was. This argument fails to take account of the market factor. The sale price itself is no test.

However, the Crown's next argument seems to have much more substance, viz. the argument that the Minister was right in making no allowance because by the time the matter came before him the company had sold all its assets on 2 Jan. 1948, and in June 1948 had gone into liquidation, these events making it clear that in 1948 the company had no stock to suffer depreciation.

On consideration, I find that contention unanswerable. There is ample legal authority to show that when a Court or other tribunal has to make computations that *prima facie* require it to forecast the future, it must do what it can with the available materials, and must often work with conventional rules and assumptions; but still if by the time of the computation the event, which ordinarily the tribunal would have to anticipate, has actually taken place,

(1) (1940) A.C. 127.

1951

HUNTTING MERRITT CO. LTD. v. MINISTER OF NATIONAL REVENUE

Sidney Smith D.J.

the tribunal must proceed on the actual facts, and can no longer act on artificial rules for measuring the future probabilities as its guide. It is no longer concerned with the future.

This is illustrated by the case of *Williamson* v. *Thorneycroft* (1). There a widow whose husband had been killed sued for compensation which would be measured by her expectancy of life. Before the case came to trial she died and her executors continued it. In assessing her loss the trial Judge awarded damages based on her expectancy of life as it appeared when the cause of action arose, based largely on her age. The Court of Appeal held this was wrong, and that the Judge should have had regard to the fact that the widow's life had proved to be short, so that her loss was extremely small.

Du Parcq L.J. said in this case (p. 660):

> In one sense it is true to say that the moment at which damages are to be fixed in a case under Lord Campbell's Act is at the moment of the death. That does not mean that one should shut one's eyes to everything which has happened subsequently . . . In assessing damages one is in a happier position if one can find that certain events have happened than if one has to speculate about events which are likely to happen . . . It seems inconceivable that it should be suggested that the Court must say "I cannot hear evidence to hear that the woman was dead" or rather "Although she is dead I must shut my eyes to that fact. I must assume that she is alive and speculate in that region of phantasy as to her prospect of continuing to live."

The British Columbia Court of Appeal reasoned in the same way in *Mah Ming Ju* v. *Terminal Cartage Ltd.* (2), where after the plaintiff had obtained a judgment for damages to be assessed, the quantum depending largely on his expectancy of life, he died from extrinsic causes before the damages were assessed. On their assessment the Court held that regard must be had to his actual life span and not to the probabilities as they originally appeared. The same ruling was made in *Ponyicki* v. *Sawajima* (3).

The same principle was followed by the House of Lords in *Bwllfa and Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks Company* (4). There the appellants, owners of coal seams near the respondents' waterworks, gave statutory notice that they intended to work the coal. The respondent gave counter-notice to leave a certain seam

(1) (1940) 2 K.B. 658
(2) (1942) 58 B.C.R. 470.
(3) (1943) S.C.R. 197 at 201.
(4) (1903) A.C. 426.

1951

HUNTTING MERRITT CO. LTD. v. MINISTER OF NATIONAL REVENUE

Sidney Smith D.J.

unworked, this giving the appellants a right to compensation. Arbitration on the amount was delayed two years, and in the meantime the price of coal unexpectedly rose. The arbitrator fixed two amounts for submission on stated case, one based on the price at the date of the notice, the other based on the price at the date of arbitration. A divisional Court held the larger sum recoverable: the Court of Appeal reversed them. The House of Lords restored the first decision.

Lord Halsbury L.C. said at pp. 428, 429:

> If it were a purchase . . . the person who had to make the calculation of what was the compensation ought to have arrived at the sum which experience has now shown to be the correct amount.
>
> It is true he probably would not have been able to arrive at that sum accurately, but he ought to have contemplated upon such material as he had what would be the true sum. He ought to have considered the possible rise or fall of prices. We now know what would have been the true sum, and the proposition baldy stated seems to be that, because you could not arrive at the true sum when the notice was given, you should shut your eyes to the true sum now you do know it, because you could not have guessed it then.
>
> It is of course only an accident that the true sum can now be ascertained with precision. But what does that matter?

Lord Macnaghten added (p. 431):

> . . . the arbitrator's duty is to determine the amount of compensation payable. In order to enable him to come to a just and true conclusion it is his duty, I think, to avail himself of all information at hand at the time of making his award which may be laid before him. Why should he have to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him why should he shut his eyes and grope in the dark?

Applying this reasoning to the present case, I think that when the matter came before the Minister, and it was then quite clear that the company would have no stock to depreciate in 1948, it was not his duty to ignore this, and speculate how the probabilities of depreciation would have appeared to him if he had considered the matter earlier. His knowledge at the time of adjudication made it quite proper for him to disallow all depreciation.

The company tried to meet the above principle by arguing that his adjudication was in effect automatic, and virtually that there was no need for him to adjudicate at all. It was argued that all he had to do was to fix the *principle* of computing depreciation, as he had done in an earlier year, and he was then "functus". Also that once

the principle was fixed in 1946, it could not be changed. With deference, I cannot accept this view. No quasi-judicial decision can be automatic. The Act requires the Minister to "allow" a deduction for depreciation before it can be made, and this requires some official act on his part. Though it is probable that the principle of computation in one year should apply to another, that is only so, *other things being equal.* Here other things were not equal; for by the time that the Minister ruled on the depreciation to be suffered in 1948, it had become apparent that there would be none.

That justified him in refusing to allow any deduction, and the fact that he could not have foreseen this at an earlier date, and might have ruled differently then, is legally irrelevant. His ruling, for the reasons stated, must be judged at the time when it was made, and it was then right.

So much for the appellant's main claim to be allowed for depreciation to take place in 1948.

However, different considerations apply to the $17,228.38 reserve allowed and set up before 1947. The Minister has not only disallowed the deduction of the larger sum but has added in and taxed this $17,228.38 as part of the appellant's profits for 1947. This course would be justified if it could be shown

(*a*) that this sum was taken from the reserve and used during 1947, or

(*b*) that this sum was left in the reserve after the end of 1948. (S. 6(3)).

There is no suggestion that this was used in 1947 or that anything was left after 1948. The Crown's written argument attempts to justify the taxation of this allowance with 1947 profits under Section 6(1), saying that this section—

> . . . requires that the sum of $17,228.38 which was part of the 1946 profits and which had been transferred to a suspense account and not taxed shall be brought back into the taxable profits and taxed along with the profits of the year 1947, because there had been no depreciation in inventory values, but on the contrary there had been an appreciation according to the price obtained on the sale of the total inventory for 1948.

I cannot see, with respect, that Section 6 requires anything of the sort; this sum, unlike the larger allowance

1951

HUNTTING MERRITT CO. LTD. v. MINISTER OF NATIONAL REVENUE

Sidney Smith D.J.

claimed, had been "allowed" by the Minister, and that being so it could only become taxable on one of the bases I have specified. The fact that there actually was no depreciation in 1947 as expected (if that were proved, which I think it was not) would be legally irrelevant.

The appeal should therefore be allowed in part, and the 1947 tax reduced by 15 per cent of $17,228.38. In the circumstances I think the appellant, though only partially successful, should have its costs, except so far as they may have been increased by the inclusion of the larger claim.

Judgment accordingly.

1946

June 3

1951

June 5

BETWEEN:

FRASER COMPANIES LIMITED.....APPELLANT;

AND

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

Revenue—Excess Profits Tax Act 1940—Interest properly charged on unpaid taxes from date prescribed for filing return—Appeal dismissed.

Held: That in an assessment for tax under the Excess Profits Tax Act, 1940, interest was correctly charged since all unpaid taxes bear interest from the date prescribed for the filing of the return to the date of payment.

APPEAL under the provisions of the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Angers at Saint John.

R. B. Hanson, K.C. and *W. J. West, K.C.* for appellant.

J. J. F. Winslow, K.C. and *A. A. McGrory* for respondent.

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

ANGERS J. now (June 5, 1951) delivered the following judgment:

This is an appeal under sections 58 and following of the Income War Tax Act, made applicable to matters

arising under the provisions of the Excess Profits Tax Act, 1940, in virtue of section 14 of the latter, by Fraser Companies Limited, of the Town of Edmundston, Province of New Brunswick, against the assessments for the years 1940, 1941 and 1942 which appear from the copies of notices of assessment forming part of the documents transmitted to the Registrar of the Court by the Minister of National Revenue and deposited in the record, to have been mailed respectively on April 14, 1944, for the year 1940, on October 18, 1945, for the year 1941 and on January 11, 1946, for the year 1942.

It seems to me advisable to quote the definition of certain terms, which are liable to arise frequently in these notes, contained in the Excess Profits Tax Act, 1940. The numbers indicate the sections of the Act.

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

(*c*) "Excess profits" means that portion of the profits of the taxpayer in excess of the standard profits;

(*f*) "Profits" in 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;

(*h*) "Standard period" means the period comprising the calendar years one thousand nine hundred and thirty-six to one thousand nine hundred and thirty-nine, both inclusive, or the fiscal periods of the taxpayer ending in such calendar years or those of such years or fiscal periods since January first, one thousand nine hundred and thirty-six, during which the taxpayer was carrying on business;

(*i*) "Standard profits" means the average yearly profits derived by a taxpayer in the standard period from carrying on the same general class of business as the business producing the profits in the year of taxation, or the standard profits as determined in accordance with section five of this Act: Provided, however, that losses incurred by the taxpayer during the standard period shall not be deducted from the profits in the standard period but the years or fiscal periods when such losses were incurred shall nevertheless be counted in determining the average yearly profits during the said standard period.

(2) Unless it is otherwise provided or the context otherwise requires expressions contained in this Act shall have the same meaning as in the Income War Tax Act, and definitions contained in the said Income War Tax Act shall apply in this Act.

1951

FRASER COMPANIES LTD. v. MINISTER OF NATIONAL REVENUE

Angers J.

14. Without limiting any of the provisions contained in this Act, sections forty to eighty-seven, both inclusive, of the Income War Tax Act, excepting section seventy-six A thereof, shall, mutatis mutandis, apply to matters arising under the provisions of this Act to the same extent and as fully and effectively as they apply under the provisions of the Income War Tax Act.

(The learned judge here refers to the notices of appeal filed by appellant and continues):

The appellant submitted the following Statement of Reasons for appeal:

Fraser Companies Limited, being a depressed business or industry during the basic standard period and having no standard profits established during the said period, and having no accrued, established or ascertained liability to pay Income or Excess Profits Tax, under the provisions of the law, it was not possible to estimate the amount of any Income or Excess Profits Tax under the provisions of the law in the absence of an established base, in respect to either income or excess profits for which such tax or taxes might be payable; to attempt to do so would at best be to guess at the tax, if any;

having no standard profits established during the fiscal period for 1942, estimation of appellant's taxable income or excess profits, if any, or the tax payable thereon, was impossible in law and in fact;

it being impossible to estimate the income, the excess profits or the tax thereon, no interest on any taxes levied after the establishment of the standard profits is due or payable, except such as may have been incurred, if any, in respect of the period between the date of the decision of the Board of Referees and the date of the full payment of the assessed tax on March 23, 1944, date prior to the first assessment, and no interest is exigible during that interim period;

in any event, the amount of the assessment, including interest, either under that of April 14, 1944, or that of October 18, 1945, or that of January 11, 1946, was absorbed and paid in the manner hereinabove indicated in March, 1944, prior to either assessment, and the appellant claims to be refunded the amount so designated as interest and paid as aforesaid;

in the premises no interest in respect of either tax for the year 1942 is payable by the appellant;

in the alternative, if any sum was exigible for interest on the tax as assessed, that amount is limited to such amount as may be found to be due from the date of the establishment of the standard profits by the Board of Referees to the date of payment.

The decision of the Minister dated June 8, 1944, signed by the Minister of National Revenue per the Deputy Minister of National Revenue for taxation, and also part of the file of the Department sets forth (*inter alia*):

WHEREAS the taxpayer duly filed Income and Excess Profits Tax Returns showing its income for the years ended 31st December, 1940, 1941 and 1942 respectively.

AND WHEREAS taxes were assessed by Notices of Assessment dated the 14th April, 1944.

AND WHEREAS Notices of Appeal were received dated 5th May, 1944, in which objection is taken to the assessed taxes for the reasons therein set forth.

The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notices of Appeal, and matters thereto relating, hereby affirms the said Assessments on the ground that the taxpayer was properly assessed for interest under the provisions of the said Acts. Therefore on these and related grounds and by reason of the provisions of the Income War Tax Act and Excess Profits Tax Act the said Assessments are affirmed.

On June 20, 1944, the appellant, in compliance with Section 60 of the Income War Tax Act, sent to the Minister a Notice of Dissatisfaction, in which it merely says that it desires its appeal to be set down for trial.

The reply of the Minister, as usual, denies the allegations contained in the Notice of Appeal and the Notice of Dissatisfaction insofar as they are incompatible with the statements contained in his decison and affirms the assessments as levied.

The evidence discloses that the appellant is an incorporated company engaged in the manufacture of pulp and lumber products. During the "standard period", i.e. the period comprising the calendar years 1936 to 1938 both inclusive as defined in paragraph (*k*) of subsection (1) of section 2 of The Excess Profits Act, 1940, its capital employed and net taxable income or net loss were as follows:

1951

FRASER COMPANIES LTD. v. MINISTER OF NATIONAL REVENUE

Angers J.

	Capital employed	net income or loss	% on capital
1936—	17,011,709.40	136,578.56	0·8%
1937—	19,224,813.69	850,177.61	4·4%
1938—	19,082,316.35	71,433.28	0·4%
1939—	18,953,882.03	55,095.57 (loss)	nil

The average capital employed during that period was $18,568,155.37 per year (not $18,568,180.37 as mentioned in appellant's brief) and the percentage of net taxable income on the capital employed during the same period was 1·4 per cent.

All amounts of income tax levied and assessed for 1939 and prvious years were paid and the issues in the present appeal do not concern those years except by reference to the standard period established by The Excess Profits Tax Act, 1940 (4 Geo. VI, chap. 32) assented to on August 7, 1940.

On April 2, 1941, the appellant filed its Income and Excess Profits return for the year 1940 and it paid the Income Tax on its net taxable income audits Excess Profits Tax on the basis of 10 per cent of capital employed.

On the same day, April 2, 1941, believing it was a depressed business within the meaning of the Act, the Company made application to the Minister to be declared a depressed business and for a reference to the Board of Referees to have its standard profits ascertained and established. The appellant's application was not dealt with and granted by the Minister until February 11, 1942, when he directed that the Board of Referees ascertain the standard profits of appellant.

The Board only rendered its decision on February 26, 1944, when the Company received notice from the Department of National Revenue that its application had been considered by the Board and approved. Unquestionably the Board moved slowly. The long delay which elapsed between the time the application was made and the day on which the standard profits were ascertained by the Board have a material bearing on the issue involved in the present appeal. I shall deal with this question more fully later.

Pending the belated decision of the Board of Referees, the appellant, convinced that its standard profits during the basic period were so low that it would not be just to

determine its liability to tax under the Excess Profits Tax Act because the business was depressed during the standard period, computed as standard profits, in accordance with the provisions of section 5 of the Act, at the figure of 10% per annum on the amount of capital employed in the business at the commencement of the last year of the standard period, i.e. as at January 1, 1939, the amount finally established being $18,956,021.84.

It was submitted on behalf of appellant that its claim for a rate of standard profit of 10% was based on the following considerations:

(*a*) 1940 costs and selling prices for sulphite and groundwood pulp, paper-board, lumber, lath, shingles and ties.

(*b*) 1937 quantities marketed for sulphite and groundwood pulp and paper-board and 1941 quantities marketed for lumber products.

(*c*) 1941 miscellaneous revenue, administration, interest, depletion, depreciation and assessor's adjustments.

Counsel for appellant observed that these factors established "potential earnings and estimated profits", which might have been realized annually during the standard period under normal conditions, of $1,830,197.82 and a percentage of 9·66 per cent on the capital employed as at January 1, 1939.

The Board of Referees in their finding ignored the potential earnings of the appellant as submitted and fixed its yearly standard profits at the arbitrary sum of One Million Dollars, equal to 5·27 per cent per annum of the capital employed.

It was urged on behalf of appellant that the sum of One Million Dollars was not based on any accurate figures, but is an arbitrary amount fixed by the Board of its own motion.

It was submitted by counsel that in April, 1941, the appellant having no base established and having proceeded to pay as required by the Act on the basis of 10 per cent, found that on the basis of 5·27 per cent of capital employed the payments were insufficient and that this was subsequently cured.

It appears from the evidence that up to March, 1944, no assessments had been made against the appellant for

1951

FRASER COMPANIES LTD. v. MINISTER OF NATIONAL REVENUE

Angers J.

the years 1940, 1941 and 1942, except the assessment for the year 1940 made on February 12, 1942, which was subsequently withdrawn and replaced by another assessment dated April 14, 1944.

The proof reveals that in March, 1944, the appellant remitted to the Department of National Revenue the full amount of all Income Tax and Excess Profits Tax due for the said three years on the basis of 5·27 per cent on the capital employed. From this counsel for appellant concluded that, when the assessments for 1940, 1941 and 1942 were made on April 14, 1944, there were no arrears owing for either class of tax.

It was urged on behalf of appellant that it never admitted liability to pay interest and that in fact no interest was due at any time. Counsel added that not only was no interest ever due by appellant but that according to the Department's own figures, particularly in relation to the years 1941 and 1942 on the basis of credits allowed by the Department in 1945, there was actually a credit in favour of the Company. On April 14, 1944, following the decision of the Board of Referees, the Department proceeded to make assessments for the three years in question; it revised the assessment for 1940 and for the first time issued notices of assessment for the years 1941 and 1942.

These assessments indicate the following:

For the year 1940—No. A-42225—Date of mailing: April 14, 1944.		
Net income declared		$1,363,251.67
Income tax levied		$ 241,562.98
Interest thereon levied		9,535.11
Total		$ 251,098.09
Payments credited—		
Income tax in full .....$	241,562.98	
On account interest	230.28	241,793.26
Leaving a balance claimed for interest of		$ 9,304.83
Excess Profits Tax levied		216,439.93
Interest thereon levied		14,375.87
Total		$ 230,815.80

Payments credited—		
Excess Profits Tax levied ..... $ 216,439.93		
Interest thereon levied 75.00	$ 216,514.93	
Leaving a balance claimed for interest of	$ 14,300.87	
For the year 1941—No. A-42226—Date of mailing: April 14, 1944.		
Net income declared	$2,872,349.07	
Income tax levied	513,200.51	
Interest thereon levied	6,728.57	
Total	$ 519,929.08	
Payments credited—		
Income tax in full ..... $ 513,200.51		
Interest ..... nil	513,200.51	
Leaving a balance claimed for interest of	$ 6,728.57	
Excess Profits Tax levied	983,342.06	
Interest thereon levied	41,585.10	
Total	$1,024,927.16	
Payments credited—		
Excess Profits Tax in full ..... $ 983,342.06		
Interest ..... nil	983,342.06	
Leaving a balance claimed for interest of	$ 41,585.10	
For the year 1942—No. B-560, Date of mailing: April 14, 1944.		
Net income declared	$2,590,076.81	
Income tax levied	$ 462,391.51	
Interest	nil	
Total	$ 462,391.51	
Payments credited—		
Income tax in full ..... $ 462,391.51		
Interest ..... nil		
No balance payable		
Excess Profits Tax levied	$ 955,313.96	
Interest thereon	14,096.18	
Total	$ 969,410.14	
Excess Profits Tax ..... $ 955,313.96		
Interest ..... nil	955,313.96	
Leaving a balance claimed for interest of	$ 14,096.14	

The Board of Referees, however, fixed the yearly standard profits of appellant at $1,000,000, equal to 5·27 per cent per annum of the capital employed. The appellant submits that the sum of $1,000,000 is purely an arbitrary amount fixed by the Board and a figure which could not have been

1951

FRASER COMPANIES LTD. v. MINISTER OF NATIONAL REVENUE

Angers J.

anticipated either by the taxpayer or the Minister and which is not "just" within the meaning of section 5 of the Act.

In April 1941 the appellant, having proceeded to pay in compliance with the Act on the basis of 10 per cent, found on the basis of 5·27 per cent of capital employed that the payments made were insufficient. This was later corrected.

Up to March 1944 no assessment had been made against appellant for the years 1941 and 1942. An assessment, made on February 12, 1942, bearing No. A535, for the year 1940, was subsequently withdrawn and replaced by assessment No. A42225 dated April 14, 1944.

The appellant contends that in March, 1944, previous to any assessment by the Department for the years 1940, 1941 and 1942, the company remitted the full amount of all income and excess profits tax due for the said three years on the basis of 5·27 per cent on the capital employed, so that when the assessments were actually made on April 14, 1944, no arrears for either class of tax was owing. The appellant further contends that it never at any time admitted liability to pay interest and that, in fact, no interest was ever due; it submits in addition that not only was no interest due at any time, but that on the footing of the respondent's own figures, especially with regard to 1941 and 1942 on the basis of credits allowed by the Department in 1945, there was a credit in favour of the taxpayer which was applied by the Minister to various years' taxes.

On April 14, 1944, after the decision of the Board of Referees was rendered, the Department proceeded to make assessments for the three years at issue, revised the assessment for 1940 and, for the first time, issued notices of assessment for 1941 and 1942.

An appeal against these assessments was made on May 5, 1944, and was prosecuted with diligence, security for costs was given and the appeal was ready to be transmitted to the Court, when, in April 1945, counsel for appellant was verbally notified by the Assistant Deputy Minister of Taxation (legal) that the assessments were to be vacated or modified.

The appeal was kept in abeyance until October 18, 1945, when new notices of assessment were issued by the

Department for the years 1941 and 1942. No new notice of assessment was sent for 1940, so that it may be considered that notice number A-42225 of April 14, 1944, is final for 1940.

With respect to 1941 a new notice of assessment number A-44377 dated October 18, 1945, was transmitted to the appellant; it disclosed the following item:

1.	Taxable income at $2,842,324.71 as against $2,872,349.07 in A42226 of April 14th, 1944, a difference of $30,024.36 in favour of the taxpayer.		
2.	Income Tax levied	$ 507,796.13	
	Interest thereon levied	4,296.71	$ 512,092.84
3.	Excess Profits Tax levied	$ 963,634.71	
	Interest	39,259.63	1,002,894.34
4.	Payments credited:		
	(a) For Income Tax in full	$ 507,796.13	
	(b) For interest on same in full	4,296.71	512,092.84
	(c) For Excess Profits Tax in full	$ 963,634.71	
	(d) For interest in full	39,259.63	1,002,894.34

Counsel for appellant submitted that the tax and the interest were paid in full without any additional money from the taxpayer and that the adjustment is due to several factors, specified as follows:

1.	The Taxable Income is less than that declared in Assessment Notice No. A42226 by	$ 30,024.36
2.	A Credit of 15c per cord on 100,081.18 cds. pulpwood for Depletion Reserve	15,012.18
	and 15c per cord additional allowance	15,012.18
	Total credited for Depletion and special allowance on pulpwood	30,024.36

Attached to assessment notice A-44377 is a statement of payments and transfers, relating to income tax and excess profits tax, which discloses the following figures:

Income tax		
amount levied	$ 507,796.13	
amount paid	513,200.51	
	a credit	$ 5,404.38
transfer from 1943		65,474.17
		$ 70,878.55
transfer to interest general tax 1941		4,296.71
		$ 66,581.84
transfer to excess profits tax interest 1941		1,635.22
	leaving a credit of	$ 64,946.62
transfer to 1945 general tax		64,946 62

1951

FRASER COMPANIES LTD. v. MINISTER OF NATIONAL REVENUE

Angers J.

Excess profits tax

amount levied	$ 963,634.71
amount paid	983,342.06
a credit	$ 19,707.35
transfer from 1943 general tax	17,917.06
total credit	$ 37,624.41
transfer to interest 1941 excess profits tax	37,624.41

According to counsel for appellant's intimation, a reference to assessment A42226 dated April 14, 1944, for the year 1941, would disclose these items:

income tax (with no payment thereon)	$ 6,728.57
interest on excess profits tax (with no payments credited)	41,585.10

I must say that this assessment was not produced, notwithstanding several requests by the Deputy Registrar.

It was suggested by counsel for appellant that, if a proper assessment had been made in 1944 for the year 1941, allowing all payments and credits as of the latter year, there would have been no interest levied.

It was submitted by counsel that, with respect to the taxation year 1942, a new assessment notice number B1157 dated October 18, 1945, was delivered to the taxpayer and that it disclosed these items:

1.	taxable income at $2,575,806.71 as against $2,590,076.81 in assessment notice number B560;	
2.	income tax levied	$ 459,822.88
	interest thereon	nil
3.	excess profits tax levied	942,825.72
	interest levied thereon	13,494.74
		$ 956,320.46
4.	payments credited:	
	income tax in full	459,822.88
	excess profits tax and interest in full	956,320.46

It was pointed out by counsel that all the income tax and the excess profits tax and interest had been paid in full and a credit for the future years established.

Counsel for appellant drew the attention of the Court to the fact that attached to the assessment notice number B1157 dated October 18, 1945, which was not produced, is a statement of transfers of overpayments showing the following figures:

Income tax		
tax levied		$ 459,822.88
amount paid		462,469.18
	a credit	$ 2,646.30
transfer to 1943 general tax, allegedly made at the time of the previous assessment		77.67
	a credit	$ 2,568.63
transfer to excess profits tax 1942		2,568.63
Excess profits tax		
tax levied		$ 942,825.72
amount paid	a credit	955,623.95
		$ 12,798.23
transfer to excess profits tax 1943 (made at some previous assessment)		309.99
	a credit	$ 12,488.25
transfer from general tax		2,568.03
	a credit	$ 15,056.87
transfer to excess profits tax interest		13,494.74
	a credit	$ 1,562.13
transfer to 1945 excess profits tax		1,562.13

It was intimated by counsel that a reference to assessment notice B560 dated April 14, 1944, for the year 1942, will indicate:

interest charged on income tax	nil
interest charged on excess profits tax unpaid	$ 14,096.18

This notice of assessment was not filed and counsel's statement is consequently of no avail.

It was urged that, if the proper credits had been given for 1942 and a proper assessment made in 1944 for the former year, after crediting all payments, there would have been no interest chargeable.

It was submitted that on January 11, 1946, a downward revision of tax was made by the Minister with respect to the year 1942 and a new notice of assessment issued bearing number B1373, which indicated a taxable income of $2,555,036.61 as against $2,590,076.81 shown in assessment notice number B560, a decrease of $35,040.20. This new notice of assessment contains the following particulars:

income tax levied	$ 456.084.27
interest thereon levied	nil
excess profits tax levied	927,905.68
interest thereon levied	12,951.09
	$ 940,856.69

1951

FRASER COMPANIES LTD. v. MINISTER OF NATIONAL REVENUE

Angers J.

The notice in question discloses in addition that the income tax and the excess profits tax were paid in full and that the interest on the excess profits tax was absorbed by credits transferred from other years. It also indicates that a credit of $3,738.61 on the income tax for the year 1942 had been transferred to the income tax for the year 1944 and that a credit of $14,920.04 on the excess profits tax for the year 1942 had been transferred as follows:

$10,078.60 to the income tax for the year 1944

4,841.44 to the excess profits tax for the year 1945

543·65 (interest credit) to the excess profits tax for the year 1945.

A table, allegedly agreed to form part of the record, showing a summary of income and excess profits taxes for the years 1940, 1941 and 1942 and the interest thereon, as levied by the Department of National Revenue, and indicating the adjustments, is included in the appellant's brief. As this table is rather extensive and may conveniently be referred to, I do not deem it expedient to analyse it.

Another table, supposed to be a statement of the reductions in the income and excess profits taxes for the years involved, contains the following information:

Reduction in taxes for 1941, 1942 and 1943 resulting from additional pulpwood depletion, less adjustment of reserve for bad debts:

	Income Tax	Excess Profits Tax	Total
1941 tax	5,404.38	19,707.35	25,111.73
1942 tax	6,307.24	27,408.28	33,715.52
1943 tax	5,517.14	21,653.83	27,170.97
	17,228.76	68,769.46	85,998.22
Interest levied			
on 1940 tax	9,535.11	14,375.87	23,910.98
on 1941 tax	4,296.71	39,259.63	43,556.34
on 1942 tax		12,951.09	12,951.09
	13,831.82	66,586.59	80,418.41
Less:			
paid on interest levied on 1940 tax	305.28		305.28
	13,526.54	66,586.59	80,113.13

Credit from reduction in taxes for 1941, 1942 and 1943 in excess of total interest levied	3,702.22	2,182.87	5,885.09
Overpaid on 1942 tax prior to assessment notices Oct. 18, 1945 (Adj. depreciation on tractor)			387.66
Overpaid on 1943 tax (instalment payments in excess of total tax due as shown on tax return T. 2-1943			55,832.60
Total transferred to credit of 1944 and 1945 taxes			62,105.35
Transferred from 1941 to 1944			41,340.92
Transferred from 1942 to 1944			13,817.21
Transferred from 1942 to 1945			6,947.22
			62,105.35

NOTE

Transfer of $83,391.23 from 1943 to 1941 includes:	
overpaid through instalment payments on 1943 tax.....	55,832.60
credit through adjustment of pulpwood depletion less adjt. of bad debts reserve	27,170.97
transfer from 1942 to 1943	387.66
	83,391.23

It was submitted on behalf of appellant that this table shows clearly that, on account of reductions in taxes and additional allowances, all taxes levied and interest thereon for the years in question were paid in full before April 14, 1944, date of the first assessment after the standard profits base was established.

It was argued on behalf of appellant that, with regard to the years 1941 and 1942 on a proper basis of assessment, after reducing the amount of taxable income and crediting allowances for depletion, not only was there no balance payable on income tax or excess profits tax and no interest exigible on either for 1941 and 1942 but that there was a credit balance. Counsel specified that this credit balance was not only large enough to pay all levies for 1941 and 1942, but was sufficient to pay all the balance claimed on either class of tax and the interest thereon and still leave a balance to the taxpayer's credit, which was applied on taxes of succeeding years.

Counsel concluded that: 1.—having regard to the facts existing in this appeal, there was no legal right vested in the Minister to impose interest on alleged deficiency payments for 1940, 1941 and 1942, the final assessments show-

1951

FRASER COMPANIES LTD. v. MINISTER OF NATIONAL REVENUE

Angers J.

ing that there was no deficiency; 2.—considering the law as it stood in 1941, there was, with regard to the years 1940, 1941 and 1942 for excess profits tax and for the years 1941 and 1942 for income tax, no interest exigible at any time and that in the alternative, if any such interest was payable, it ran only from the date of assessment; 3.—for excess profits tax purposes, on the basis of the law as it stood in 1941, it was not possible for the taxpayer to estimate its taxable income, because between August 7, 1940, and February 16, 1944, the taxpayer had no established "standard profit" or base within the meaning of the Act.

It was contended on behalf of appellant that, having regard to the facts established by the Board, there was no right vested in the Minister to impose interest on alleged deficiency payments and that the payments made by the taxpayer, beginning in April 1941 and continuing throughout 1942 and 1943, were sufficient to pay both classes of taxes in full, if credits and allowances reducing the amount of taxable income and the quantum of the tax, such as were allowed in the assessments made in 1945 and 1946 for the years 1940, 1941 and 1942, had been allowed when the original assessments were made for each of the said years. It was further alleged that the earlier assessments did not faithfully represent either the amount of taxable income or the amount of taxes of either class payable by the taxpayer and that, if the allowances had been made even on the basis of the right to impose interest, it would have been found that there were no deficiency payments and that therefore no interest was exigible.

Dealing with the claim for interest on income tax assessed, counsel admitted that under section 48 of the Income War Tax Act, read in conjunction with section 54, Parliament authorized the assessment of interest on all *unpaid* income tax from the date fixed for the filing of the return to the date of payment. He declared, however, that in the present case the amount levied for the 1940 income tax was paid in full at the time the first assessment was issued and that in fact the amount remitted for income tax overpaid the sum levied by $3,040.99, which was credited upon the Excess Profits Tax Act for that year. In counsel's opinion this eliminates all right to charge interest for the year 1940.

Regarding the claim for interest on income tax for 1941 and 1942 it was submitted that the record shows that the amount levied for income tax on April 14, 1944, had been paid in full in March 1944 and that the assessment notice A42226 indicates that nothing was due for interest on the 1941 income tax account and that assessment notice A44377 for the year 1941, due to re-assessments and credits, discloses that, while interest was charged for the year 1941, all had been settled, not by the taxpayer but absorbed by transfers made by the Department.

Concerning the year 1942 counsel pointed out that assessment notice B560 shows no interest, the tax having been paid in full before the assessment and that the same position is indicated by the final assesment notice B1157 dated October 18, 1945.

Counsel's conclusion was that, with respect to the three taxation years in question, having regard to the series of assessments made after payment of the tax, the Department's own figures disclose that, after credits were allowed, which should have been allowed as from the time the tax returns were made, there were no deficiency payments of income tax and that consequently no interest was exigible.

It was submitted on behalf of appellant, in connection with the excess profits tax, that notice of assessment A535 for the year 1940 dated February 12, 1942, indicated a tax of $120,788.98 and interest of $205.80, but that notice of assessment A42225 dated April 14, 1944, before which date the tax had been paid in full, showed an interest charge of $14,375.87. It was further submitted that subsequently, due to credits granted under assessment B1157 dated October 18, 1945, this charge was entirely absorbed.

Regarding the year 1941 counsel stated that there was an interest charge of $41,585.40, the tax itself having been paid in full, but that by notice of assessment A44377 dated October 18, 1945, this interest charge was absorbed due to credits allowed then which, in his opinion, should have been allowed as from the time when the return for 1941 was made in 1942. He inferred that in the circumstances no interest in equity was chargeable for that year.

Counsel drew the attention of the Court to the fact that the same condition obtains for the year 1942, that the

1951

FRASER COMPANIES LTD. v. MINISTER OF NATIONAL REVENUE

Angers J.

tax had been paid in full in March 1944, that assessment notice B560 issued on April 14, 1944, indicates that $14,-096.18 were levied while all the tax had been paid and that subsequently, by reason of credits and readjustments allowed under assessment B1157 dated October 18, 1945, in which the tax was reduced, the amount claimed for interest was declared paid and a credit for other years established.

It was submitted by counsel for appellant that in the year 1940 and the following years, after the enactment of the Excess Profits Tax Act which made the taxes applicable to the profits of the appellant's fiscal year 1940, the Company being a depressed industry and having no profits established during the fiscal period and no accrued and ascertained liability to pay either income or excess profits taxes under the provisions of the law as it stood in 1941, it was not possible to estimate the amount of any tax, particularly the excess profits tax, payable by it in respect of the year 1940 and the two following years. Counsel said that the appellant having no standard profit established during the whole period, estimation of its taxable income, if any, or of the tax payable by it in respect of the year 1940 and the following years was impossible of performance in fact and in law.

Counsel urged that, there being no base rate established until 1944 and in view of the provisions of the law as it stood in 1941, no interest accrued until an assessment was made in April 1944 and that by April 1944, before the assessments were made, the entire amount of both income and excess profits taxes had been paid in full, nay, having regard to the subsequent assessment, overpaid.

Counsel alleged that the respondent, after the appeal had been entered, amended the assessments and, while seeking to preserve the right to make the various levies for interest, absorbed the whole. He explained that what is sought in the present appeal is the return of the amounts levied for interest, but that, if the appellant fails on that point, it relies on the fact that a corporation may under subsection (3) of section 48 of the Income War Tax Act pay its taxes by instalments *without interest* until after assessment. He specified that, insofar as the years 1940 and 1941 for excess profits tax and the year 1941 for income tax are

concerned, under the provisions of subsection (3) of section 48 and of section 49 of the Income War Tax Act in force in 1941 for income tax purposes and through the application of sections 14 and 16 of the Excess Profits Tax Act for the years 1940 and 1941 for excess profits tax purposes, there would be no interest chargeable on deficiency payments, except after assessment, pursuant to the provisions of section 54 of the Income War Tax Act.

Counsel signalled out that subsection (3) of section 48, as it existed in 1941, stipulated that "any corporation may pay the tax in respect of any fiscal period by instalments without interest", as provided for by subsection (1) of said section. In counsel's opinion subsection (3) of section 48, as it stood in 1941, clearly provides that a corporation may pay its taxes by instalments without interest and that, if it does so, there is no provision in the Act compelling it to pay interest on deficiency payments, except after assessment, in compliance with section 54 of the Income War Tax Act.

As mentioned by counsel for appellant, section 54 as it existed in 1941, required the Minister to send a notice of assessment to the taxpayer, verifying or altering the amount of the tax as estimated by the latter in his return and subsection (3) thereof enacts that all taxes due and unpaid shall bear interest at the rate of 5 per cent per annum, unless otherwise provided.

Counsel relied on subsection (3) of section 48 enacting that "any corporation may pay the tax in respect of any fiscal period by instalments without interest", as provided for by subsection (1) of this section.

It was argued on behalf of appellant that under subsection (4) of section 54 it is clear that, if interest may be charged, it can only be charged after assessment, at the rate of 3 per cent. It was submitted that at the time the original assessments were made on April 14, 1944, all taxes had been paid, that there remained only the claim for interest, but that on the vacating of the assessments and the issue of new ones in October 1945, due to credits, transfers and adjustments, even the interest had been absorbed by the Department.

1951

FRASER COMPANIES LTD. v. MINISTER OF NATIONAL REVENUE

Angers J.

Counsel pointed out that the depletion allowances shown in the notice of assessment A44377 reduced the taxes previously assessed for the years 1940, 1941 and 1942 and that the taxes for these three years were overpaid, the overpayments being applied in part by the Income Tax Division in settlement of interest levied for the said three years and the balance carried forward as payment on account of income and excess profits taxes for 1944 and 1945.

It was contended by counsel for appellant that sections 48 and 49 of the Income War Tax Act were only applied, as they existed in 1941, for income tax purposes, but that pursuant to sections 14 and 16 of the Excess Profits Tax Act, as enacted in 1941, they were made applicable for excess profits tax purposes to the years 1940 and 1941.

It was suggested by counsel that the principle that no interest was payable under section 48 of the Income War Tax Act, as it applied to the year 1941 for income tax purposes and to the years 1940 and 1941 for excess profits tax purposes, is clear when sections 48 and 49 are examined, as they applied to the year 1942 and the subsequent years, because on August 1, 1942, said sections were amended with the intention of providing that, if any deficiency arose in the tax paid by reason of an underestimate made by the taxpayer, such deficiency, after notice of assessment, would be payable with interest at 5 per cent per annum from the day four months after the end of the taxation year after payment and that these amendments were made to apply in respect of fiscal periods ending on and after December 31, 1942.

It was submitted that, in addition to the foregoing argument with respect to interest on excess profits tax for the years 1940, 1941 and 1942 and on income tax for the year 1941, it is unjust and inequitable that the Company should be charged interest on alleged deficiencies (which did not in fact exist when finally assessed in October 1945) in the payment of taxes arising by reason of the delay by the Department in submitting the case to the Board of Referees or by reason of the delay of two years by the Board of Referees under the Excess Profits Tax Act in determining a standard profit or base for the Company.

Counsel pointed out that, before the assessment for the years 1940, 1941 and 1942, the appellant had fully paid

the income and the excess profits taxes as finally assessed in April 1944, that subsequently the Department withdrew the assessments, except for 1940, and that, on October 18, 1945, issued amended assessments which gave credits to the taxpayer more than sufficient to wipe out the claim for interest and indeed leave a credit which was applied on subsequent years. According to counsel the interest charge for 1940 was balanced or absorbed by transfers and credits from 1941 and other years.

Counsel finally contended that it would be unjust, inequitable and contrary to the proper construction of the taxing Statute that the appellant should be forced to pay taxes on amounts which were not determinable and which it is not obligated to pay prior to the determination of its standard profit or indeed until the actual assessments had been made, in respect of which the Company was in no way in default.

After recapitulating the facts and quoting the definitions of the words "excess profits", "standard profit" and "standard period", which, by the way, comprises the years 1936 to 1939 inclusive, counsel for respondent referred to section 5 of the Excess Profits Tax Act, of which subsection (1) enacts:

> 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 the fiscal period of the taxpayer in the standard period computed in accordance with the First Schedule to this Act: . . .

Section 11, dealing with the payment of tax, reads thus:

> 11. Any person liable to pay any tax hereunder shall estimate the amount of tax payable and shall send with the return of profits not less than one-third of the aggregate amount of such tax and may pay the balance within four months thereafter, together with interest at the rate of five per centum per annum upon such balance from the last day prescribed for the making of such return until the time payment is made, and all the provisions of the Income War Tax Act relating to payments at other times than those herein specified shall, mutatis mutandis, apply as if enacted in this Act.

1951

FRASER COMPANIES LTD. v. MINISTER OF NATIONAL REVENUE

Angers J.

Section 12, relating to assessment, is thus worded:

> 12. After examination of the taxpayer's return the Minister shall send a notice of assessment to the taxpayer verifying or altering the amount of the tax as estimated by him in his return and any additional tax found due shall be paid in the same manner, at the same time and subject to the same interest and penal provisions as if the additional tax were found due under the provisions of the Income War Tax Act.

Counsel pointed out that in virtue of section 14, sections 40 to 87 of the Income War Tax Act, save 76A, shall apply, mutatis mutandis, to matters arising under the provisions of the Excess Profits Tax Act as fully as they do under the provisions of the Income War Tax Act.

Section 33 fixes the time within which every person liable to taxation shall deliver to the Minister a return of his total income during the last preceding year. This section has no materiality in the present case.

Subsection (2) of section 35 provides that a corporation shall make a return within four months from the close of its fiscal period. As indicated by its return, the appellant's fiscal year ends on December 31.

In virtue of subsection (1) of section 48 any person liable to pay a tax is required to estimate the amount of tax payable by him and to send with his return not less than one-third of the amount of the tax and may pay the balance within four months thereafter, together with interest at the rate of 5 per cent per annum upon the balance outstanding.

Amendments to section 48 were made affecting the 1941 and 1942 periods, whereby corporations were permitted to pay during each of the last four months an amount equal to one-twelfth of the tax as estimated by the taxpayer and during each of the next eight months one-eighth of the balance of the tax so estimated.

It was submitted by counsel that, if a corporation elected to make payments as provided by this amendment, no interest was chargeable in respect of the amounts paid, but that the corporation remained liable to pay interests on the difference between the amount estimated and paid and that finally assessed by the Minister.

Section 49 stipulates an additional interest at the rate of 3 per cent per annum upon the deficiency from the date of default to the date of payment. It may be convenient to quote the section:

> 49. If any person liable to pay any tax under this Act . . . pays less than one-third of the tax as estimated by him, or should he fail to make any payment at the time when the filing of his return is due, or fail to pay the balance of the tax as estimated by him within four months therefrom, he shall pay, in addition to the interest of five per centum per annum provided for by the last preceding section, additional interest at the rate of three per centum per annum upon the deficiency from the date of default to the date of payment.

Section 54 provides that, after examination of the taxpayer's return, the Minister shall send him a notice of assessment verifying or altering the amount of the tax estimated, that any additional tax which may be due over the estimated amount shall be paid within one month from the date of the mailing of the notice of assessment and that all unpaid taxes shall bear interest at 5 per cent per annum from the date prescribed for the filing of the return to the date of payment.

Section 55 is immaterial herein.

Counsel drew the attention of the Court to the fact that in its return dated April 2, 1941, for the taxation period ended December 31, 1940, the appellant estimated its net taxable income at $956,042.87, the income tax thereon at $168,021.33 and its excess profits tax at $114,725.14, making a total of $282,746.47, which the Company paid.

It was submitted that the Company reckoned the average capital employed in the years 1936 to 1939 inclusive at $18,568,180.37 and particularly in the year 1939 at $18,953,882.03—and that the Board of Referees, by order dated February 26, 1944, ascertained the capital employed as at January 1, 1939, to be $18,956,021.84.

Counsel stated that the Company, in making up its income tax return for 1940, paid excess profits tax only under the first part of the second schedule, namely 12 per cent of $956,042.87, and regarding item 47, indicated:

Tax at 12 per cent (estimated excess profits tax payable) $114,725.14, adding this statement: "Standard Profits claim filed on S.P. 1".

1951

FRASER COMPANIES LTD. v. MINISTER OF NATIONAL REVENUE

Angers J.

It was submitted on behalf of respondent that there are no answers in the second part of the return dealing with standard profits, that no indication is made that the Company had elected to make any computation of its standard profits and that, if it had elected to compute its standard profits at 10 per cent of its capital employed, the return would have shown no tax payable under part 2 of the second schedule, subject to the proviso in section 5(1). It was specified that the right to compute the standard profits at 10 per cent on the capital is subject to the proviso that the Board of Referees shall ascertain the standard profits at an amount, in its sole discretion, of not less than 5 per cent and not more than 10 per cent of capital employed at the commencement of the preceding year in the standard period as computed by the Board.

In its return dated April 30, 1942, covering the taxation period ending December 31, 1941, the Company estimated its net taxable income for that year at $2,478,579.32, its income tax at $442,321.96 and its excess profits tax at $545,287.45, the income and excess profits taxes totalling $987,609.41, which, according to his solicitor, the appellant paid.

Counsel again stated that the Company made no answers to the second part of the excess profits tax questions other than "S.P. 1 claim filed." It was submitted that the appellant made no computation of its standard profits and that the 10 per cent of the capital employed during the relevant period, according to the Company's estimate of capital, would amount to $1,895,388.20, whereas the Company's own estimate was $2,478,579.32, which would mean a substantial amount payable under the second part of the second schedule.

It was argued by counsel for respondent that it is incorrect to state, as is mentioned in paragraph 4 of appellant's factum, that "meantime, in accordance with the provisions of section 4 of the Excess Profits Tax Act, the appellant . . . computed its standard profits as commanded by the Statute, at the amount of 10 per cent per annum on the amount of capital employed in the business at the commencement of the last year of the standard period, that is as at January 1, 1939, the amount finally established being $18,956,021.84."

It was further alleged that another error in this statement is that the appellant is not commanded by the Act to compute its standard profits at 10 per cent but is only permitted to do so, and then subject to the proviso that the Board shall ascertain the standard profits on an amount of capital as computed by the Board. Counsel for respondent found it difficult to understand how the Company could in 1941, 1942 and 1943 compute its standard profits on the amount of capital of $18,956,021.84 when this sum was not ascertained until February 26, 1944, the date on which the Board of Referees made its finding to that effect.

It was submitted that on June 25, 1943, the appellant estimated its taxable income for 1942 at $2,590,508.35, the income tax payable thereon at $462,469.18 and the excess profits tax at $569,911.84, making a total of $1,032,381.02, which amount was paid by the taxpayer.

Counsel stated that on February 26, 1944, the Board of Referees ascertained and allowed the appellant's standard profits at $1,000,000, which is somewhat in excess of 5 per cent of the capital as established by the Board and that following this ruling the Income Tax authorities made their assessment and notified the taxpayer accordingly.

Counsel contended that these assessments were amended ("re-amended" seems more accurate) by the Income Tax Office and that a final assessment, including interest, was made and paid by the Company. He thereupon gave a detailed statement of the income and excess profits taxes and of the payments thereon. I do not deem it necessary to quote this statement.

According to counsel it may be seen that in each year there was a deficiency in the amount paid for taxes at the time these payments were due.

With regard to section 33 of the Income War Tax Act, counsel repeated that every person liable to taxation must file a return of his total income by a definite date, which, in the case of corporations, is fixed within four months of the close of their fiscal year, the fiscal year of the appellant ending on December 31.

Counsel alleged that for the year 1942 the time for filing the return was six months from the close of the fiscal period, which extended the time to June 30 (section 35).

1951

FRASER COMPANIES LTD. v. MINISTER OF NATIONAL REVENUE

Angers J.

It was claimed on behalf of respondent that there are many errors in appellant's factum which are generally denied, except insofar as are admitted in respondent's factum to be correct. Counsel here dealt with some of these errors; I do not consider expedient to review them in detail.

Counsel added that there are also errors in the table set out in appellant's factum, but that, even supposing them to be correct, the conclusion drawn by the appellant is not exact, although it is a fact that prior to April 14, 1944, namely on March 23, 1944, the taxes assessed, including interest, were nearly all paid.

It was urged by counsel that the payments claimed by appellant to be credited against interest were in fact applied to the taxes as from the due date thereof.

Counsel concluded that the figures showing payments amounting to $1,057,520.89, made on March 23, 1944, on account of taxes, were for taxes due on April 30, 1941, April 30, 1942, and on the instalment dates in 1942 and 1943 in respect of the 1942 taxes and that the interest was not paid in full at that time.

By section 33 the appellant was required, without notice or demand, to file a return of its total income during the preceding year as follows:

on April 30, 1941, for the year 1940

on April 30, 1942, for the year 1941

on June 30, 1943, for the year 1942.

Subsection 1 of section 54 provides that after examination of the return the Minister shall send a notice of assessment to the taxpayer verifying or altering the amount of the tax as estimated by the latter.

Subsection 2 stipulates that any additional tax found due over the estimated amount shall be paid within one month from the date of the mailing of the notice of assessment.

Subsection 3 says that all taxes found due and unpaid shall bear interest at the rate of 5 per cent per annum from the date prescribed for the filing of the return to the date of payment.

Dealing with the penalty for delay in payment of the tax, subsection enacts (*inter alia*) that, if the taxpayer fails to pay the additional tax aforesaid within one month from the date of mailing of the notice of assessment, he shall pay, in addition to the interest of 5 per cent provided for by subsection 3, interest at 3 per cent per annum from the expiry of the period of one month from the date of the mailing of the notice of assessment to the date of payment, provided however that, notwithstanding the date of mailing of any notice of assessment, the additional rate of interest shall not be applied until after the expiry of four months from the date when the return was to be filed.

The appellant filed returns at the proper times and paid what it estimated to be the full amount exigible for income tax and excess profits tax.

The Minister, after examination of the returns, sent notices of assessment in compliance with section 55 and, as thereby authorized, issued re-assessments. Section 55 has an extremely broad sense and the taxpayer is at the Minister's mercy.

The final assessments in each year included interest which was calculated from the dates fixed by the Act for the filing of the returns.

It is trite law that the intention of the legislators to impose a charge upon a subject must be expressed in clear and unambiguous terms: *Micklethwait and Commissioner of Inland Revenue* (1); *Partington* v. *Attorney-General* (2); *Cox and Rabbits* (3); *The Oriental Bank Corporation* v. *Wright* (4); *Tennant* v. *Smith* (5); *McLaren and Minister of National Revenue* (6); *Craies,* Treatise on Statute Law, 4th ed., 107; *Beal,* Cardinal Rules of legal interpretation, 3rd ed., 491; *Maxwell,* Interpretation of statutes, 9th ed., 336.

The principle was briefly and clearly summed up by Lord Cairns *In re Partington* v. *Attorney-General* (*ubi supra*):

> . . . 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

(1) (1855) 11 Ex. C.R. 452, 456.
(2) (1869) L.R. 4 E. & I. App., 100, 122
(3) (1878) 3 App. Cas. 473.
(4) (1880) 5 A.C. 842, 856.
(5) (1892) App. Cas. 150, 154.
(6) (1934) Ex. C.R. 13.

1951

FRASER COMPANIES LTD. v. MINISTER OF NATIONAL REVENUE

Angers J.

be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

The decision in the above case was approved *In re Attorney-General* v. *Earl of Selborne* (1).

It was submitted on behalf of respondent that in the present case the statute says that interest shall run from the date fixed for the filing of the return and not from the date of the assessment. In the case of excess profits the statute has not provided that interest shall run from the date when the standard profits are fixed nor from the date on which the notice of assessment is issued. The judgment of Maclean, J., *In re Peter Birtwistle Trust* v. *Minister of National Revenue* (2), with regard to interest, may be referred to with benefit. At page 101 the learned Judge said:

> A question arises as to whether the appellant is liable for interest upon the tax, prior to the assessment. It appears that annual returns of income were made by the Canadian Trustee on behalf of the "Peter Birtwistle Trust", beginning with the year 1919. The first assessment seems to have been made in 1936, for the years 1919 to 1934 inclusive, and that apparently was the consequence of an application made in the Supreme Court of Ontario by the Colne Trustee, but that application, and the decision of Rose C.J. thereon, (1935) 4 D.L.R. 137, has nothing to do with the issue here, and no purpose would be served by any discussion of it. Sections 48, 49 and 54 of the Act provide for the imposition of interest, if the tax is not wholly paid at maturity. S. 55 provides for the continuation of liability for any tax where no assessment has been made.

The Peter Birtwistle Trust appealed to the Supreme Court; the appeal was allowed and the assessments were set aside. (Kerwin, J. dissenting). The judgment of Mr. Justice Kerwin was upheld by the Privy Council on an appeal *sub nom. Minister of National Revenue and Trusts and Guarantee Company, Ltd.* (3).

Counsel for respondent claimed that interest has been charged only on balances found to be due after giving credit for all allowances made by the Department. The claim seems to be well-founded.

(1) (1902) 1 K.B. 388, 396.
(2) (1938) Ex. C.R. 95; (1939) S.C.R. 125.
(3) (1940) A.C. 138.

It was admitted by counsel that section 48 (as amended by section 15 of Statute 1 Edward 8, chapter 38) is the governing section in respect of the income tax for the year 1940; it provides that "every person liable to pay any tax under this Act (except any tax payable under section eighty-eight hereof) shall estimate the amount of tax payable by him and shall send with the return of the income upon which such tax is payable not less than one-third of the amount of such tax and may pay the balance within four months thereafter together with interest at the rate of five per centum per annum upon such balance from the last day prescribed for making such return to the time payment is made."

Section 49 added in the same statute stipulates:

> 49. If any person liable to pay any tax under this Act (except any tax payable under section eighty-eight hereof) pays less than one-third of the tax as estimated by him, or should he fail to make any payment at the time when the filing of his return is due, or fail to pay the balance of the tax as estimated by him within four months therefrom, he shall pay, in addition to the interest of five per centum per annum provided for by the last preceding section, additional interest at the rate of three per centum per annum upon the deficiency from the date of default to the date of payment.

Section 48 was again amended by section 26 of Statute 4-5 George 6, chapter 18, by adding subsections (2), (3), (4) and (5); subsection (3), the only one material and relevant herein, enacts:

> (3) Any corporation may pay the tax in respect of any fiscal period by instalments without interest as provided for by subsection one of this section and section forty-nine as follows:
>
> (i) during each of the last four months of such fiscal period an amount equal to one-twelfth of the tax as estimated by the corporation to have been payable in respect of the fiscal period last preceding the said fiscal period first mentioned in this subsection, and,
>
> (ii) during each of the first eight months of the fiscal period next succeeding the said fiscal period first mentioned in this subsection an amount equal to one-eighth of the tax estimated by the corporation to be payable in respect of the said fiscal period first mentioned as aforesaid after deducting from the tax so estimated the sum of the instalments paid as provided for in subparagraph (i) of this subsection.

Section 48, amended as aforesaid, was applicable to the taxation year 1941. It was submitted on behalf of respondent that, in respect of the 1941 taxation period, the appellant was permitted to pay one-twelfth of its income tax

1951

FRASER COMPANIES LTD. v. MINISTER OF NATIONAL REVENUE

Angers J.

as estimated by it during each of the months of September, October, November and December and the first eight months of 1942. Counsel added that the effect of section 48 was that the appellant could pay its tax for the year 1941 by instalments partly in advance of the usual time for payment, namely April 30, 1942, and partly by instalments payable in the first eight months of 1942 and that, if the full tax as might be finally assessed against the appellant had been paid by the instalments in the period ending on September 30, no interest would be chargeable. It was urged that, if the taxpayer underestimated the amount of its tax, it would be liable for interest on the deficiency under section 54. Subsection 3 of section 54 enacts:

> Unless otherwise provided, all taxes found due and unpaid shall bear interest at the rate of five per centum per annum from the date prescribed for the filing of the return to the date of payment.

The record has never been completed in spite of numerous requests to counsel by the registrar. I feel that I have allowed counsel a reasonably long delay to produce the missing elements of evidence and that I should now dispose of the case as it stands.

After a careful perusal of the evidence and of the exhaustive argument of counsel and an attentive study of the law, which, I may say, is fairly intricate and lacks clarity and precision, I have reached the conclusion, with some hesitation, that the appellant was only assessed for interest provided for by the law. In view of the want of clearness and accuracy of the law and of the numerous assessments and re-assessments made, indicating obviously that the Minister or one of his underlings were not absolutely conscious of their position, I do not think that I should allow to the respondent his costs against the appellant.

There will accordingly be judgment dismissing the appeal without costs.

Judgment accordingly.

ONTARIO ADMIRALTY DISTRICT

1951
May 25
June 8

BETWEEN:

THE GREAT LAKES PAPER COMPANY LIMITED, ... PLAINTIFF;

AND

PATERSON STEAMSHIPS LTD., . DEFENDANT.

Shipping—Goods on board ship damaged before bill of lading issued—Bill of lading contemplated before loading and before damage—Carrier entitled to have rights decided as though bill of lading had issued.

Held: That since the loading of certain cargo on defendant's ship contemplated the issue of a bill of lading with respect to the same the defendant's rights in an action for damage to a certain part of the cargo loaded before the bill of lading was issued must fall to be determined as if a bill of lading had been issued and the provisions of the Water Carriage of Goods Act, 1936, are applicable.

ARGUMENT on point of law whether defendant may rely on provisions of the Water Carriage of Goods Act.

The argument was heard before the Honourable Mr. Justice Barlow, District Judge in Admiralty for the Ontario Admiralty District, at Toronto.

Peter Wright and *F. Gerity* for plaintiff.

Jean Brisset for defendant.

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

BARLOW D.J.A. now (June 8, 1951) delivered the following judgment:

An application by the defendant to determine a question of law raised by the pleadings, namely: Is the Water Carriage of Goods Act, 1936, applicable to the 189 rolls of news print damage to which forms the basis of this action?

For the purpose of this application the parties agree that the following facts shall be admitted:

1. A contract, in the nature of a charterparty, was made and entered into by the parties, Paterson Steamships Limited and the Great Lakes Paper Company Limited on the 24th day of February, 1949, a copy of which is annexed hereto as Schedule "A", and

1951

GREAT LAKES PAPER CO. LIMITED v. PATERSON STEAMSHIPS LIMITED

Barlow D.J.A.

2. Pursuant to such contract, bills of lading were given in the usual course of business in the form annexed hereto as Schedule "B".

3. Paterson Steamships Limited were, at all relevant times, owners of the steamship *Prescodoc.*

4. Pursuant to the contract, as aforesaid, the steamship *Prescodoc,* whereof Frank Butters was Master, arrived alongside the wharf of Great Lakes Paper Company Limited at Fort William and commenced the loading of newsprint at about 5 o'clock p.m. on the 14th day of May, 1949.

5. At about 1 o'clock p.m. on the 15th day of May, 1949 the loading of newsprint, as aforesaid, was checked, it being found that water was entering into the No. 1 hold by means of a small hole situated in the shell plating.

6. Thereupon a portion of the newsprint already loaded was discharged again it being found that it had been damaged by water.

7. No bills of lading were given or received for that portion of the newsprint which was discharged in consequence of water damage, consisting of 189 rolls of a total weight of 328,160 lbs. standard white newsprint.

8. The shell plating leak was in due course repaired; a full cargo was loaded; bills of lading for such cargo similar to Schedule "B" were issued, and the steamship proceeded on its voyage.

The liability of the defendant in this action, and the evidence which the parties were required to adduce, depends very largely upon whether or not the Water Carriage of Goods Act, 1936, is applicable. Hence the reason for bringing this application at the present time.

Counsel for the defendant contends that the matter must be dealt with as if a bill of lading had been issued, or in the alternative that the charterparty made between the parties and dated the 24th February, 1949, by paragraph 12 thereof, which is as follows:

12. The Bill of Lading shall have effect subject to the rules scheduled to and as applied by the Water Carriage of Goods Act, 1936.

presumes that a bill of lading will be issued, and makes the terms of a bill of lading applicable or in any event makes the Water Carriage of Goods Act 1936, applicable.

The condition in the bill of lading which the defendant relies upon, is as follows:

This bill of lading shall have effect subject to the provisions of the Water Carriage of Goods Act, 1936 of the Dominion of Canada including the schedule thereto . . .

It is to be noted from the facts admitted, that the plaintiff is both the charterer and the shipper. It was the usual practice for the defendant to issue a bill of lading after

loading of a cargo had been completed. A bill of lading was not issued with respect to the 189 rolls of newsprint, because before the loading had been completed it was discovered that water had entered No. 1 hold of the ship and had caused damage to the said rolls of newsprint, which were immediately unloaded. This having been done, the ship then proceeded to load a cargo of newsprint with respect to which a bill of lading was issued, but which did not include the 189 rolls of newsprint in question in this action. Undoubtedly if the damage had not been discovered before the loading was completed, a bill of lading would have been issued with respect to these rolls of newsprint. Furthermore, there is no time limit within which a bill of lading may be issued, and this might even yet be done.

A bill of lading as between the shipper (the plaintiff) and the carrier (the defendant) is merely a receipt.

Upon these facts, and under the circumstances disclosed, the defendant should not be deprived of any advantage that may accrue to it by virtue of the issue of a bill of lading. See Scrutton on Bills of Lading, 15th Ed. p. 10 as follows:

> A bill of lading is a receipt for goods shipped on board a ship, signed by the person who contracts to carry them, or his agent, and stating the terms on which the goods were delivered to and received by the ship. It is not the contract, for that has been made before the bill of lading was signed and delivered, but it is excellent evidence of the terms of the contract.
>
> The terms of the contract may also be gathered from the charter, where there is one, provided that (1) its terms either wholly or in part are expressly incorporated in the bill of lading, or (2) the charterer is also the shipper, in which case the bill of lading as between charterer and shipowner is usually merely a receipt.

And also p. 52, as follows:—

> Where the charterer is himself the shipper, and receives as such shipper a bill of lading in terms differing from the charter, the proper construction of the two documents taken together is that, *prima facie* and in the absence of any intention to the contrary, as between the shipowner and the charterer, the bill of lading, although inconsistent with certain parts of the charter, is to be taken only as an acknowledgment of the receipt of the goods.

There is no third party interest in this action, and the matter must be determined as between the charterer and shipper and the carrier.

1951

GREAT LAKES PAPER CO. LIMITED v. PATERSON STEAMSHIPS LIMITED

Barlow D.J.A.

In *Luckenbach Steamship Company, Inc.* v. *American Mills Company* (1), it was held that where a cargo is received for shipment by a carrier under a verbal contract which contemplates the issuance of a bill of lading, and the cargo is destroyed by fire on the wharf before issuance of a bill of lading, the carrier may avail itself of a bill of lading exemption against loss by fire since there was an implied understanding that the carrier would in due course issue its customary bill of lading.

This decision is directly applicable to the case at bar, by reason of the fact that paragraph 12 of the charterparty quoted above clearly contemplates the issue of a bill of lading.

The above decision was followed and affirmed in *Eastern Outfitting Company* v. *Pacific Mail Steamship Company* (2). In this latter case no bill of lading was actually issued before the goods were damaged, but it was held that the carrier was entitled to avail himself of the defences contained in the usual form of bill of lading. This case is directly in point. I therefore find that since the loading of the 189 rolls of newsprint on the defendant's ship contemplated the issue of a bill of lading with respect to the same, the defendant's rights must fall to be determined as if a bill of lading had been issued. It therefore follows that the provisions of the Water Carriage of Goods Act, 1936, are applicable.

Apart from the above finding, it is clear to me from the terms of section 12 of the charterparty quoted above, that the agreement between the parties gave to the defendants the protection afforded them by the Water Carriage of Goods Act, 1936.

For further reference see *Hugh Mack and Co., Ltd.* v. *Burns and Laird Lines, Ltd.* (3); *Harland and Wolff, Ltd.* v. *Burns and Laird Lines, Ltd.* (4) and Temperley and Rowlatt Carriage of Goods by Sea Act 1924, 3rd Ed. p. 10.

I, therefore, find that the Water Carriage of Goods Act 1936 is applicable to the 189 rolls of newsprint, the damage of which forms the basis of this action.

Costs of the application will be in the cause.

Judgment accordingly.

(1) (1928) A.M.C. 558.
(2) (1928) A.M.C. 974.
(3) (1944) 77 Ll. L. Rep. 337.
(4) (1931) 40 Ll. L. Rep. 286.

1951

Jan. 8

June 25

BETWEEN:

GEORGE EDWIN BEAMENT.....APPELLANT;

AND

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

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 7A(1), 9(1)—Words "resident" and "ordinarily resident" in s. 7A(1) of the Act have no technical meaning—Whether a person was resident or ordinarily resident in Canada is a question of fact—Where there is no physical presence of the taxpayer or any abode taxpayer is not resident or ordinarily resident in the jurisdiction—Appeal dismissed.

Prior to 1939 the appellant resided and practised law in Ottawa. In September 1939 he enlisted in the Canadian Army and went overseas in 1940 where he held a number of military appointments. While overseas he married and established a home. He returned to Canada with his family on May 8, 1946. During the period 1940-1945, the appellant remained a member of an Ottawa legal firm, which he gave as being his business address, maintained a bank account in Ottawa and paid income tax on his Canadian income. In his income tax return for the taxation year 1946 the appellant sought to deduct from tax a sum of $657 on the ground that at no time in the said year, prior to May 8, he was resident or ordinarily resident in Canada. The Minister disallowed the deduction and the appellant appealed to the Income Tax Appeal Board which dismissed his appeal.

Held: That the words "resident" and "ordinarily resident" in s. 7A(1) of the Income War Tax Act have no technical meaning. The question whether in any year a person was "resident" or "ordinarily resident" in Canada within the meaning of said section is a question of fact. *Thomson* v. *Minister of National Revenue* (1945) Ex. C.R. 17 followed.

2. That where there is no physical presence of the taxpayer nor any abode or place of habitation it follows that the taxpayer is not "resident" or "ordinarily resident" in the jurisdiction. However, if the appellant was not physically present in Canada in 1946 prior to May 8, he had an abode or place of habitation in Canada.

3. That the appellant, during the period in which he was absent from Canada, continued to be "ordinarily resident" therein.

APPEAL from the decision of the Income Tax Appeal Board dismissing the appellant's appeal against his 1946 assessment.

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

M. H. Fyfe for appellant.

R. S. W. Fordham K.C. and *P. H. McCann* for respondent.

1951

BEAMENT v. MINISTER OF NATIONAL REVENUE

Angers J.

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

ANGERS J. now (June 25, 1951) delivered the following judgment:

This is an appeal from the judgment of the Income Tax Appeal Board rendered on December 21, 1949, dismissing the appeal of George Edwin Beament to the said Board.

In the statement of reasons to be advanced in support of the appeal the appellant alleges substantially:

the assessment appealed from has disallowed the appellant's claim to a deduction from tax in the sum of $657, under the provisions of section 7A(1) of the Income War Tax Act, although on the facts as above set forth he is entitled to the benefits of that section; in this connection the following reasons are advanced:

(*a*) *Taxability and consideration of section 9(1) of the Act.* The appellant was clearly liable to personal income tax with respect to all his taxable income for the year 1946 under the provisions of section 9(1). On the facts above set forth his liability to tax falls with the provisions of subsections (*a*), (*b*), (*d*) and (*h*) of that section. This liability to tax under section 9(1) is not contested by the appellant, who recognized and accepted it, as an examination of his T. 1—General (1946) discloses. In considering section 9(1), it is to be noted that residence or being ordinarily resident in Canada, although being a condition which is set out in subsection 9(1) (*a*), is only one of a number of conditions upon which an individual becomes liable to income tax. It is clear from an examination of this section that there are a number of classes of persons who are clearly neither resident nor ordinarily resident in Canada, but who are liable to personal income tax under subsections (*d*), (*e*), (*f*) and (*h*) of section 9. It should be noted that the scheme of this section 9(1) is not to base liability to personal income tax on the condition of being resident or ordinarily resident in Canada, but then to define a number of situations such as are covered by subsections (*b*) to (*h*) and to declare that in such situations the individual shall be deemed for all purposes of the Act to be "resident or

ordinarily resident in Canada." On the contrary, this section defines eight main conditions upon which the right to impose income tax on the personal income of the individual is based, but none of these conditions requires that the individual, in order to be liable to personal income tax, shall be "resident or ordinarily resident in Canada" during the whole of the taxation year.

(*b*) *Residence of the appellant.*

The facts relevant to the residence of the appellant during the years 1939 to 1946 inclusive are fully hereinabove set out. "Being resident or ordinarily resident" in a particular jurisdiction is a question of fact and not one of law. These terms are not defined anywhere in the Act. With respect to residence, unlike the question of domicile, the intention of the individual is in no sense an ingredient in determining the question. Personal presence in a jurisdiction at some time during the year either by the husband or by the wife and family is essential to establish residence within it. The term "ordinarily resident" is broadly equivalent to habitual residence in the sense of being in the jurisdiction or coming to the jurisdiction year after year. It is submitted, on a consideration of the facts hereinabove set forth, that some time after February 22, 1941, and well before January 1, 1946, the appellant ceased to be resident or ordinarily resident in Canada. Accordingly he was neither "resident nor ordinarily resident in Canada" on January 1, 1946, and he did not become resident or ordinarily resident in Canada during the year 1946 until he and his family arrived in Canada on May 8, 1946.

(*c*) *Application of section 7A(1) of the Act.*

This section provides for a deduction from the tax in favour of a taxpayer who qualifies under subsection (*a*) or (*b*) taken in conjunction with the ensuing phrase in the body of the section defining the conditions. The appellant's claim for a deduction in this case rests on subsection (*a*). The amount of the

1951

BEAMENT v. MINISTER OF NATIONAL REVENUE

Angers J.

deduction from tax is determined in accordance with a formula based upon the proportions set out in the body of the section.

In order to deprive the appellant of the benefit of this section, it will be necessary to hold as a matter of interpretation that the phrase "during the taxation year" in subsection (*a*) does not apply to the first antecedent phrase "not being previously resident." This would involve interpreting this subsection as though it were to read "not being previously resident (at any time in Canada) or ordinarily resident in Canada during a taxation year . . .". It is submitted that such an interpretation would involve reading into this subsection words which do not appear in it and would also involve offending well established principles in the interpretation of statutes. The phrase "in Canada" where it is first used in this subsection must apply to the first antecedent as well as to the immediate antecedent. The phrase "in Canada during a taxation year" is one phrase which appears a number of times in the same form throughout the section. If part of it must apply to the first antecedent, the whole of it must apply likewise. Similarly when the phrase "during the said taxation year" appears in the subsection (*a*) it must apply to its first antecedent as well as to its immediate antecedent in order that its first antecedent can bear any meaning.

It is submitted that the correct interpretation of subsection (*a*) is:

> not being previously resident in Canada during a taxation year or not being previously resident in Canada during a taxation year becomes resident in Canada during the said taxation year or becomes ordinarily resident in Canada during the said taxation year.

Applying this interpretation to the taxation year in question, namely 1946, the phrase "the year 1946" needs merely be inserted in place of the expressions "a taxation year" and "the said taxation year" as they appear above, so that it then reads:

> not being previously resident in Canada during the year 1946 or not being previously ordinarily

> resident in Canada during the year 1946 or becomes ordinarily resident in Canada during the year 1946.

The succeeding phrase of the body of the section lends strong support to the contention hereinabove set out. It reads:

> so that he neither resided nor was ordinarily resident in Canada during the whole of the taxation year . . .

It is clear that the corresponding phrase "during the whole of the taxation year" must apply to its first antecedent "resided" as well as to its immediate antecedent "ordinarily resident." This same principle of interpretation must be applied throughout the section in order that all expressions used may bear a reasonable meaning and that a result offending common sense may be avoided.

On the basis of the interpretation of section 7A(1) hereinabove set out it is submitted that this section clearly applies to the appellant in accordance with the following tests:

1. he was not resident in Canada in the year 1946 previous to May 8;

2. he was not ordinarily resident in Canada in the year 1946 previous to May 8;

3. he neither resided in Canada during the whole of the year 1946 nor was he ordinarily resident in Canada during the same period.

It is submitted that the appellant is entitled to deduct from the tax otherwise payable by him under section 9(1) of the Act a portion of such tax that bears the same relation to the whole tax as the number of days in the period January 1 to May 8, 1946, bears to 365. It is understood that the correctness of the calculation based on this formula and set out in the statement appended to the T.1—General (1946) return of the appellant is not in dispute.

(*d*) *Interpretation of statutes generally.*

It has been suggested on behalf of respondent that the application of section 7A(1) of the Act to the

1951

BEAMENT v. MINISTER OF NATIONAL REVENUE

Angers J.

facts of this case, in accordance with the reasons outlined above, produces a result which was not intended by the draughtsmen of this section. This may or may not be so, but the irrelevance of this suggestion needs not be laboured. It is well established law that the interpretation of a statutory enactment must be found within the words which the Parliament has used in the enactment and that the unexpressed intention, even of the legislators themselves, is entirely irrelevant to the question of interpretation.

In his reply to the notice of appeal dated September 24, 1949, the Minister of National Revenue says in substance:

that at no time did the appellant cease to be ordinarily resident in Canada;

that the status of appellant, while out of Canada, remained that of a member of the Armed Forces of Canada temporarily overseas;

that the matters alleged by appellant do not afford grounds under the provisions of the Income War Tax Act for the relief claimed;

that the appellant's income for the taxation year 1946 has been properly assessed under the said Act.

In another reply to the notice of appeal dated July 21, 1950, the Minister of National Revenue admits all the allegations therein contained, save the allegation concerning the residence of the appellant, and says that the latter was always at liberty to return, and did in fact return, to his father's residence at Ottawa, in which the appellant still had his personal effects and belongings.

The respondent, in reply to the whole of the notice of appeal, adds:

that the facts and circumstances set forth by the appellant do not bring him within the provisions of section 7A (1);

that at no material time did the appellant cease to be ordinarily resident in Canada;

that the status of the appellant, while he was out of Canada, remained that of a member of the Armed Forces of Canada temporarily overseas;

that the facts set out by appellant rendered him resident or ordinarily resident in Canada in the taxation year 1946.

The question at issue in this appeal is whether the appellant in respect of the year 1946 is entitled to take advantage of the relief offered by section 7A of the Act, which poses the question of whether or not he is a person who, not having been previously resident or ordinarily resident in Canada during 1946, became resident or ordinarily resident during that year.

The evidence discloses that, prior to his enlistment in the Canadian Active Service Force in September 1939, the appellant was a partner in the firm of Beament & Beament carrying on a law practice in the City of Ottawa and that during the period of his war service he continued as a non-active partner in the said firm and on his discharge in 1946 resumed his activities therein. The evidence further reveals that, prior to his enlistment, the appellant was unmarried and lived with his parents in Ottawa.

In August 1940 Beament sailed with his regiment for England. On February 22, 1941, he was married in England to a British subject domiciled in the United Kingdom. Immediately after his marriage he established a matrimonial home in the United Kingdom, which he continued to maintain until his return to Canada in May 1946. While in the United Kingdom the appellant and his family resided in rented premises at such places as were convenient, having regard to appellant's military duties and the conditions imposed by war.

The evidence shows that in September 1941 he was ordered to return to Canada to take up an appointment with the 5th Canadian Armoured Division at Camp Borden, in the Province of Ontario. He stayed in Canada for a period of approximately two months and returned to England with the 1st Canadian Armoured Brigade. During his stay in Canada his wife remained in England.

It appears that from November 1941 until July 1944 the appellant lived in England, holding divers appointments in the Canadian Army; in July 1944 he proceeded to France as a member there. Later he returned to England and resumed living with his wife and children.

The proof establishes that in June 1945 he was appointed to command the Canadian Army University in the United

1951

BEAMENT v. MINISTER OF NATIONAL REVENUE

Angers J.

Kingdom, that this was a military appointment, notwithstanding that the duties were of a civilian character, that the University completed its tasks at the end of April 1946 and that consequently the appellant abandoned his command at that time.

In May 1946 Beament brought his family to Canada, arriving in Halifax, N.S., on the 8th.

It appears from the evidence that during the whole period of his overseas service the appellant was attached to the Canadian Army and that he did not receive his discharge until after his return to Canada in May 1946.

The proof reveals that during the period 1940-1946 the appellant maintained a bank account and a safety deposit box in a branch of one of the Chartered Banks in Ottawa and that they were operated for him in connection with his Canadian income under a power of attorney in favour of his father. It further reveals that, while overseas, Beament kept a personal account in the London, England, Branch of the Bank of Montreal.

In his income tax return for the taxation year 1946 the appellant claims an exemption under the provisions of section 7A(1) of the Income War Tax Act, the material portion whereof reads thus:

> 7A (1). A taxpayer who
>
> (*a*) not being previously resident or ordinarily resident in Canada during a taxation year becomes resident or ordinarily resident in Canada during the said taxation year, or
>
> (*b*) being resident or ordinarily resident in Canada during a taxation year, ceases to be resident or ordinarily resident in Canada during the said taxation year
>
> so that he neither resided nor was ordinarily resident in Canada during the whole of the taxation year, may deduct from the tax otherwise payable by him under subsection one of section nine of this Act, a portion of the said tax that bears the same relation to the whole tax as the period in the taxation year during which he neither resided nor was ordinarily resident in Canada bears to the whole taxation year.

The Minister refused to allow the deduction claimed by appellant on the ground that he was ordinarily resident in Canada throughout the taxation year (1946) and was not entitled to the said deduction. The appellant thereupon appealed the assessment for the year 1946 on the ground that at no time in the said year, prior to May 8, he was resident or ordinarily resident in Canada and that

consequently he is entitled to the deduction provided by section 7A (1). The issue herein is therefore wholly concerned with this question.

During the hearing of the appeal discussion arose concerning the meaning and scope of the word "previously" in section 7A (1). Two members of the Income Tax Appeal Board adopted the opinion that the word "previously" is limited by the words "during a taxation year" when first used in this subsection and that this interpretation is made certain by a reading of the whole section. As stated by the said members, there being no ambiguity in the words used, the question to be decided in the present instance is whether the appellant was or was not "resident" or "ordinarily resident" in Canada from the beginning of the year 1946 to the date of his return to Canada in May.

The Minister, in his answer to the appeal, confines his submission to the sole question as to whether or not during the said period the appellant was "ordinarily resident" in Canada. It is hardly necessary to note that the words "resident" and "ordinarily resident" in section 7A (1) have no technical meaning and that the question whether in any year a person was "resident" or "ordinarily resident" in Canada within the meaning of said section is a question of fact: *Thomson and Minister of National Revenue* (1). The headnote is satisfactorily comprehensive and I deem it apposite to quote a part thereof (p. 18):

Held: That a person must reside somewhere.

2. That constant personal presence is not essential to residence there and that a person may continue to be resident in a place although physically absent from it.

3. . . .

4. That the question of whether a person is ordinarily resident in one country or in another cannot be determined solely by the number of days that he spends in each; he may be ordinarily resident in both if his stay in each is substantial and habitual and in the normal and ordinary course of his routine of life. *Levene* v. *The Commissioners of Inland Revenue,* (1928) 13 T.C. 486 followed.

5. That the terms "residing" and "ordinarily resident" in section 9(*a*) of the Income War Tax Act have no technical or special meaning and that the question whether in any year a person was "residing or ordinarily resident in Canada" within the meaning of the section is a question of fact. *Lysaght* v. *The Commissioners of Inland Revenue,* (1928) 13 T.C. 511 followed.

(1) (1945) Ex. C.R. 17.

1951

BEAMENT v. MINISTER OF NATIONAL REVENUE

Angers J.

This judgment was affirmed by the Supreme Court, Taschereau, J., dissenting (1). Some remarks by Rand, J., seem to me relevant (p. 224):

> The gradation of degrees of time, object, intention, continuity and other relevant circumstances, shows, I think, that in common parlance "residing" is not a term of invariable elements, all of which must be satisfied in each instance. It is quite impossible to give it a precise and inclusive definition. It is highly flexible, and its many shades of meaning vary not only in the contexts of different matters, but also in different aspects of the same matter. . . .
>
> The expression "ordinarily resident" carries a restricted signification, and although the first impression seems to be that of preponderance in time, the decisions on the English Act reject that view. It is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. . . .

Contrary to certain judicial pronouncements in the United Kingdom that there is little, if any, difference in substance in the meaning of "resident" or "ordinarily resident", I am of the opinion that the wording of subsection (1) of section 7A makes it clear that Parliament intended that there was a distinction between a taxpayer who was previously a resident and one who was previously an ordinarily resident in Canada.

Counsel for appellant relied on certain decisions rendered in the Courts of the United Kingdom dealing with the meaning of the words "resident" and "ordinarily resident" as used in the Income Tax Act of that country: *Ford* v. *Hart* (2); *Young* v. *Inland Revenue Commissioners* (3); *Rogers* v. *Inland Revenue Commissioners* (4); *Cooper* v. *Cadwalader* (5); *Loewenstein* v. *De Salis* (6); *Reid* v. *Inland Revenue Commissioners* (7); *Levene* v. *Inland Revenue Commissioners* (8); *Inland Revenue Commissioners* v. *Lysaght* (9); *Re Halliday* (10); *Lord Inchiquin* v. *Inland Revenue Commissioners* (11); *Russell* v. *Minister of National Revenue* (12).

(1) (1946) S.C.R. 209.
(2) (1873) L.R. 9 C.P. 273.
(3) (1875) 1 T.C. 57.
(4) (1879) 1 T.C. 225.
(5) (1879) 5 T.C. 101.
(6) (1926) 10 T.C. 424.
(7) (1926) 10 T.C. 673.
(8) (1928) L.T.R. 97.
(9) (1928) 13 T.C. 511.
(10) (1945) O.L.R. 233.
(11) (1948) T.C. 279.
(12) (1949) Ex. C.R. 91.

In addition to the cases hereinabove mentioned counsel for respondent relied on the judgment in *Cohen* v. *Commissioner for Inland Revenue* (1). The headnote, sufficiently exact, reads thus:

> A taxpayer may be "ordinarily resident" within the Union within the meaning of section 30(1) (*a*) of Act 31 of 1941 and therefore not entitled to the exemption from supertax in respect of dividends distributed by a public company and received by him in a tax year notwithstanding the fact that during the whole of that tax year he was absent from the Union.

The chief object of counsel for appellant in relying upon the judgments cited, with the exception of *Ford V. Hart* and *Re Halliday* (ubi supra), was to establish that in every one the taxpayer had spent time in the jurisdiction in the taxation year under review or that he had maintained an abode therein, irrespective of whether he was there himself or not. Counsel contended that in the present case the appellant had not been physically present in Canada in 1946, prior to May 8, and had not had, during the same period, an abode in Canada.

In the *Cohen* case the material facts submitted to the Appellate Division of the Supreme Court of South Africa include a statement that the taxpayer leased a flat in Johannesburg, South Africa, for a term of five years and that on his departure the flat was sublet fully furnished. As stated by two members of the Income Tax Appeal Board, the taxpayer still held a contractual relationship with an abode in South Africa and continued to own the furnishings contained therein.

The same two members of the Income Tax Appeal Board concluded that in the present instance the appellant retained an interest in an already established abode in Canada. They added, however, that they do not think that agreement or disagreement with appellant's argument in this respect would settle the issue involved herein and they said that they adopted the statement of the President in his decision in the case of *Thomson* v. *The Minister of National Revenue* (*supra*), which is thus worded (p. 24):

> The cases, as it will be seen, really carry one no further than the dictionary, and, in the main, are but useful illustrations of the circumstances under which a person may be considered as residing or ordinarily resident in a place or country.

(1) (1945) 13 South African Tax Cases 174.

1951

BEAMENT v. MINISTER OF NATIONAL REVENUE

Angers J.

Counsel for appellant submitted that the decision in *Rogers* v. *Commissioners of Inland Revenue* (*supra*) is authority for the statement that lack of physical presence during the taxation period is not conclusive in favour of the taxpayer, who claims because of it that he is not resident or ordinarily resident within the jurisdiction. As mentioned by two members of the Income Tax Appeal Board, the appellant herein maintained an abode within the jurisdiction.

It was urged on behalf of appellant that, where there is no physical presence of the taxpayer nor any abode, it follows that the taxpayer is not "resident" or "ordinarily resident" in the jurisdiction. I may say with all due respect that, contrary to the opinion expressed by the majority of the Income Tax Appeal Board, I believe that, if there is no physical presence of the taxpayer nor any abode or place of habitation, one must conclude that in such a case a person upon whom the Minister wishes to impose a tax is not "resident" or "ordinarily resident" in the jurisdiction. Be that as it may, if the appellant was not physically present in Canada in 1946 up to May 8, he had an abode or place of habitation in Canada.

Two members of the Income Tax Appeal Board drew the conclusion that the decision as to whether the appellant was, previous to May 8, "ordinarily resident" in Canada in the year 1946 must be reached by a proper appreciation and correlation of all the facts and circumstances which would weigh in determining the degree, quality or nature of the relationship of appellant in Canada. Briefly, this includes consideration of his residential status before, during and after his military career.

It was argued on behalf of appellant that during the period in which he was away from Canada he had no fixed abode or place of habitation therein, that his absence exceeded five years, that he married while overseas and established a matrimonial home in the United Kingdom and that during that period he returned to Canada only once in 1941, in the course of his military duties. The two members of the Income Tax Appeal Board thought that the weight of these elements is weakened by a consideration of other factors, namely that the appellant was unmarried, that he lived in his parents' home, that he was engaged

in the practice of his profession in Ottawa; that he enlisted for overseas service in the Canadian Army and that at the time of his enlistment he was "ordinarily resident" in Canada. As pointed out by the two members of the Income Tax Appeal Board, it can be said that until his departure for overseas the appellant's customary mode of life was that of a lawyer carrying on his profession and residing in Canada.

The customary mode of life of appellant was broken into by his decision in 1939 to enlist in the Active Service Force of Canada. He would not know how long his military duties would keep him away from his country; this, of course would depend on the duration of the war.

The word "ordinarily" has been contrasted, quite logically I may say, with the word "extraordinarily" in *Inland Revenue Commissioners* v. *Lysaght* (*ubi supra*); observations of Viscount Summer will be found on page 243.

The two members of the Income Tax Appeal Board declared that, in their opinion, the appellant going overseas during the war was in the nature of a special commission of a certain duration and was an extraordinary happening in his life. They added that war is itself an extraordinary happening and that they could not find anything in the evidence to disturb their conviction that the appellant's absence from Canada on military duty was only temporary and was but an interruption of his customary mode of life.

I agree with the two members of the Income Tax Appeal Board that the fact that appellant, during his stay overseas, married and established a matrimonial domicile is natural.

It seems to me significant that the appellant, during the whole period of his service overseas, continued as a non-active partner in the law firm in which he had been practising his profession before leaving Canada and that he resumed his active participation therein on his return to Canada, as soon as military duties were ended.

There is no evidence that, during the period he was overseas, the appellant had made commitments in the

1951

BEAMENT v. MINISTER OF NATIONAL REVENUE

Angers J.

United Kingdom which would indicate a change in the settled order of his life or an intention to live, at the conclusion of his military duties, elsewhere than in Canada.

Counsel for appellant relied on the judgments in *Ford* v. *Hart* and *re Halliday* (*supra*) as supporting the proposition that, since appellant was on military duties, his movements being controlled by the military authorities and he being consequently unable to return to Canada, he must be considered to be resident elsewhere than in Canada. I may say that I share the opinion of the majority of the Income Tax Appeal Board that these decisions are not in point.

I deem it apposite and fair to note that one of the members of the Income Tax Appeal Board, namely Mr. W. S. Fisher, K.C., expressed a dissenting opinion and was inclined to allow the appeal. His reasons for judgment are sound and well set out. He has had a long experience in income tax matters. I must admit that I felt much hesitation before adopting the view of the majority of the Board.

After carefully perusing the evidence and the able and exhaustive arguments of counsel and studying the doctrine and the precedents, I am satisfied that the appellant, during the period in which he was absent from Canada, continued to be "ordinarily resident" therein. I may say that I quite willingly agree with the two members of the Income Tax Appeal Board that the conduct pursued by appellant is creditable to him and that because of the nature of the service which called him out of Canada I would have liked to find in law a proper basis for allowing his claim. Unfortunately this was not to be, and, in the circumstances, the appeal must be dismissed. The respondent will be entitled to his costs against the appellant, if he deems fit to claim them.

Judgment accordingly.

1951

Apr. 9
June 1

BETWEEN:

JAMES GOODFELLOW ROBSON.....APPELLANT;

AND

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

Revenue—Income Tax—Income—Income War Tax Act, R.S.C. 1927 c. 97, s. 3—Purchase of shares in a company having earned profits on hand—Object of purchase of shares to obtain distribution of profits—Difference between purchase price and true value of shares is a dividend—Not necessary for purchaser to resell shares in order to attract income tax—Valuation of shares—Appeal dismissed.

On an appeal from assessment for income tax the Court found that the appellant bought shares at a decided under-value from a company that held earned profits and that the object in so buying was to distribute these profits.

Held: That the difference between the price paid for the shares and their true value is a dividend and subject to income tax.

2. That where a party purchases shares that themselves represent a profit the transaction is complete for tax purposes as soon as the shares reach his hands and it does not matter whether he resells them or not.

APPEAL under the provisions of 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.

Dougald Donahy, 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 (June 1, 1951) delivered the following judgment:

The appellant appeals from a re-assessment by the Minister of his income for 1944. By this assessment the Minister added $290,000 to his income for that year. The transaction on which the Minister based his action was as follows:

Appellant was at all times the majority shareholder and managing director of Timberland Lumber Co. Limited, a sawmill company which held half the shares of the Salmon

1951

ROBSON v. MINISTER OF NATIONAL REVENUE

Sidney Smith D.J.A.

River Logging Company Limited. This company supplied the Timberland Company with its logs. It seems to be undisputed that in 1944 the Salmon River Company was nearly out of the type of timber that the Timberland Company used (but not of other types), so that the latter had to open up a new tract of timber, at an expense of something like $500,000. It had considerable ready money, but lacked $100,000. It then, in July 1944, sold its Salmon River shares to its shareholders for $99,000, this sale being claimed by the appellant to have been due to its pressing need for the money. It may be noted that the shares were bought by the shareholders of the Timberland Company, including the appellant, in practically the same ratio as their holdings in the Timberland Company, the slight variation being apparently due to the impossibility of splitting individual shares.

The respondent claims that these shares were sold at a gross under-value, and that in effect the sale was a mere pretence, the real purpose of the transaction being to allow the Timberland Company to distribute the shares among its shareholders as a substitute for a dividend. At the time of the sale the Timberland Company had an earned surplus of about $700,000; and the respondent claims that the purported sale was merely a shift for distributing part of this surplus in a way that would enable the shareholders to evade income tax. The appellant denies that the shares which were sold for $100 per share were sold at an under-value, and also argues that even if they were, the profit that he made was a capital profit and not income; and further that until he resold the shares, which was not until 1945, no profit was made; so that, at all events, he was not assessable in 1944.

I think it will be convenient to consider the relative law before I analyze the admitted facts and the evidence. On the facts as claimed by the respondent there can be no doubt that the new Income Tax Act sec. 8(1) (*c*) would catch the appellant, but he says that there is nothing similar in the Income War Tax Act which governed in 1944. The respondent in answer invokes sec. 18 of the latter Act and also the more general provisions of section 3.

If the facts are as claimed by the respondent, I have some doubts about the applicability of sec. 18, but I have no doubt that the provisions of sec. 3 would be wide enough to cover the transaction. The Act would have been a dead letter with respect to companies if a company bulging with earned profits, instead of distributing these in cash to its shareholders, could buy with the money, say, a number of motor-cars and distribute them tax free to shareholders; the same would apply to its buying and distributing shares in another company. If that is so, then it cannot be material that the distributing company does not buy the shares expressly for the purpose, but uses shares that it has owned for some time. The same considerations must apply to any variation of the same kind of transaction. If the company cannot give shares away tax free, then what is substantially a gift, such as a pretended sale for a nominal consideration, must be in the same position; and I cannot distinguish between a nominal consideration and an inadequate consideration.

The above conclusion does no violence even to the language of sec. 3 of the Income War Tax Act which includes as income

> profits directly or indirectly received . . . from stocks or from any other investment.

If shareholders, because they are shareholders, are given the chance to buy shares in another company at less than their value, and the selling company then has undistributed profits on hand, then I think sec. 3 is applicable, at least on the assumption that the company is intending to distribute the profits. So I have no serious doubt about the taxability of the transaction if the facts are as the respondent alleged. That must be considered with some care.

The appellant admits that fourteen months after he bought (or purported to buy) the Salmon River shares at $100 he re-sold them to two other companies, viz., Westminster Shook Mills Limited and B.C. Manufacturing Co., at $750 each. As he himself said in the box, this was quite a "spread"; but he claims that $100 was a reasonable price on the facts as known in 1944, and the prospects as they then appeared. He also represents the sale as being necessary for the Timberland Co. because it had to have $100,000 more cash.

1951

ROBSON v. MINISTER OF NATIONAL REVENUE

Sidney Smith D.J.A.

We have here two factors to consider, first, the adequacy of the price, and secondly, the *bona fides* of the sale; though of course the two have a bearing on each other.

One of the appellant's chief explanations of the price was that the sale was made in the middle of a war, and also that he feared a post-war depression such as he said took place in 1921. I do not find this very convincing. It is general knowledge that the war period, at all events part of it, was an extremely prosperous one for both logging and milling companies, and in July, 1944, the end was not so clearly in sight that anyone had begun to worry about it. Other reasons given for the low price were that the Salmon River Company was depleting its timber supply, especially fir, which was particularly necessary for the Timberland Co. The fir situation of course made a close connection of the two companies less important than before, but the value of the shares did not depend on that connection. The witness Wilson, a member of a firm of accountants which at all times (including 1944) seems to have had a close relation to the running of the companies, gave evidence to the effect that owing to the prospective exhaustion of the Salmon River Company's timber, the value of its shares in 1944 was only $113. A more disinterested accountant, named Kent, criticized Wilson's figure, pointing out that it ignored the probability that the Salmon River Company would secure another source of timber.

Then we have the evidence of another independent expert Rodgers, who valued the Salmon River Company's assets in 1945 and considered that the value would have been much the same from 1943 to 1945. He valued the assets at $2,264,200. And the only sizable liability was $400,000 owing on debentures. Even on the balance sheets prepared by the Company's own accountants for 1943 and 1944, in which one can assume the assets would be very conservatively valued, and appreciation in value of fixed assets due to enhanced prices would not be reflected, the assets are shown as worth many times the liabilities. Even if the company had gone into liquidation in July, 1944, the shares would have proved worth a good deal more than $100.

The appellant, apart from testifying vaguely to some improvements in the Salmon River property between July, 1944, and the resale of his shares to the Westminster Co. and the B.C. Manufacturing Co., explained the resale price of $750 per share by saying that the purchasers were "desperate" for timber. How the appellant could testify as to that I do not quite see. He called no one representing the purchaser companies who could properly state their motives. Renwick, an officer of both purchaser companies, was called by the respondent. He was extremely vague on most points, but did say that his companies got good value for their money, and I do not think he said anything helpful to the appellant. The respondent also called Rodgers, who had valued the Salmon River assets for the purchasers, and his evidence indicated they had been willing to pay $750 per share because he reported the shares were actually worth more. Then there was a good deal of evidence on value by a witness Beer, who is an accountant in the Income Tax Department. He valued the shares in 1944 on a book value basis at $395 and on an earning basis at between $390 and $490, though he thought any of these figures inadequate because they took no account of appreciation of fixed assets through the general rise in prices.

In view of the evidence given, I think that $100 per share in 1944 was nothing like an adequate price for the Salmon River shares. It is of some significance that Mr. Wilson's firm, writing to the Income Tax Inspector on 20 June, 1944, disagreed with Wilson's view expressed at the trial, viz., that in 1944 the Salmon River Company's outlook was a poor one; the letter stated that "Salmon River will accumulate funds fairly rapidly from now on."

I turn now to the *bona fides* of the sale transaction, by which I mean the question whether it was an ordinary business transaction, or was designed for distributing part of the profits of the Timberland Co. among its shareholders. Since a company can have only fictitious intentions when it is dealing with its collective shareholders, the question becomes one whether the shareholders' object was to benefit the company by putting $99,000 at its disposal or to benefit themselves individually by obtaining its property. Since I have no reason to doubt the evidence that the company

1951

ROBSON v. MINISTER OF NATIONAL REVENUE

Sidney Smith D.J.A.

needed $100,000 to carry on, the shareholders undoubtedly had as one of their objects, the putting of funds at its disposal; the question is whether that was their primary object or merely an incidental one.

I find the appellant's evidence on this point unconvincing. It was perhaps natural enough that the company should turn to its members for financing, rather than borrow from the bank, as it could have done. But the form the transaction took militates against the probabilities of the appellant's story. If he really felt the doubts that he mentions about the value of the Salmon River shares, one would have expected him to take merely a mortgage or pledge of the shares and not an outright transfer. Moreover, the Timberland Co. at the time owned a large number of Salmon River debentures, which had consistently been paying 7 per cent interest. These and not the Salmon River shares were the appropriate security for obtaining an advance. If the appellant really felt the doubts he has testified to about the shares, here was the obvious solution; for the debentures were not only the more stable commodity, but they could have priority over the shares if the Salmon River Co. met with disaster. The fact that the appellant chose to take the shares instead, and to take an absolute transfer, indicates to me that he considered them more desirable than the debentures, and that his object was to benefit himself and not the company.

If there remains any doubt about the object being to distribute the company's profits, it seems to be dispelled by the correspondence that took place in October 1943 and June 1944, between the accountants representing the company and the income tax inspector at Vancouver.

The accountants wrote on 5 October, 1943, to the inspector:

> . . . it is the intention of Timberland Lumber Company Limited to distribute its investment in the shares and debentures of Salmon River Logging Co Ltd. to its shareholders as a dividend. In order to make this distribution it is essential that the value of the shares of Salmon River Logging Co. Ltd. be agreed to by your department.

The letter then argued that the value should be based on asset values rather than on book values, and that asset values should be small because of the taxes that would be

deducted before the shareholders could get their money out. The inspector replied that

for the purpose of the contemplated distribution the book value thereof will be used as the basis of the distribution.

On 20 June, 1944, 24 days before the sale of shares to the appellant and other shareholders, the accountants again wrote to the inspector, and after complaining of his avowed basis of valuation, continued:

as we pointed out in our discussions of 10 June, 1944, this basis of value would result in very onerous taxation of the Timberland shareholders since they would first of all be charged with their proportion of Salmon River surplus included in the book value, and would then be subject to personal income tax when this surplus of Salmon River was distributed as a dividend. In effect they would be taxed twice on the same surplus.

In order to avoid this duplication we proposed that Salmon River Logging Company declare a dividend of its entire earned surplus, setting up the dividend as a liability . . . In this way the book value of Salmon River shares would be reduced to par and it is proposed that the transfer be made on this basis.

Here I point out that it did not follow that even if a dividend exhausting the reserve had been declared, the asset value of the shares would drop to par; for any enhanced value of the fixed assets due to rising markets had still to be taken into account. The accountants' letter continued:

. . . We find that there has been a substantial change in Timberland's financial position. The quantity of fir logs available from Salmon River has decreased . . .

In consequence, the letter said the company had to acquire a timber stand of its own, for which it needed $100,000 and perhaps another $200,000 for working capital. The letter adds:

It is apparent therefore that the company will be short of working capital, and for this reason it may be deemed advisable to sell Salmon River shares to Timberland shareholders rather than distribute the shares as a dividend. As no further principle of taxation is involved should the shares be sold on the basis of book value, after the declaration of the dividend covering all accumulated profit of Salmon River Logging Co. Ltd., we assume that either method will be acceptable to you.

In a later letter of 2 August, 1944, the accountants repeated that the Timberland Co. wished to sell to its own shareholders the Salmon River shares,

but before doing so wish you to advise them the fair market value of the shares.

1951

ROBSON
v.
MINISTER
OF
NATIONAL
REVENUE

Sidney
Smith
D.J.A.

The inspector answered that he was not in a position to advise on the fair market value.

It will be noted that before the accountants wrote on 2nd August, the Timberland Co. had already passed a resolution for selling the shares to its members, from which I infer that they acted without the accountants' advice.

The accountants' letters quoted are disarming in their candour, and may perhaps be taken as evidence that they did not value the Salmon River shares as highly as later events showed they should have done. But it is extremely obvious that the sale actually carried out was not at all the transaction that the accountants proposed and had attempted to convince the inspector would not be subject to tax. The accountants' proposal was for the Salmon River Co. to declare a dividend that would exhaust its reserve of between $550,000 and $600,000 (which it had not the funds to pay at once); *then* the Timberland Co. would sell the shares—apparently ex dividend—at par. Actually however the Salmon River Co. did not declare the dividend; this is proved by the company's balance sheet at the end of 1944, which shows the reserve still intact, and in fact increased; yet in spite of this the Timberland Co. still sold the shares to its members at par, though these then carried the right to participate in the reserve when it should be resorted to.

So even if the accountants were right in valuing the shares at par if a certain course was taken (on which I am far from satisfied), still that course was not taken and therefore a par value ceased to have any justification.

In view of the accountants' letters it seems to be quite impossible to say that the object of this transaction was no to distribute part of the Timberland's Co.'s profits, and the accountants themselves recognized that so far as the sale price might fall below the true value, the recipients were liable to tax. Rightly or wrongly, the accountants thought they had worked out a plan for reducing the value of the shares to par, at which price they planned to sell. But the plan, whether good or bad, was not followed by the company.

There seems to be no reported Canadian or English case in which a shareholder has been held to have received a

dividend because he has bought shares at an under-value from a company that has earned profits on hand. But the American case of *Timberlake* v. *Commissioner of Internal Revenue* (1); and also the Supreme Court case of *Palmer* v. *Commissioner of Internal Revenue* (2), recognized that a benefit given in such a way might be taxable as a dividend though in that instance it was held that the company was not intending to distribute profits and that the price at which it offered shares to members was at the time an adequate price. The cases of *Taplin* v. *Commissioner of Internal Revenue* (3), and *Commissioner of Internal Revenue* v. *Van Vorst* (4), in which sales of assets to a shareholder at an under-value were held not to render him liable to tax are, I think, distinguishable because the Court held that nothing equivalent to payment of a dividend was intended. In those cases there was nothing like a rateable distribution to shareholders generally. At all events, the decisions turned on findings of fact. I do not think it material that the Timberlake case, *supra,* turned on a specific statutory provision; the section merely declared what I think would be implied as a matter of law without express enactment.

I will now consider the appellant's other point, namely, that even if he bought the Salmon River shares at an under-value, still he could not be taxed on the benefit thereby received until he resold them and thereby fixed the amount of profit. The *Palmer* case *supra,* is perhaps the strongest authority for him on this point, but a case of that kind turns on different principles from this. When a transaction is dealing with goods representing capital, there is nothing in the way of profit till the goods are resold and nothing to which the tax can attach; but where, as here, the party is getting shares that themselves represent profit, the transaction is complete for tax purposes as soon as the shares reach his hands; and it does not matter whether he resells them or not. The price on resale would only matter so far as it threw light on the value at the date of receipt. The case of *Timberlake* v. *Commissioners of Internal Revenue, supra,* is in point.

(1) (1942) 132 Fed. (2nd) 259.
(2) (1937) 302 U.S. 63.
(3) (1930) 41 Fed. (2nd) 454.
(4) (1932) 59 Fed. (2nd) 677.

1951

ROBSON v. MINISTER OF NATIONAL REVENUE

Sidney Smith D.J.A.

I therefore hold that the appellant bought the Salmon River shares at a decided under-value from a company that held earned profits and that the object was to distribute these. I hold that as a result the difference between the price paid and the true value was a dividend, and subject to income tax.

It remains to consider the value: the Minister fixed the true value at $600 per share, basing this apparently on the fact that fourteen months later the shares resold for $750. I am concerned with the value at the date of the purported sale. The witness Wilson fixed it at $113 per share, but for reasons already given, I am unable to accept this figure. The Crown's witness Beer put the book value at approximately $400 and value computed on earnings at something more. He pointed out that this made no allowance for war-time appreciation in fixed assets due to rising prices. These would seem to account largely for the willingness of the Westminster Shook Co. and the B.C. Manufacturing Co. to pay $750 in 1945. Appellant tried to account for this willingness by saying they were "desperate" for timber; but his evidence is met by that of their valuer Rodgers who indicated that they paid this price because he valued the shares at even more. He also gave evidence that the value of Salmon River shares remained much the same from 1943 to 1945. In view of this, I find myself unable to say that the Minister's figure of $600 is unjustified.

The appeal therefore fails.

Judgment accordingly.

1951

Apr. 2 & 3
June 29

BETWEEN:

FELICIA H. FLINTOFT, GRACE C. CASSILS and JAMES FLINTOFT, the Executors and Trustees named in the Last Will and Testament of EDWARD PERCY FLINTOFT, deceased ..... APPELLANTS;

AND

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

Revenue—Succession Duty—The Dominion Succession Duty Act 4-5 Geo. VI, c. 14, s. 3(1) (g)—"Succession"—Benefits paid voluntarily and not payable out of a fund "established for the purpose" do not constitute a "succession"—Appeal allowed.

After the death of F, in his lifetime employed by the Canadian Pacific Railway Company, a monthly pension of $230.74 became payable to and was paid to his widow, of which the sum of $16.74 was payable out of the Canadian Pacific Railway Company Trust Fund, almost entirely comprised of employees contributions, the balance being payable out of the railway company's current revenue and charged to working expenses. The respondent in his assessment made under the Dominion Succession Duty Act included in the aggregate value of the assets of the estate the capitalized value of the total pension of $230.74 per month. F's executors appealed from such assessment in so far as it included that portion of the pension, $214, paid out of the railway company's current revenue.

Held: That the monthly payment of $214 not being payable or granted out of the Pension Trust Fund or out of any other fund established for the purpose but being a voluntary payment made by the railway company out of its revenue does not fall within the provisions of s. 3(1) (*g*) of the Act and is not a succession under any provision of the Act.

2. That the taxability of superannuation or pension benefits or allowances is limited by s. 3(1) (*g*) of the Act to those cases in which the benefits or allowances are payable "out of a fund established for the purpose" except in those cases when they are payable under legislation of Canada or a province.

APPEAL under the Dominion Succession Duty Act.

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

R. C. Holden, K.C. and *C. F. H. Carson, K.C.* for appellants.

1951

FLINTOFT v. MINISTER OF NATIONAL REVENUE

Cameron J.

Bernard Bourdon, K.C., Paul Fontaine, K.C. and *I. G. Ross* for respondent.

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

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

This is an appeal from an assessment dated March 12, 1948, and made under the Dominion Succession Duty Act (1940-41, c. 14 as amended) on the estate of Edward Percy Flintoft, late of the City of Montreal, who died testate on May 8, 1946. His last will and testament dated March 30, 1944, was duly admitted to probate by order dated May 20, 1946. Mr. Flintoft in his lifetime was employed by the Canadian Pacific Railway (hereinafter called the company) from 1908 until the time of his retirement on March 1, 1945, on which latter date he was its general counsel and one of its vice-presidents. In the said assessment there was included in the aggregate net value of the assets of his estate the capitalized value of a pension of $230.74 per month, payable to his widow, Felicia H. Flintoft. In appealing from the said assessment, the appellants admitted that of the monthly sum of $230.74, payable to Mrs. Flintoft, the sum of $16.74 was payable out of the Canadian Pacific Railway Company Trust Fund (hereinafter to be referred to as "the Trust Fund"), and that that proportion of the total pension was properly included as an asset of the estate and taxable under the provisions of section 3(1) (*g*) of the Act. They contend, however, that the balance of $214 which has been paid and is being paid, not out of the Trust Fund but out of the company's current revenue and charged to working expenses, is not an asset of the estate and is not a "succession" within any of the provisions of the Act.

The full amount of the assessment has been paid by the appellants under protest and in these proceedings a declaration is sought setting aside the assessment in regard to this matter and for the repayment to the appellants of any sums paid by them in excess of the amount to which the respondent is legally entitled. By order of this Court pleadings were delivered.

On August 10, 1936, a new policy for employee pensions was adopted by the Board of Directors of the company, as shown by an extract from the minutes of that date (Ex. A-1). Effective January 1, 1903, the company had inaugurated a system of voluntary pensions without contribution from the employees. At the meeting of August 10, 1936, it was resolved that, subject to certain reservations not here material, the former plan would be dropped and a new system of contributory pensions would come into effect on January 1, 1937. The rules and regulations of the new Pension Department and effective January 1, 1937, form part of Ex. A-1. The rules and regulations in effect at the time of Mr. Flintoft's death are contained in the pamphlet Ex. A-3.

Pursuant to Rule 10(*a*), Mr. Flintoft on December 3, 1936, elected to become a contributor under the new pension system (Ex. A-2). From and after January 1, 1937, until his retirement on March 1, 1945, he made contributions to the Pension Fund equal to 3 per cent of his salary in accordance with the pension rules, his total contributions over that period aggregating $4,768.80. Under Rule 18(*a*), Mr. Flintoft upon retiremeent would have been entitled to a monthly pension of $576.12, but no part thereof under that rule would have been payable to his surviving wife. Rule 19(*a*) provides that "any contributor may elect to receive in lieu of the pension allowance granted under Rule 18, an allowance payable to himself during his life, subject to the condition that one-half of the allowance will be continued to his wife should she survive him"; and by Rule 19(*f*) it is provided that "the optional allowances referred to in this rule shall be calculated in accordance with the methods prescribed from time to time by the Actuary." Mr. Flintoft, desiring to take advantage of that provision and within the time limit set out in Rule 19(*c*), gave notice by Ex. A-4, dated April, 1944, that he desired the reduced pension allowance provided for in Rule 19, subject to the condition that one half of such pension allowance should be continued to his wife should she survive him. From the date of his retirement on March 1, 1945, Mr. Flintoft received the reduced pension at the rate of $461.47 per month until his death on May 8, 1946, the total payments aggregating $6,579.67. Of the total monthly payment of $461.47,

1951

FLINTOFT v. MINISTER OF NATIONAL REVENUE

Cameron J.

$33.47 was paid each month out of the Trust Fund established under the pension rules, and $428 was paid by the company out of its current revenue and charged to working expenses. Upon his death his widow, in accordance with Rule 19, began to receive a monthly pension allowance of $230.74, of which $16.74 was paid out of the Trust Fund and $214 was paid out of the current revenues of the company, and charged to working expenses.

The pension system is administered by a committee of seven members, four of whom are officers of the company and appointed by its Board, the remaining three being elected from among the general chairmen of the organized classes of employees of the company (Rule 2). Its powers are set out in Rule 6 and include the power to determine the eligibility of employees to receive pension allowances, the amount of contributions, all pension allowances and refunds; to retain the services of an actuary for the purpose of valuing the Trust Fund and to determine the percentages that may be withdrawn therefrom; and it shall from time to time, as required, make reports of its actions to the Board, which may review, alter or rescind such actions.

Rule 12 provides for the establishment of the Trust Fund and the payments to be made therefrom. The applicable parts are as follows:

12. (*a*) All contributions by employees shall in the first instance be deposited in a chartered bank in a separate account to the credit of the Trust Fund of which Canadian Pacific Railway Company shall be trustee, which Trust Fund shall not form any part of the revenues or assets of the Company. The Trust Fund shall be administered by the Trustee subject to the provisions of these rules and shall be invested from time to time in Dominion Government Securities or securities guaranteed by the Dominion Government.

(*b*) From the Trust Fund thus set up there shall be paid:

1. The cost of administering the Trust Fund.

2. Such proportion of the cost of administering the pension system as the Committee may from time to time determine.

3. A proportion of the pension allowance of any contributor retiring after January 1, 1937. Such proportion shall be determined and certified to from time to time by the Actuary, and unless the Committee shall otherwise direct shall be expressed as a percentage of that portion of the total pension which accrues in respect of the period for which the employee has made contributions. The proportion so determined shall not be increased until such time as the Fund shall be found to be in a position to bear 50 per cent of the cost of all pensions emerging thereafter; provided,

however, that any contribution made by the Company under Rule 13(*b*) shall, if at any time so directed by the Board, be applied in whole or in part to increase either temporarily or permanently the proportion so determined.

It will be noted that only a proportion of the pension allowance of any contributor is payable out of the Trust Fund. Pursuant to the requirements of Rule 12(*b*) 3, Mr. Rutherford, the actuary appointed under Rule 6(*a*), made a report on the valuation of the Pension Trust Fund (Ex. A-9) and made the following recommendation:

It is recommended that, effective from January 1, 1945, the proportion of each pension emerging in future to be charged to the Fund be increased from 30 per cent to 33 1/3 per cent of that portion of the total pension which shall accrue in respect of the period for which the employee shall have made contributions.

That recommendation was carried into effect and it was pursuant thereto that *out of the Trust Fund* there was paid to Mr. Flintoft upon retirement the monthly sum of $33.47, and following his death the monthly sum of $16.74 was paid to Mrs. Flintoft. The evidence indicates that the company issues all cheques to pensioners, its pension payrolls (of which Exhibits A-5 to 8 are samples) indicating the amounts payable out of the Trust Fund, and monthly thereafter it recovers from the Trust Fund the payments which it had made on its behalf. The evidence is conclusive that the balance of the payments to both employee pensioners and dependent pensioners was paid out of current revenues of the company and charged monthly to working expenses; and that the company had established no fund or reserve in respect thereof.

Rule 13 is as follows:

13. (*a*) The Company shall pay in to the Trust Fund monthly an amount equal to 25 per cent of any allowances paid pursuant to Rule 21, except the minimum allowances provided for in the said rule or allowances which are commuted under the provisions of said rule. Such payments into the Trust Fund will be applied from time to time for the purpose of increasing the proportion of the pension allowances which the Trust Fund would otherwise provide.

(*b*) The Company may from time to time make contributions directly to the Trust Fund, to be applied in accordance with the directions of the Board, for the purpose of increasing the proportion of the pension allowances which the Trust Fund would otherwise provide.

1951

FLINTOFT v. MINISTER OF NATIONAL REVENUE

Cameron J.

Under para. (*a*) thereof, the payments by the company to the Trust Fund were small, aggregating up to December 31, 1950, only $9,554. Under para. (*b*) thereof the company up to December 31, 1950, had paid into the Trust Fund a sum in excess of $22,000,000. All payments made to the Trust Fund are ear-marked so as to indicate contributions by employees, and contributions by the company under both Rule 13(*a*) and Rule 13(*b*). It will be noted, however, that contributions made under Rule 13(*b*) are "to be applied in accordance with the directions of the Board" (i.e., the Board of Directors of the company), and the evidence is that up to date no direction has been given by the Board in relation thereto. While, therefore, those contributions form part of the Trust Fund, they are as yet not available for the purpose of increasing the proportion of the pension allowances which the Trust Fund would otherwise provide. It is being invested and allowed to accumulate. The Trust Fund which is now available for payment of a proportion of the pension allowances is comprised of employees' contributions and the negligible amount provided by the company under Rule 13(*a*). Mr. L. B. Unwin, Vice-President of the company in charge of finance, and Chairman of the committee administering the pension system, stated that from his experience and knowledge it would not be at least until 1970 that it would be advisable for the Board to direct the actuary to take into account in his calculation of the percentage payable out of the Trust Fund, any monies contributed by the company under Rule 13(*b*). I assume that the intention is to build up the Trust Fund over a period of years and in the meantime to pay the remaining portion of the allowances out of the current revenue. Rule 12(*b*) 3 provides for the actuary to determine and certify from time to time the proportion of pension allowances payable out of the Trust Fund and that the proportion so determined shall not be increased until such time as the Fund shall be found to be in a position to bear 50 per cent of the cost of all pensions emerging therefrom (subject to a provision not now relevant.) The actuary, Mr. Rutherford, stated that the Trust Fund is not now able to bear 50 per cent of such cost and that as an actuary he was of the opinion that the Fund would not be in that position in the foreseeable future.

The question for decision, therefore, is whether the monthly payment of $214 to Mrs. Flintoft is a "succession" within the meaning of the Act. "Succession" is defined in section 2(*m*) and by that section the term also includes "any disposition of property deemed by this Act to be included in a succession." Section 3 declares certain dispositions to be deemed as successions and for the respondent it is submitted that section 3(1) (*g*) is applicable to the facts of this case. It is as follows:

> 3. (1) A "succession" shall be deemed to include the following dispositions of property and the beneficiary and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to such property:
>
> (*g*) any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased, including superannuation or pension benefits or allowances payable or granted under legislation of the Parliament of Canada or of any Province, or under any other superannuation or pension fund or plan whether the said benefits or allowances are payable or granted out of the revenue of His Majesty in respect of the Government of Canada, or of any Province thereof, or out of any fund established for the purpose, which benefits or allowances shall be deemed for the purposes of the Act to have been purchased, acquired, or provided by the deceased.

As originally enacted, subsection (*g*) comprised only the first five lines as it now appears, concluding with the words "on the death of the deceased." That part I shall refer to as the original part of the subsection. By 6-7 Geo. V. c. 25, the subsection was repealed and a new subsection (*g*), as above quoted, was substituted therefor. It contained all the original subsection, but added thereto were all the words commencing, "including superannuation or pension benefits or allowances." That part I shall refer to as the added part of subsection (*g*).

In *McDougall* v. *Minister of National Revenue* (1), I considered the meaning and effect of subsection (g) in regard to certain lump sum payments made to the widow of an employee of the Bell Telephone Company under the provisions of its "Pension Fund." In that case, no contribution to the fund had been made by the deceased employee or his widow. In that case I held that the award and payments

(1) (1949) Ex. C.R. 314.

1951

FLINTOFT v. MINISTER OF NATIONAL REVENUE

Cameron J.

were purely voluntary and that the recipient of the payments had no right to enforce the payment thereof, and that under those circumstances there was no beneficial interest arising by survivorship or otherwise to the donee, upon the death of the employee. In that case I referred to and followed the case of *re Miller's Agreement, Uniacke* v. *Attorney-General* (1), in which Wynn-Parry, J. said at p. 80:

> The property in question in each case is an annuity, and is clearly in each case an annuity purchased or provided by Mr. Noad, the deceased. However, the vital question is: Did any beneficial interest, within the meaning of that phrase as used in the section, accrue to the plaintiffs on the death of Mr. Noad? In my view, the word "interest" in the subsection means such an interest in property as would be protected in a court of law or equity. In the present case, it is clear—and counsel for the Crown, does not contend to the contrary—that the effect of the deed of Feb. 4, 1942, is not to create any trust in favour of the annuitants. It further appears clear to me, from the reasoning of the Court of Appeal in *Re Schebsman, Ex. p. Official Receiver, Trustee* v. *Cargo Superintendents (London), Ltd. & Schebsman,* that at common law the annuitants have no right to sue Mr. Miller or Mr. Vos under the deed. On the receipt by each of the annuitants of any payment in respect of her annuity, the property in the money so paid will pass to her, but she has no right to compel any payment. At common law, so far as each annuitant is concerned, the deed is *res inter alios acta,* and she has no right thereunder.

And, at pp. 82-3 he said:

> On its true construction, I cannot find—and this is really admitted—that the deed confers on any of the annuitants any right to sue, or anything more than a right to retain any sums which may from time to time be paid by Mr. Miller or Mr. Vos under the deed. In my view, the annuitants are not persons to whom the deed purports to grant something or with whom some agreement or covenant is purported to be made, and, in these circumstances, the annuities are not annuities within the meaning I place on the word as appearing in the Finance Act, 1894, s. 2(1) (*d*) . . . on the view which I take of the document, the payments, if and when made, will be no more than voluntary payments and, as such, appear to me to be quite outside the scope of the section. Therefore, I hold that the annuitants are not liable to estate duty in respect of the annuities.

In the *Uniacke* case it was held:

> (i) on the true construction of the deed, notwithstanding the use of the word 'entitled to,' the annuitants had no rights thereunder either at common law or in equity, except the right to retain any sums paid to them.
>
> (iii) the word "interest" in the Finance Act, 1894, s. 2(1) (*d*), meant such an interest in property as would be protected by the courts, and the annuities payable under the deed were, therefore, not annuities within the meaning of s. 2(1) (*d*), and the annuitants were not liable to estate duty in respect of them.

(1) (1947) A.E.R. 78.

(iv) since the annuitants had no right to sue for the annuities, they did not become "entitled" to them within the meaning of that phrase in the Succession Duty Act, 1853, s. 2, and, therefore, they were not liable to succession duty in respect of them.

Now, in the original part of subsection (*g*) it will be noted that it is not all of the interest purchased or provided by the deceased that is deemed to be a succession, but only "the extent of the beneficial interest accruing or arising by survivorship or otherwise."

There can be no doubt that all contributions of the company to the Trust Fund (save possibly the small amounts payable under Rule 13*a*) were to be and remain voluntary and that no pensioner or pensioner's dependent would have any claim *against the company* for pension allowance. The entire scheme arises from the Board meeting of August 10, 1936, and clause 7 of the plan therein outlined in Ex. A-1 is as follows:

7 All contributions of the Company are to remain voluntary and no employee or pensioner will have a legal right or claim against the Company for pension allowance.

Then Rule 31 is as follows:

31. (*a*) The establishment and continuance of this system of pensions insofar as the Company's contributions are concerned is purely voluntary on the part of the Company, which reserves the right to alter, suspend or discontinue from time to time and in whole or in part its contributions towards pension allowances or to the Trust Fund, and neither such establishment and continuance nor any action at any time taken by the Board or the Committee shall be construed as giving to any employee or pensioner a legal right or claim to any allowance from the Company for pension. While it is the policy of the Company to encourage its employees to remain with it, and by faithful service, to qualify for pension allowances, nothing contained in these rules shall diminish or affect any right which it otherwise has to discharge any employee at any time when the interests of the Company in its judgment may so require, without liability for any claim for any pension or allowance, other than salary or wages owing and unpaid, and for the repayment of the contributions, if any, made by the employee under Rule 11.

(*b*) Notwithstanding anything contained in these rules, the Company may cancel its voluntary proportion of any pension whenever it is established, in the opinion of the Committee, that a pensioner is guilty of serious misconduct.

Now it is not necessary to consider whether Mrs. Flintoft has or has not a legal right to enforce the payment to her of the monthly sum of $16.74 out of the Trust Fund because of the admission made by the appellants that as to that

1951

FLINTOFT v. MINISTER OF NATIONAL REVENUE

Cameron J.

amount the assessment is valid. It is clear that under the Rules she cannot compel the Committee in charge of the Trust Fund to resort to that part of the Trust Fund which is made up of company contributions made under Rule 13(*b*), until the Board has so directed; or to increase the monthly payments out of other trust funds until the actuary has so directed. On the evidence, it is extremely improbable that the payments to Mrs. Flintoft out of the Trust Fund will be increased during her lifetime, as she is now in her 70th year. It is equally clear that the balance of the monthly payments, amounting to $214, is not paid out of the Trust Fund or out of any fund set aside for the purpose, but is paid voluntarily by the company out of its current revenues and charged to working expenses. Mrs. Flintoft would have no legal right to compel the company to pay that or any other amount and if it was discontinued she would be without any remedy. On the principles followed in the *McDougall* case I must reach the conclusion that the monthly pension of $214 does not fall within the original part of subsection (*g*).

In my opinion, the added part of subsection (*g*) was enacted for the purpose of broadening the meaning of the opening words of the original subsection, "Any annuity or other interest purchased or provided by the deceased," so as to include therein certain superannuation or pension benefits or allowances which might not be considered to have been "purchased or provided by the deceased," but which thereafter "shall be deemed for the purpose of this Act to have been purchased, acquired or provided by the deceased." Provision is made for two classes of such benefits or allowances, namely: (i) those payable or granted under legislation of the Parliament of Canada or of any province; and (ii) those payable or granted under any other superannuation fund or plan.

The dispute as to whether the monthly payment of $214 falls within the added part of section 3(1) (*g*) centres around the meaning to be attributed to the words (which I shall refer to as the "whether" clause)—

> Whether the said benefits or allowances are payable or granted out of the revenue of His Majesty in respect of the Government of Canada or of any Province thereof, or out of any fund established for the purpose.

Counsel for the appellants admits that such monthly payment falls within the words "under any other pension plan," and that were it not for the provisions of the "whether" clause, which I have just quoted, such payment would be taxable as a succession. His submission, however, is that full effect must be given to all the words of the added part and that the "whether" clause expressly limits the general words which precede it, and that any superannuation or pension benefits or allowances not payable or granted under any legislation of Canada or of one of its provinces, but granted or payable under any other pension fund or plan is dutiable only if payable or granted *out of any fund established for the purpose.* In this case he submits that the payment, being merely voluntary and not payable out of any "fund established for the purpose," is therefore not assessable to duty.

In interpreting a taxing Act, the Court must be governed by the expressions used in the Act itself and the intention of Parliament must be gathered therefrom. In *Tennant* v. *Smith* (1), Lord Halsbury said at p. 154:

> This is an income tax Act, and what is intended to be taxed is income. And when I say "what is intended to be taxed", I mean what is the intention of the Act as expressed in its provisions, because, in a taxing Act it is impossible, I believe, to assume any intention, any governing purpose in the Act, to do more than take such tax as the statute imposes.

In *Salomon* v. *Salomon* (2), Lord Watson in considering the expression "intention of the legislature," said at p. 38:

> "Intention of the legislature" is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication.

For the respondent it is contended that all such benefits or allowances payable or granted "under any other superannuation fund or plan" are subject to duty whether or not they are payable or granted out of a fund established for the purpose. To support this contention would mean that I must either read "whether" as "whether or not," or limit

(1) (1892) A.C. 150. (2) (1897) A.C. 22.

1951

FLINTOFT v. MINISTER OF NATIONAL REVENUE

Cameron J.

the applicability of the whole of the "whether" clause to benefits or allowances granted or payable by the Parliament of Canada or by a province.

There can be no doubt, I think that the "whether" clause is made applicable to all the benefits or allowances previously mentioned in the section whether they be made under legislation or "under any other superannuation or pension fund or plan." The words "the said benefits or allowances" which follow immediately after "whether" refer back to the "benefits or allowances" previously mentioned and which are there identified as being of two classes, namely, those payable or granted under legislation and those payable or granted "under any other superannuation or pension fund or plan." The first part of the "whether" clause relating to the revenue of His Majesty can have no application to the payments made "under any other fund or plan," and it would follow, therefore, that the remaining words "or out of any fund established for the purpose" must refer to those payments made "under any other superannuation or pension fund or plan," although they are not necessarily limited thereto. I am unable to agree with the submission of counsel for the respondent that the "whether" clause has no application to this appeal. I think it has, and later herein will consider what effect should be given to that view of the matter.

Nor do I think that "whether" means the same as "whether or not." The phrase "whether or not" is a very broad term indicating that no limit or qualification is to be placed on the preceding words; it is equivalent to "in any case" or "in all events." It is suggested by Mr. Carson that if "whether" were to be read as "whether or not," the "whether" clause would be wholly unnecessary in that it would add nothing to the broad meaning of the preceding words, that therefore it would be meaningless and such an interpretation should not be adopted. There is much force to that argument, but I prefer to rest my opinion on what I consider to be the real meaning of "whether," when, as here, it is followed by the correlative "or." In my view, it is used here as introducing a disjunctive clause having a qualifying or conditional force, and when used with the

word "or" is equivalent to "in either of the cases mentioned." In my opinion it would be improper to read "whether" as meaning "whether or not."

To what extent, then, does the "whether" clause qualify the preceding words? In my view, it limits the taxability of such superannuation or pension benefits or allowances to those cases in which the benefits or allowances are payable "out of a fund established for the purpose," except in those cases where they are payable under legislation of Canada or a province, in which latter cases, even if payable out of revenue, they are made dutiable.

I have stated above that in my opinion the "whether" clause is made applicable to the words "under any other superannuation fund or plan." It seems to me that in referring to "revenue" of His Majesty and to "any fund established for the purpose," Parliament has indicated that not all superannuation or pension benefits or allowances should be made dutiable successions, but only those where there is reasonable certainty that the payments will be continued. In the case of legislative payments that assurance is provided whether the source be revenue or out of an established fund; in other cases, such assurance is provided only if a fund for that purpose has been established. Such a limitation in my view is implicit in the "whether" clause. It also seems to me to be a not unreasonable limitation, excluding from taxation, as I think it does, those benefits or allowances which are dependent only on a plan but lack the assurance of continuity in payment, such as is provided by the existence of a fund or by being payable out of Government revenue. If there were no such limitations, it is apparent that in many cases the estates of decedents could be charged with succession duty in respect of benefits or allowances to dependents which the latter might never receive, or from which they might benefit for but a short period.

It is of some interest to note that in the Province of Nova Scotia the Succession Duty Act, 1945, c. 7, s. 3(2) (*g*) was amended by Statutes of 1946, c. 53, by adding thereto the following:

including superannuation or pension benefits or allowances *whether contractual or gratuitous* payable or granted under legislation of the Parlia-

1951

FLINTOFT v. MINISTER OF NATIONAL REVENUE

Cameron J.

ment of Canada or of any Province or under any other superannuation or pension fund or plan *where* the said benefits or allowances are payable or granted out of the revenue of His Majesty in respect of the Government of Canada or of any Province or out of any fund established for the purpose *or otherwise,* which benefits or allowances shall, for the purposes of this Act, be deemed to have been purchased, acquired or provided by the deceased.

It will be noted that the wording is very similar to the added part of section 3(1) (*g*) of the Dominion Act, but that the words "benefits or allowances;" that "where" replaces the word "whether" as used in the Dominion Act, and that the words "or otherwise" follow the expression "or out of any fund established for the purpose." These variations are of great significance and I think it may be assumed that if the words "or otherwise" were also in the Dominion Act, the appeal herein would fail.

My conclusion, therefore, is that the monthly payment of $214.00 to Mrs. Flintoft, not being payable or granted out of the Pension Trust Fund or out of any other fund established for the purpose, but being a voluntary payment made by the company out of its revenue, does not fall within the provisions of section 3(1) (*g*) and is not a "succession" under any provision of the Act. The appeal will therefore be allowed and there will be a declaration:

(1) That the only part of the monthly payment to Mrs. Flintoft which is subject to payment of succession duties is the capitalized value of that part thereof which is payable out of the Canadian Pacific Railway Pension Trust Fund, which capitalized value by agreement of the parties is fixed at $2,108;

(2) That the appellants are entitled to be repaid the difference between such amount as they have paid under the assessment relating to the whole of the said pension, and the amount properly assessable on the monthly payment of $16.74, payable out of the Canadian Pacific Railway Company Trust Fund, having a capitalized value of $2,108. During the course of the trial, counsel for the appellants intimated that such difference amounted to $2,842.93 but I do not think that counsel for the respondent agreed thereto. If the parties are unable to agree on the amount, there will be a reference back to the Minister for the purpose of amending the assessment in accordance with my finding.

1951

FLINTOFT v. MINISTER OF NATIONAL REVENUE

Cameron J.

I should state further that by the stipulation of the parties duly filed, it has been agreed that while in the original assessment *in respect of the whole pension* its capitalized value was fixed at $29,056.13, that valuation was in error and should have been fixed at $16,000.

The appellants are also entitled to their costs after taxation, and to payment out of the amount deposited for security for costs.

Judgment accordingly.

BETWEEN:

NISBET SHIPPING COMPANY LIMITED, ... SUPPLIANT;

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June 13, 14

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July 20

AND

HIS MAJESTY THE KING ..... RESPONDENT.

Crown—Petition of Right—Negligence—Collision at sea—Exchequer Court Act, R.S.C. 1927, c. 34, ss. 19(c), 50A—Regulations for Preventing Collisions under Order in Council P.C. 259, dated February 9, 1897—Naval Service Act, R.S.C. 1927, c. 139, s. 45—King's Regulations and Admiralty Instructions—Canada Shipping Act, S.C. 1934, c. 44, ss. 649(1), 712—Officers in charge of navigation of Canadian warship not freed from duty of care where operations not actually against enemy—Collision Regulations not binding on Crown but embody principles of good seamanship—Section 19(c) of Exchequer Court Act not restricted to claims based on negligence occurring within Canada—His Majesty not entitled to limitation of liability under Section 649(1) of Canada Shipping Act.

Suppliant claimed damages for loss of its steamship *Blairnevis* in the Irish Sea through collision between it and Canadian warship H.M.C.S. *Orkney*, a steam frigate forming part of His Majesty's Canadian naval forces on active service. The *Blairnevis* had detached herself from a convoy and was proceeding independently to Workington, England, and the *Orkney* was on her way to take over escort duty for portion of the convoy going to Liverpool. The vessels were on crossing courses and the *Orkney* struck the *Blairnevis* on her port bow. Subsequently the *Blairnevis* had to be beached and was lost. Suppliant claimed collision and loss resulted from negligence of officers charged with navigation of the *Orkney*.

Held: that since the operations on which H.M.C.S. *Orkney* was engaged, although warlike operations, were not actual operations against the enemy the officers charged with her navigation were not freed from

1951

NISBET SHIPPING COMPANY LIMITED v. THE KING

Thorson P.

the duty of care for the safety of merchant vessels. *Shaw Savill and Albion Co. Ltd.* v. *The Commonwealth* (1940) 66 C.L.R. 344 approved.

2. That the Collision Regulations established by Order in Council P.C. 259, dated February 9, 1897, do not bind the Crown but, while they do not as such apply to His Majesty's ships, constitute a code recognized by all nations as well adapted for preventing collisions at sea and embody principles of good seamanship that ought to be applied everywhere. *The F. J. Wolfe* (1945) P. 61; (1946) P. 91 followed.

3. That where Parliament has seen fit to establish the standard of care by which the conduct of its officers or servants is to be measured there is no lack of jurisdiction under section 19(*c*) of the Exchequer Court Act by reason of the fact that the collision happened on the high seas and there was no provincial law of negligence that could be applied.

4. That section 19(*c*) of the Exchequer Court Act is not restricted to claims based on negligence occurring within Canada.

5. That the officer of the watch of the *Orkney* was negligent in failing to keep a proper lookout and the Commander did not act as promptly and appropriately as the situation demanded.

6. That there was no contributory negligence on the part of those on board the *Blairnevis*.

7. That the loss of the *Blairnevis* was the result of the negligence of the officers of the *Orkney*.

8. That section 649(1) of the Canada Shipping Act does not apply to His Majesty and he is not entitled to any limitation of liability under it.

PETITION OF RIGHT for damages under section 19(*c*) of the Exchequer Court Act.

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

C. R. McKenzie K.C., H. A. Aylen K.C. and *B. F. Clark* for suppliant.

L. Beauregard K.C. for respondent.

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

THE PRESIDENT now (July 20, 1951) delivered the following judgment:

The suppliant, a Scottish Corporation having its head office and chief place of business at Glasgow, Scotland, claims damages for the loss of its steamship *Blairnevis* in the Irish Sea on February 13, 1945, through a collision between it and a Canadian warship, *H.M.C.S. Orkney,* a

steam frigate forming part of His Majesty's Canadian naval forces on active service and manned by officers and men of the Royal Canadian Navy.

The claim is brought under section 19(*c*) of the Exchequer Court Act, R.S.C. 1927, chap. 34, as amended, which reads as follows:

> 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.

In a claim under this section the onus of proof that all the conditions of liability required by it have been met rests on the suppliant. It must bring its claim within the four corners of the section for apart from it the Crown is under no liability.

As to one condition of liability there is no dispute. The *Orkney* was owned by His Majesty in right of Canada and manned by members of the naval forces of Canada. They must, therefore, under section 50A of the Exchequer Court Act, as enacted in 1943, Statutes of Canada 1943, chap. 25, be deemed to have been servants of the Crown, and it is clear that at the time of the collision they were acting within the scope of their duties or employment. The disputed issues of fact are whether there was negligence on the part of any officer of the *Orkney* and, if so, whether or to what extent the loss of the *Blairnevis* resulted therefrom.

The *Blairnevis* had sailed from Melilla in Spanish Morocco on February 1, 1945, with a cargo of iron ore bound for Workington, England, joined a naval convoy at Gibraltar and sailed from there in convoy on February 4, 1945, continued in this convoy until February 12, 1945, when she reached a position in the Irish Sea off certain islands known as the Skerries. There the convoy had been broken up into two portions, one going east to the Mersey and the other north-west to the Clyde and the *Blairnevis* had been instructed by the commodore of the convoy to detach herself from it and proceed independently to Workington. While she was doing so she was struck on her port bow

1951

NISBET SHIPPING COMPANY LIMITED v. THE KING

Thorson P.

at about 1.34 a.m. on February 13, 1945, by *H.M.C.S. Orkney*. The *Orkney* was one of four Canadian frigates, designed as anti-submarine vessels, making up the 25th Escort Group based at Londonderry in Northern Ireland. With two other frigates of the group she had left Moville near Londonderry at 10 a.m. on February 12, 1945, under the command of Acting Commander Victor Browne of the Royal Canadian Volunteer Reserve, who was also the senior officer of the group, with instructions to relieve the escort that was with the Mersey portion of the convoy and take over escort duty for the balance of its voyage. It was while the *Orkney* and the other two frigates were on their way to take over this duty that the *Orkney* struck the *Blairnevis*. The collision occurred at 1.34 a.m. on February 13, 1945, and the position of the vessels was established at latitude 53 degrees 38 minutes North and longitude 4 degrees, 38 minutes West, about 57 miles west of Liverpool.

The respondent's main defence in point of law was that at the time of the collision *H.M.C.S. Orkney* was engaged in warlike operations to protect merchant vessels against enemy submarine action and that consequently the respondent could not be held responsible for loss caused by her even if it resulted from negligence on the part of those charged with her navigation. It can be accepted that the *Orkney* was engaged in warlike operations. With her sister ships of the 25th Escort Group she was on her way to take over escort duty for the Mersey portion of the convoy that had come from Gibraltar and relieve the escort that had accompanied it. The threat of danger to merchant vessels from enemy submarine action in the area made such duty necessary. The Irish Sea was a theatre of war. If, therefore, the respondent's contentions were well founded in law that would be the end of the suppliant's case but I am satisfied that the law does not go that far. Counsel for the respondent could not, of course, find any English decision directly in point, for prior to the Crown Proceedings Act, 1947, no claim lay against the Crown in the United Kingdom for the negligence of its officers or servants, but he relied strongly on the decision of the Full Court of the High Court of Australia in *Shaw Savill and Albion Co. Ltd.* v. *The Commonwealth* (1). In Australia section 56 of the

(1) (1940) 66 C.L.R. 344.

Judiciary Act, 1903-1940, provides that any person making any claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth in the High Court. The legislation is thus similar in principle to section 19(*c*) of the Exchequer Court Act, although broader in extent in that the claim in tort is not confined to a claim for negligence. In the case relied upon the plaintiff, a United Kingdom company, sued the Commonwealth for damages suffered by it as the result of a collision between its motor vessel and an Australian warship and certain questions of law came before the Court on demurrers and motion. The Full Court unanimously held that an action for negligence brought against the Crown for acts done in the course of active naval or military operations against the enemy must fail, four of the judges taking the view that while the forces of the Crown are engaged in actual operations against the enemy they owe no duty of care to avoid loss or damage to private individuals and the other that such acts are not justifiable *durante bello*. But the Court also held that this immunity from action does not attach to activities of the Crown's combatant forces in time of war other than actual operations against the enemy. The governing reasons for the decision were clearly expressed by Dixon J., with whom Rich A. C. J. and McTiernan J. agreed. After pointing out that the liability of the Commonwealth must be vicarious and depends on the existence of a duty of care in some individual, as is also true of the liability of the Crown under section 19(*c*) of the Exchequer Court Act, he said, at page 361:

> Outside a theatre of war, a want of care for the safety of merchant ships exposes a naval officer navigating a King's ship to the same civil liability as if he were in the merchant service. But, although for acts or omissions amounting to civil wrongs an officer of the Crown can derive no protection from the fact that he was acting in the King's service or even under express command, it is recognized that, where what is alleged against him is failure to fulfil an obligation of care, the character in which he acted, together, no doubt, with the nature of the duties he was in the course of performing, may determine the extent of the duty of care; Cp. *Halsbury's Laws of England*, 2nd ed., vol. 23, p. 666. It could hardly be maintained that during an actual engagement with the enemy or a pursuit of any of his ships the navigating officer of a King's ship of war was under a common-law duty of care to avoid harm to such non-combatant ships as might appear in the theatre of operations. It cannot be enough to say that the conflict or pursuit is a circumstance affecting the reasonableness of the officer's conduct as a discharge of the duty of care, though the duty itself persists. To adopt such a view

1951

NISBET SHIPPING COMPANY LIMITED v. THE KING

Thorson P.

would mean that whether the combat be by sea, land or air our men go into action accompanied by the law of civil negligence, warning them to be mindful of the person and property of civilians. It would mean that the Courts could be called upon to say whether the soldier in the field of battle or the sailor fighting on his ship might reasonably have been more careful to avoid causing civil loss or damage. No one can imagine a court undertaking the trial of such an issue, either during or after a war. To concede that any civil liability can rest upon a member of the armed forces for supposedly negligent acts or omissions in the course of an actual engagement with the enemy is opposed alike to reason and to policy. But the principle cannot be limited to the presence of the enemy or to occasions when contact with the enemy has been established. Warfare perhaps never did admit of such a distinction, but now it would be quite absurd. The development, of the speed of ships and the range of guns were enough to show it to be an impracticable refinement, but it has been put out of question by the bomber, the submarine and the floating mine. The principle must extend to all active operations against the enemy. It must cover attack and resistance, advance and retreat, pursuit and avoidance, reconnaisance and engagement. But a real distinction does exist between actual operations against the enemy and other activities of the combatant services in time of war. For instance, a warship proceeding to her anchorage or manoeuvring among other ships in a harbour, or acting as a patrol or even as a convoy must be navigated with due regard to the safety of other shipping and no reason is apparent for treating her officers as under no civil duty of care, remembering always that the standard of care is that which is reasonable in the circumstances Thus the commander of His Majesty's torpedo-boat destroyer *Hydra* was held liable for a collision of his ship with a merchant ship in the English Channel on the night of the 11th of February 1917, because he failed to perceive that the other ship, which showed him a light, was approaching on a crossing course. The hearing was *in camera* and obviously the *Hydra* was on active service and war conditions obtained (*H.M.S. Hydra* (1918) P. 78).

It may not be easy under conditions of modern warfare to say in a given case upon which side of the line it falls. But, when, in an action of negligence against the Crown or a member of the armed forces of the Crown, it is made to appear to the court that the matters complained of formed part of, or an incident in, active naval or military operations against the enemy, then in my opinion the action must fail on the ground that, while in the course of actually operating against the enemy, the forces of the Crown are under no duty of care to avoid causing loss or damage to private individuals.

There is no authority dealing with civil liability for negligence on the part of the King's forces when in action, but the law has always recognized that rights of property and of person must give way to the necessities of the defence of the realm. A good statement will be found by *Sir Erle Richards, Law Quarterly Review,* vol. 18, at p. 135. To justify interference with person or property, it must, according to some, be shown that the measures were reasonably considered necessary to meet an appearance of imminent danger. But this seems a strict test: See *Pollock* on *Torts,* 14th ed. (1939), p. 132, note t, and p. 134; *Law Quarterly Review* vol. 18, at pp. 138-141 and 158, and cp. *R.* v. *Allen* (1921) 2 I.R. 241.

> The uniform tendency of the law has been to concede to the armed forces complete legal freedom of action in the field, that is to say in the course of active operations against the enemy, so that the application of private law by the ordinary courts may end where the active use of arms begins. Consistently with this tendency the civil law of negligence cannot attach to active naval operations against the enemy.

In my judgment, the principles thus laid down are applicable in the present case. It follows that since the operations in which *H.M.C.S. Orkney* was engaged, although warlike operations, were not actual operations against the enemy, the officers charged with her navigation were not freed from the duty of care for the safety of merchant vessels. That a collision between one of His Majesty's warships and a merchant vessel in time of war may be attributed to the negligence of the commander of the warship is illustrated by a case such as *H.M.S. Hydra* (1), although it must be conceded that in that case it was not shown that at the time of the collision the warship was engaged in warlike operations. This fact may have prompted counsel for the respondent to contend that immunity from the duty of care for merchant vessels extended to the officers of a Canadian warship engaged in warlike operations even although they were not actual operations against the enemy. He suggested that the decision of the House of Lords in *Yorkshire Dale Steamship Company Ltd.* v. *Minister of War Transport* (2) supports this proposition but, as I read the reasons for judgment in that case, it has no applicability here. There the issue was whether the claimant's motor vessel had been stranded as a consequence of warlike operations and consequently entitled to war risk insurance. It does not touch the question whether persons engaged in warlike operations are free from the duty of care to which they would otherwise be subject.

The next defence put forward was a denial of the Court's jurisdiction to entertain the claim. Counsel for the suppliant urged that the officers charged with the navigation of the *Orkney* had been guilty of negligence in that they had failed to comply with the "Regulations for Preventing Collisions and for Distress Signals", generally known as the

(1) (1918) P. 78. (2) (1942) 78 Lloyd's List L.N. 1.

1951

NISBET SHIPPING COMPANY LIMITED v. THE KING

Thorson P.

International Rules of the Road, as established by Order in Council P.C. 259, dated February 9, 1897, as amended, particularly Article 19 which reads as follows:

> When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other.

Exception to this contention was taken on behalf of the respondent. It was objected that the Regulations do not bind the Crown, that the collision between the vessels occurred on the high seas and no provincial law of negligence can be applied to it, that section 19(*c*) of the Exchequer Court Act must be construed restrictively as covering only claims where a provincial law of negligence can be applied and that a claim based on negligence outside of Canada is not within its ambit.

I am unable to agree with these objections. It may be conceded that the Regulations do not bind the Crown but it is established that while they do not as such apply to His Majesty's ships they constitute a code recognized by all maritime nations as well adapted for preventing collisions at sea and embody principles of good seamanship that ought to be applied everywhere: *vide The F. J. Wolfe* (1). In the Court of Appeal Scott L.J. regarded the Regulations as the embodiment of principles of seamanship and said, at page 95:

> Those rules represent the considered views of almost generations of seamen of many nations.

and later, on the same page, expressed these views:

> since the abolition in 1911 of the statutory presumption of fault where there had been a breach of a regulation, it makes, generally speaking, very little practical difference whether one says that the rules for prevention of collisions are directly operative "as such", or merely "as a guide for seamanship" . . . but the principles of seamanship ought, in my view, always to be borne in mind, whether one calls them "rules" or "principles". Their bearing on maritime duty and fault under the one aspect or the other is normally just the same. Every skilled and experienced navigator has the regulations—the crossing rule at any rate—deeply ingrained in his mind, and reacts to it just as a natural stimulus from the brain acts on muscles. It is automatic.

But it is immaterial whether the Regulations were applicable as such or as an embodiment of principles of seamanship that the officers in charge of the navigation of

(1) (1945) P. 61; (1946) P. 91.

His Majesty's ships ought to apply, for *H.M.C.S. Orkney* was bound by the King's Regulations and Admiralty Instructions by reason of section 45 of the Naval Service Act, R.S.C. 1927, chap. 139, which provided:

> 45. *The Naval Discipline Act* 1866 and the Acts in amendment thereof passed by the Parliament of the United Kingdom for the time being in force, and the King's Regulations and Admiralty Instructions, in so far as the said Acts, regulations and instructions are applicable, and except in so far as they may be inconsistent with this Act or with any regulations made under this Act, shall apply to the Naval Service and shall have the same force in law as if they formed part of this Act.

The King's Regulations and Admiralty Instructions in force at the time of the collision were thus by an Act of the Parliament of Canada made applicable to His Majesty's Canadian warships wherever they were operating. Chapter XVI of these Regulations and Instructions contain regulations identical in wording with the Collision Regulations referred to with the result that the situation is similar to that which was pointed out by Sir Gorell Barnes J. in *H.M.S. Sans Pareil* (1). If the facts brought the case within the words of Article 19 it was the duty of the *Orkney* and the officers in charge of her navigation to keep out of the way of the *Blairnevis*. It set the standard for the duty of care to be followed: *vide* also *The Queen Mary* (2).

This disposes of the contention of lack of jurisdiction on the ground that because the collision happened on the high seas there was no provincial law of negligence that could be applied. While it has been established by the Supreme Court of Canada in *The King* v. *Armstrong* (3) and *Gauthier* v. *The King* (4) that the law of negligence to be applied in a claim under 19(*c*) of the Exchequer Court Act is that of the province in which the alleged negligence occurred as it was in force at the time when liability for negligence of that sort was first imposed upon the Crown, and these decisions have been followed and applied in this Court in *Tremblay* v. *The King* (5) and *Zakrzewzki* v. *The King* (6), it is not to be assumed that these decisions are an exhaustive statement of the applicable law. The appropriate provincial law was held to be applicable on the

(1) (1900) P. 267 at 272.
(2) (1949) 82 Ll. L. Rep. 303.
(3) (1908) 40 Can. S.C.R. 229 at 248.
(4) (1918) 56 Can. S.C.R. 176 at 180.
(5) (1944) Ex. C R. 1.
(6) (1944) Ex. C.R. 163.

1951

NISBET SHIPPING COMPANY LIMITED v. THE KING

Thorson P.

assumption that Parliament had this law in mind when it imposed the liability on the Crown since it had not specified what law was applicable. But these decisions can have no bearing in a case where Parliament has itself seen fit to establish the standard of care by which the conduct of its officers or servants is to be measured as it did in the present case when it made His Majesty's ships subject to the King's Regulations and Admiralty Instructions. In such case Parliament has itself enacted, within its competence, the law of negligence to be applied.

Nor can it be agreed, although the question is not free from difficulty, that section 19(*c*) must be restricted to claims based on negligence occurring within Canada. Although, as Maxwell on Interpretation of Statutes, 9th Edition, points out, at page 148, the legislation of a country is primarily territorial, it is also true, as the same author states, at page 151, that an intention that a statute shall have extra-territorial operation may be readily collected from the nature of the enactment. There would have been substance in the respondent's contention when liability for the negligence of its officers or servants was first imposed upon the Crown by section 16(*c*) of the Exchequer Court Act, as enacted in 1887, Statutes of Canada, 1887, chap. 16, when this Court was given exclusive and original jurisdiction to hear and determine:

> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment;

The liability for negligence was then a narrow one. In order to bring his claim within the statute a suppliant had to prove that his injury had occurred actually "on" a public work. If it happened "off" the public work itself he had no remedy even if the negligence which caused it had arisen "on" a public work. This was definitely settled by the Supreme Court of Canada in *Paul* v. *The King* (1) which was followed in a long line of cases. Under this state of the law there could be no claim based on negligence occurring outside of Canada for it was only when there was injury and negligence on a public work that the responsibility of the Crown was engaged. There was thus a territorial limitation of liability. This was not wholly removed by

(1) (1906) 38 Can. S.C.R. 126.

the amendment of section 16(*c*) of the Exchequer Court Act in 1917, Statutes of Canada, 1917, chap. 23, which had then become section 20. This repealed the previous enactment and substituted the following:

> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work.

Under the section as thus amended it was no longer necessary for a suppliant to prove either that his injury had happened actually "on" a public work or that the negligence which caused it had arisen "on" a public work. It did not matter where the injury happened or where the negligence arose so long as the suppliant could prove that his injury resulted from the negligence of an officer or servant of the Crown, while acting within the scope of his duties or employment, if such duties or employment were "upon any public work". In *The King* v. *Schrobounst* (1) these words were held to be descriptive of the kind of duties or employment rather than their physical locality. It was not necessary for a suppliant to prove that the duties or employment were actually "on" a public work so long as he could show that they were related to or connected with a public work. But while there was thus a substantial enlargement of the Crown's liability there was still room for argument that since Parliament imposed liability only where there was negligence by an officer or servant of the Crown while acting within the scope of his duties or employment upon any public work it could not have intended the imposition of liability where the negligence occurred outside of Canada, since there would be no duties or employment upon a public work outside of Canada. Then came the amendment of the Exchequer Court Act in 1938, Statutes of Canada, 1938, chap. 28, by which section 19(*c*) in its present form was enacted. This struck out the limitation of liability implied in the words "upon any public work". With the elimination of this limitation of liability the argument that there was a locational restriction of liability lost its potency. If officers or servants of the Crown are guilty of any negligence outside of Canada while acting within the scope of their duties or employment

(1) (1925) S.C.R. 458.

1951

NISBET SHIPPING COMPANY LIMITED v. THE KING

Thorson P.

and injury results therefrom I see no reason for assuming that Parliament did not intend that the responsibility of the Crown should be engaged. There is nothing in the section itself that warrants its restriction to claims based on negligence occurring within Canada. Moreover, when Parliament by the Naval Service Act made the King's Regulations and Admiralty Instructions applicable to His Majesty's Canadian ships it clearly intended that they should be applicable wherever such ships were operating. I am also of the view that section 50A of the Exchequer Court Act, to which reference has been made, has some bearing on the question. It provided as follows:

> 50A. For the purpose of determining liability in any action or other proceeding by or against His Majesty a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

Certainly it was intended that the deemed relation of master and servant should exist in the case of a member of His Majesty's Canadian forces wherever such member was serving and there is nothing to suggest that it was intended that there should be any territorial restriction of the liability for his negligence. I have, therefore, reached the conclusion, although not without some doubt, that the suppliant's claim is not outside the ambit of section 19(*c*) of the Exchequer Court Act by reason of the fact that the alleged negligence of the officers in charge of the navigation of *H.M.C.S. Orkney* occurred outside of Canada.

The disputed issues of fact may now be considered, the first being whether the officers charged with the navigation of the *Orkney* were guilty of negligence. The evidence establishes that the *Orkney* was coming slightly south of south-east on a course of 140 degrees and that the *Blairnevis* was going slightly north-east on a course of 26 degrees. The two vessels were thus on crossing courses involving risk of collision within the meaning of Article 19 of the Regulations and the *Orkney* had the *Blairnevis* on her starboard side. The latter was the stand-on ship and the former the give-way one. It was the duty of the *Orkney* to keep out of the way of the *Blairnevis* and her failure to do so without justification implies negligence on the part of the

officers charged with her navigation. These were Commander Browne, the officer commanding the *Orkney*, and Lieutenant Page, the officer of the watch on duty before and at the time of the collision. In my view, the evidence points to the conclusion that the failure of the *Orkney* to keep out of the way of the *Blairnevis* was due to fault on the part of these officers either severally or jointly. Indeed, counsel for the respondent did not even attempt to defend their conduct.

It cannot be said that the *Blairnevis* appeared suddenly in front of the *Orkney* making it impossible for the latter to avoid the collision. Commander Browne had been advised what to expect. He had been told that a convoy of ships was coming up from the south and that it would break up at the Skerries, one portion proceeding easterly to the Mersey and the other northerly to the Clyde. He ought, therefore, to have anticipated that there might be ships coming up on his starboard side and have seen that a proper lookout was kept for them. Moreover, as early as 1.10 a.m. while he was in the chart house observing the plan position indicator he had the report of the *Orkney's* radar indicating contact with the convoy she was to meet bearing on her starboard side and also the presence of an independent ship, which must have been the *Blairnevis,* also on her starboard side. This latter fact appears from the following answers of Commander Browne on his examination for discovery as an officer of the Crown:

Q. Wherever she was, she must have been picked up by radar somewhere off your starboard bow?

A. Yes.

Q. And she must have been picked up a long time before the collision?

A. That is correct.

Q. That is quite so?

A. Yes.

Q. And, Commander, we are not speaking now of two or three minutes. We are speaking of quite a period of time, as much perhaps as twenty minutes: that is correct also?

A. Yes.

There is also his report of the collision, dated February 20, 1945, in which it is stated that the *Blairnevis* was first seen at 1.30 a.m. and that she was then on a bearing of 210 degrees and approximately 7½ cables, 1,500 yards, away.

1951

NISBET SHIPPING COMPANY LIMITED v. THE KING

Thorson P.

While there was some dispute as to visibility Commander Browne put it at 1,500 yards. The other evidence is that lights could be seen much farther away. The second officer of the *Blairnevis* said that the visibility was good to pick up lights but not objects and that when coming along past the Skerries he could see the Skerries light over 10 miles away and Captain McKinnon said that he saw the stack lights on Anglesey 15 miles away. The *Blairnevis* was sailing under dimmed lights, a red light on her port side and a green one on her starboard side, and without a mast-head light. Commander Browne was in the chart room looking at the plan position indicator when he was told by the officer of the watch that there was a ship at 210 degrees on his starboard side and concluded that it was sufficiently far off the beam that he did not need to worry about it, but then he was advised very shortly afterwards that the ship was now 30 degrees and he then realized that that was very dangerous and came on the bridge. It was also stated that the first light of the *Blairnevis* that was seen was her red port navigation light. This was the sighting of the officer of the watch but Commander Browne said that he first saw it not more than a minute before the collision or not more than two minutes. It should also be remembered that prior to the collision the *Orkney* was sailing without any lights. Commander Browne said that he had switched on the lights at 1.30 a.m., which was 4 minutes before the collision, but on this point I prefer the evidence of the witnesses for the suppliant who were on the *Blairnevis* that when they first saw the *Orkney* she was unlighted and that her lights went on just a few seconds before the collision. The fact that the *Orkney* was sailing without lights made it all the more necessary to keep a sharp lookout for such vessels as the *Blairnevis* whose presence in the vicinity had been indicated or should have been anticipated. It was much easier for the *Orkney* to see the *Blairnevis* sailing with her dimmed navigation red light, which was visible at least a mile away, than for the *Blairnevis* to pick up the *Orkney* sailing without any lights. On the evidence I have no difficulty in finding that there was failure on the part of the responsible officer of the *Orkney* to keep a proper lookout for the movement of the *Blairnevis* on her starboard side from the time of her first reported presence at 1.10 a.m.

according to the radar and her first sighting by the officer of the watch at 1.30 a.m. according to Commander Browne's evidence. This failure must primarily be laid at the door of Lieutenant Page, the officer of the watch, who was temporarily in charge of the ship. If he had kept the lookout which he could and should have done the *Blairnevis* would have been seen sooner than she was and there would have been no difficulty in keeping the *Orkney* out of her way as Article 19 of the Regulations required. His failure to keep a proper lookout was negligence on his part from which the collision was a resulting consequence.

But, although the failure of the officer of the watch to keep a proper lookout was the prime cause of the collision, and this is sufficient to establish the suppliant's claim, I have also come to the conclusion that Commander Browne was not wholly free from fault. He did not act as promptly and appropriately as the situation demanded. He ought to have appreciated sooner than he did the risk of collision with the vessel on his starboard side which the radar had reported and the officer of the watch had sighted and should have taken charge sooner. If he had gone to the bridge sooner than he did the collision could have been averted. There is some question as to when he did come to the bridge after he realized the imminence of danger and what he did. He said that he did not appreciate the proximity of the ship until one of his officers told him that she was very close. He said that he first saw the red light of the *Blairnevis* not more than a minute or not more than two minutes before the collision and that he gave the order for half speed astern as soon as the presence of the ship was reported to him and the order full speed astern as soon as he appreciated how close she was. There is an important discrepancy between the oral evidence and the entries in the deck log and the engineer's log. The deck log shows that both engines were put half astern at 1.32½ a.m. and full astern at 1.33¼ a.m. and that the collision occurred at 1.34 a.m. But the engineer's log records the half astern order at 1.34, with the notation that the impact was felt, and the full astern order at 1.34½ a.m., which was half a minute after the collision. The *Orkney* was easily manoeuverable. Commander Browne said that he could bring her to a stop

1951

NISBET SHIPPING COMPANY LIMITED v. THE KING

Thorson P.

even at her top speed of over 10 knots in a minute or a minute and a half during which she would go 300 yards. He also said that at 1.30 a.m. he had switched on her lights and reduced her speed to 8 knots which would enable her to be brought to a stop in even a shorter time and distance. Commander Browne suggested that there had been delay on the part of the engineer in putting his orders into effect. If that is so then the engineer was negligent but I am of the view that Commander Browne cannot place the delay in stopping the engines and putting them full speed astern on the engineer. He was himself responsible. If he had acted more promptly he would have had time in which to bring the *Orkney* to a stop and so avert the collision. Moreover, there is substance in the submission that he failed to take the helm action, either hard aport or hard astarboard, that he ought to have taken. On the evidence, I have come to the conclusion that his failure to act as promptly and as appropriately as he ought to have done must be regarded as negligence on his part.

While counsel for the respondent admitted that on the facts the case against the *Orkney's* officers was a strong one he submitted that there was contributory negligence on the part of those on board the *Blairnevis* and that the suppliant's petition should, therefore, be dismissed. The submission would, in my judgment, be a sound one if such contributory negligence could be established, notwithstanding the division of damages in *Saint John Tug Boat Company Limited* v. *The King* (1), but as I view the evidence it does not warrant a finding of contributory negligence.

The first ground of contributory negligence assigned was that there had been failure on the *Blairnevis* to keep a proper lookout. It was submitted that it was imperative to keep a sharp lookout because the *Blairnevis* was sailing without a masthead light, that there should have been a lookout on the forecastle head instead of on the port wing of the bridge since there were gun nests in front of it, that if there had been a lookout on the forecastle the *Orkney* might have been seen sooner and steps taken to prevent the collision. It was also urged that the important duty of lookout ought not to have been entrusted to a young man

(1) (1945) Ex. C.R. 214; (1946) S.C.R. 466.

of 18 years. There is nothing in the evidence to support a finding of failure to keep a proper lookout. The presence of the gun nests in front of the port wing of the bridge would not obstruct the view from it of a vessel on the course taken by the *Orkney* and there is no foundation for the assumption that the *Orkney* would have been seen sooner if there had been a lookout on the forecastle instead of on the port wing of the bridge. Furthermore, it would have taken longer for a message to get back to the bridge from the forecastle than from the port wing. I also find that the young man who was posted on the port wing of the bridge saw the *Orkney* as soon as it could be seen and gave the alarm immediately. There was a proper lookout on the *Blairnevis*.

It was next urged that the *Blairnevis* had failed to take sufficiently prompt evasive action to prevent the collision. Reference was made to article 21 of the Regulations and the note thereto reading as follows:

> Article 21. Where by any of these Rules one of two vessels is to keep out of the way, the other shall keep her course and speed.
>
> Note:—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision.

It was submitted that since the *Orkney* was sailing without lights she could not be seen by lookouts on the *Blairnevis* until she was quite near, that consequently the situation was the same as if the *Blairnevis* had been sailing in thick weather—that is to say, when visibility is restricted by fog—and that as soon as the second officer of the *Blairnevis* saw the *Orkney* on his port side and that a collision was imminent he ought to have taken immediate action and reversed his engines to swing his bow to starboard and that he had failed to do so. The answer to this charge is that it was the duty of the *Blairnevis* as the stand-on ship to keep her course and speed and that the master of the *Blairnevis* took helm action hard astarboard just as soon as he saw that the *Orkney* was not going to keep out of the way.

The third count of contributory negligence charged to the *Blairnevis* was that as soon as the presence of a vessel on her port side was reported her masthead light should

1951

NISBET SHIPPING COMPANY LIMITED v. THE KING

Thorson P.

have been switched on in order to indicate her course to the *Orkney*. This would have made no difference for Commander Browne admitted that he had seen the red light of the *Blairnevis* and knew the direction in which she was proceeding.

Finally, it was argued that when the second mate gave the order for hard astarboard a signal of one blast should have been given as required by Article 28 of the Regulations. The answer to that is that even if there was a failure to give this signal such failure did not contribute to the collision: *vide The "Dotterel"* (1).

My conclusion is that there was no contributory negligence on the part of those on board the *Blairnevis*. When they first picked up the *Orkney* out of the dark on the port side of the *Blairnevis* and saw that she was not going to keep out of the way there was nothing that they could do to avert the collision. The fault was solely that of the officers charged with the navigation of the *Orkney*. I, therefore, find that the suppliant has brought its claim within the ambit of section 19(*c*) of the Exchequer Court Act and is entitled to damages.

It was agreed between counsel that if the suppliant should be found entitled to damages there should be a reference to the Registrar for an enquiry as to quantum. It was submitted for the respondent that the responsibility of the Crown should be restricted to the damages resulting from the collision and should not extend to the loss of the ship on the ground that it resulted from the negligence of the master and officers of the *Blairnevis* in not applying for tug assistance to get her to Liverpool sooner than they did. It was also suggested that the determination of this issue should be left to the Registrar as part of his enquiry. I have come to the conclusion that the Court ought to determine it as a matter of law so that the Registrar could proceed with his assessment of the damages on the basis so determined. I also find myself unable to accept the submission that the Crown ought not to be held responsible for the loss of the *Blairnevis*. The facts are against it. The collision tore a hole in her port bow in her No. 1 hold. The pumps were started immediately and Captain McKinnon

(1) (1947) 80 Ll.L. Rep. 272.

informed the *Orkney* that he was proceeding slow to Liverpool and requested her to accompany. The *Blairnevis* was found to be making water in the No. 1 hold and her engines were stopped. A collision mat was prepared and fixed over the hole and she went slow ahead but the mat was carried away and she stopped again. Captain McKinnon then, through the *Orkney,* requested a salvage tug. The collision mat was re-rigged and the ship went slow ahead. She was still making water in the No. 1 hold, the pumps were not able to keep up and Captain McKinnon again enquired about the tug. At 7.00 a.m. he informed the *Orkney* that a salvage tug was urgently required and asked her to come within hail. The *Orkney* did so and offered the use of her pumps but they were useless because of a difference in voltage. The second collision mat was put on and the *Blairnevis* tried to proceed slowly. At 11.20 a.m. the tug *Crosby* came alongside and put her pumps to work but the *Blairnevis* was making water fast and sinking slowly by the head. At 12.10 a.m. her foredeck was awash and at 12.12 her engines stopped and her No. 1 hold was full of water. At 12.40 a.m. the salvage tug *Watchful* came alongside and commenced pumping water from the No. 1 hold but could not lower it. There was a strong breeze blowing and in the heavy swell seas were breaking continuously over the deck. At 13.00 p.m. the pumping operations ceased, the pumps were disconnected and preparations were made to beach the ship. The crew was taken off and she was taken in tow by two tugs and towed stern first towards the Zebra Bank. At 16.45 a.m. she went aground and at 17 a.m. she was re-boarded by her master, officers and a few members of the crew. The *Watchful* was standing by hoping to refloat her at high tide and beach her so that the hole in her side would be accessible at low water. At high tide the *Blairnevis* was again taken in tow by four tugs and beached, but the heavy seas and the condition of the ship made it impossible to continue salvage operations on that tide. Finally, the master received instructions from the Salvage Master on the *Watchful* to be prepared to abandon ship. It seemed doubtful whether the tugs could get alongside to take off the crew and the *New Brighton* lifeboat was called out but this proved unnecessary for at 3.30 a.m. on February 14, one of the

1951

NISBET SHIPPING COMPANY LIMITED v. THE KING

Thorson P.

tugs succeeded in coming alongside and taking off the crew. At high water the vessel was boarded by a salvage crew and found to be almost completely broken in half. Subsequently, the Liverpool and Glasgow Salvage Association and the Mersey Dock and Harbour Board concluded that the salvage of the *Blairnevis* was impracticable and notice was given by the Board that she had become an obstruction that had to be removed. It was impossible to hold a survey on her. The owners had no alternative other than to submit to the decision of the Board and could do nothing to minimize their loss. It was urged that if the assistance of a tug had been requested earlier the *Blairnevis* might have been saved. That may possibly be so, but there is nothing to suggest that the master and officers were negligent in not requesting aid sooner. Captain McKinnon did not think that his ship was as badly damaged as it turned out to be. He asked for aid as soon as his collision mat went away and thought that an earlier call for assistance would not have made any difference. Nor should any fault be attributed to him for not sending his request for aid by wireless. It was not for him to break radio silence and bring possible danger from submarines to escort and other vessels. I am satisfied that the master and officers of the *Blairnevis* did everything that was reasonable to save their ship and no responsibility for her loss should be attributed to them. Her loss must be regarded as the result of the negligence of the officers of the *Orkney* and I so find. It is on that basis that the Registrar should assess the suppliant's damages.

There remains only the contention that the respondent has the right to limit his liability to $38.92 for each ton of the *Orkney's* tonnage and a decree of limitation of liability accordingly is sought. The right is claimed under section 649(1) of the Canada Shipping Act, 1934, Statutes of Canada, 1934, chap. 44, which provides as follows:

649. (1) The owners of a ship, whether registered in Canada or not, shall not, in cases where all or any of the following events occur without their actual fault or privity that is to say—

(i) where any loss of life or personal injury is caused to any person being carried in such ship;

(ii) where any damage or loss is caused to any goods, merchandise, or other things whatsoever, on board the ship;

(iii) where any loss of life or personal injury is, by reason of the improper navigation of the ship, caused to any person carried in any other vessel;

(iv) where any loss or damage is, by reason of the improper navigation of the ship, caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel;

be liable to damages in respect of loss of life or personal injury, either alone or together with loss or damage to vessels, goods, merchandise, or other things, to an aggregate amount exceeding seventy-two dollars and ninety-seven cents for each ton of their ship's tonnage; nor in respect of loss or damage to vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding thirty-eight dollars and ninety-two cents for each ton of the ship's tonnage.

In my opinion, the application for limitation of liability should not be granted. Section 712 of the Canada Shipping Act, 1934, provides:

712. This Act shall not, except where specially provided, apply to ships belonging to His Majesty.

It should be noted that as a matter of law the liability of ship owners for damage done by their ship to another ship is unlimited except in so far as that law has been modified by statute: *vide* Dr. Lushington in the *Wild Ranger* (1). The applicant for limitation of liability must, therefore, show that his claim falls within a modifying statute and that the general rule does not apply to him. This the respondent cannot do. Counsel for the respondent sought to escape from section 712 by contending that, while it stated that the Act, except where specially provided, did not apply to His Majesty's ships, it did not state that the Act did not apply to His Majesty as the owner of the ships and that consequently he could take advantage of the limitation of liability conferred by section 649. I am unable to accept this restriction on the meaning of section 712. I find support for a larger view of it, namely, that it means that the Act, except when specially provided, does not apply to His Majesty, in the statement of Kerwin J. in *The King* v. *Saint John Tug Boat Co. Ltd.* (2) that by section 712 section 640 of the Act does not apply to His Majesty. I am similarly of the view that section 649 of the Act does not apply to His Majesty and that he is not entitled to any limitation of liability under it.

(1) (1863) Lush. 564, s.c. 7 L.T.N.S. 725.

(2) (1946) S.C.R. 466 at 468.

1951

NISBET SHIPPING COMPANY LIMITED v. THE KING

Thorson P.

This disposes of the contention but, even apart from this ground, there is also the fact that there is no evidence before me of tonnage on which a limitation of liability could be based.

The result is that there will be judgment that the suppliant is entitled to damages for the loss of the *Blairnevis* in such amount as will be found by the Registrar on the enquiry to be held by him. The suppliant is also entitled to costs.

Judgment accordingly.

1951

Mar. 13, 14, 15 & 16, Apr. 30 May 1 & 2.

July 26

BETWEEN:

JOE'S & CO. LIMITED .....SUPPLIANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

Crown—Petition of Right—Contract—No recovery on quantum meruit or for damages—Petition dismissed.

Suppliant contracted with the Crown to construct twenty dwelling houses. After completion of the work suppliant was paid in full the contract price and the security deposited by it was returned. It now seeks to recover from respondent a further sum made up of several items set forth in the petition no claim for which was at any time made by suppliant in writing to the respondent during the course of the work contracted to be done, nor was the contract repudiated by suppliant. Some of the claims refer to specific items covered by the contract and others are alleged to have arisen through wrongful acts or omissions of the respondent.

The Court found that the suppliant failed to substantiate its claim for the specific items covered in the contract and that the acts or omissions complained of should have been in the contemplation of suppliant at the time the contract was signed.

Held: That the rights of the parties must be determined by the provisions of the contract and the contention of suppliant that it is entitled to recover on a *quantum meruit* basis fails since the contract provided the amounts to be paid to suppliant and any claim for damages must also fail as suppliant has not established any breach of the obligations imposed on respondent by the contract.

PETITION OF RIGHT by suppliant to recover from the Crown money alleged owing it.

The action was tried before the Honourable Mr. Justice Graham, Deputy Judge of the Court, at Winnipeg.

Irving Keith, K.C. and *P. W. A. Westbury* for suppliant.

Hugh Phillipps, K.C., C. K. Tallin, K.C. and *K. E. Eaton* for respondent.

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

GRAHAM, D. J. now (July 26, 1951) delivered the following judgment:

The suppliant, Joe's & Company Limited, carries on its business of contractors, builders and engineers, in the province of Manitoba. Its active principal is Mr. Joe Jacobucci who has had considerable experience in the contracting business of the nature here involved.

On August 30, 1948, the suppliant submitted a tender for the construction of twenty dwelling houses for the Minister of Justice, representing the Crown, at or near the Manitoba Penitentiary at Stony Mountain. The houses were to be built for the use of members of the staff of the Penitentiary.

The amount of the tender was $147,700. However, before any contract was signed, the suppliant found that labour and material costs had advanced in the interval and as a result a fresh tender was submitted for $162,900. This was accepted, and on September 30, 1948, a contract was duly entered into between the respondent and the suppliant.

The contract is in the form usual in such transactions and attached thereto and made part of the contract were the plans and specifications of the works to be completed by the suppliant.

The contract is a "lump sum" or "firm" contract in as much as the contractor agrees to accept a fixed amount as payment for the work to be performed. The houses were to be of three types, distinguished as types A, B and C. They were laid out in groups. Group 1 comprised eight houses; group 2, three houses; group 3, six houses and the southern group, three houses.

The suppliant, as it was required to do, prior to submitting its tender, had examined the site of the proposed buildings and certified to this in the tender submitted.

1951

JOE'S & CO. LTD. v. THE KING

Graham D.J.

The evidence discloses that rods were driven into the ground at different points on the site to determine the nature of the terrain below the surface.

This examination disclosed the likelihood that rock would be encountered in making the excavations of the basements called for in the contract. When the parties met to sign the contract, Mr. Jacobucci intimated this likelihood to Mr. Catto, the Chief Penitentiaries Engineer, and the one authorized to act for the respondent. What was said at the time is not too clear, but it appears that Mr. Catto told Mr. Jacobucci that in such an event, the respondent would help in the blasting and removal of the rock. In any event rock was encountered and the respondent did the necessary blasting, removal of boulders, filling in where necessary and the rough levelling of the basement sites.

After the signing of the contract, representatives of the parties, including Mr. Catto, and Mr. Brown, the engineer and secretary of the suppliant company, met at the site to determine the levels at which the houses were to be built and the location of the individual houses. The governing factor in determining the levels was the relationship of the sewer connections to be installed to a main sewer line already in existence on or near the site, and with which the new lines would be connected.

The suppliant then moved a bulldozer out to the premises and commenced excavating some of the basements. Rock was encountered at different levels ranging from 9 inches to 2 feet. It then became apparent that blasting operations would be necessary if the levels agreed upon were to be maintained.

As a result of discussions that took place between Mr. Lyons, the chief trade instructor of the Penitentiary and Mr. Brown, the engineer in charge for the suppliant, authority was received on October 16, from the Commissioner of Penitentiaries, to raise the levels to "rock level" as found necessary, but with the limitation that each individual house be held as nearly as possible to original grade level. The levels were raised accordingly in some cases from 2 to 3 feet, and the houses built to conform thereto.

There is a conflict in the evidence as to which parties suggested this change. Mr. Jacobucci says that Mr. Lyons did, and that he (Mr. Jacobucci) pointed out that such a change would involve considerable added expense because of the pouring of concrete at higher levels, the necessity of using ramps and added scaffolding and the filling in of the surrounding area to the grade level. He says that he was assured that the filling in would be done by the respondent as soon as the forms for the concrete were taken down. Mr. Lyons on the other hand, says that Mr. Brown, the suppliant's engineer, asked permission to change the levels and that he undertook to submit the matter through the Warden, to the Chief Penitentiaries Engineer in Ottawa, which he did.

If it were necessary, I would have to accept the evidence of Mr. Lyons as to what took place and to hold that the suggestion to raise the levels came from the suppliant. I come to this conclusion not only because of the credence I give to the evidence of Mr. Lyons, with whom I was favourably impressed as a witness, but on the circumstances and position of the contracting parties at that time.

However, it is not necessary that this point be decided since the evidence shows that there was a mutual acceptance of the change in the levels, and in my opinion, neither party can now complain as to the results that flowed from that decision. The settlement of the levels is always a preliminary to the work of construction such as contemplated here.

The works covered by the contract were in due course completed. During the course of the work, progress reports were made from time to time, and payment, I assume, made accordingly. In any event, it is not disputed that the suppliant received in final settlement under the contract the full sum of $162,900, and the security deposited by it, returned.

The suppliant now claims, by way of petition of right, that the respondent should pay to the suppliant the further sum of $26,205.31.

1951

JOE'S & CO. LTD. v. THE KING

Graham D J.

This claim is comprised of several items which may be summarized as follows:

1.	The filling in of mortised recesses in doors and the re-mortising to fit different types of hardware supplied by respondent	$ 1,004.00
2.	Cutting back of eaves on four houses	300.00
3.	Cutting back of bulkheads on stairway in 8 houses to give head-room	960.00
4.	Change in windows on 5 type B houses	175.00
5.	Cost of levelling basements	979.20
6.	Cost of lumber and labour for constructing scaffolds and ramps	1,275.00
7.	Cost of extra labour in pouring concrete	680.00
8.	Cost of moving back equipment, materials and labour to site for laying of sidewalks	494.50
9.	Added labour costs	20,337.61
	Total:	$ 26,205.31

At the hearing, the petition was amended to correct an error of $10 in the mathematical computation of the claim asserted in Item 3 which should total $960, and again to correct the total claimed in the prayer of the suppliant from $25,710.81 to $26,205.31.

It should be noted that the suppliant at no time during the course of the work made any claim in writing to the respondent for payment of any of these items.

On July 25, 1949, the suppliant wrote Mr. Catto a letter, exhibit 10, in which it is stated that the houses could not be completed for less than $9,500 per unit, an amount in excess of what was to be paid. The letter says that there were several contributing causes, one of which was the "layout of the terrain as each unit has been practically surrounded by sewer excavations and ditches which has made material handling extremely difficult and has increased our labour costs by approximately 2/5 more than anticipated." Another is stated to be "the overall wage increase granted by the Manitoba Fair Wage Act." Finally the letter asks for favourable consideration and an adjustment of the contract price. This request was refused and the suppliant so advised.

In my opinion, this letter of Mr. Jacobucci was a general plea for recognition of the difficulties encountered by the suppliant but is not a claim in writing for payment of any of the above items in conformity with clauses 41 and 42 of the contract.

1951

JOE'S & CO. LTD. v. THE KING

Graham D.J.

These clauses read as follows:

41. It is intended that every allowance to which the Contractor is fairly entitled will be embraced in the Engineer's monthly certificate, but should the Contractor at any time have claims of any description which he considers are not included in the progress certificates such claims must be made in writing to the Engineer within thirty days after the date of the delivery to him of the certificate from which he considers the items of such claims to have been omitted, but in no case beyond the period of sixty days from the date of the practical completion of that portion of the work to which such claims apply. And in default of the presentation of such claims within the time or times so limited the Minister may treat such claims as absolutely barred.

42. The Contractor in presenting claims of the kind referred to in the last preceding clause must accompany them with satisfactory evidence of their accuracy and the reason why he thinks they should be allowed.

The other clauses of the contract which have peculiar importance in dealing with the issue before me are Clauses 7, 8, 10, 17 and 56. These read as follows:

7. The Engineer may, in writing, at any time before the final acceptance of the works, order any additional work or materials or things not covered by the contract to be done or provided, or the whole or any portion of the works to be dispensed with, or any changes to be made which he may deem expedient in or in respect of the works hereby contracted for, or the plans, dimensions, character, quantity, quality, description, location or position of the works or any portion or portions thereof or in any materials or things connected therewith or used or intended to be used therein or in any other thing connected therewith or used or intended to be used therein or in any other thing connected with the works, whether or not the effect of such orders is to increase or diminish the work to be done or the materials or things to be provided or the cost of doing or providing the same, and the Engineer may in such order, or from time to time as he may see fit, specify the time or times within which each order shall, in whole or in part, be complied with. The Contractor shall comply with every such order of the Engineer. The decision of the Engineer as to whether the compliance with such order increases or diminishes the work to be done or the materials or things to be provided, or the cost of doing or providing the same and as to the amount to be paid or deducted, as the case may be, in respect thereof, shall be final. As a condition precedent to the right of the Contractor to payment in respect of any such order of the Engineeer the Contractor shall obtain and produce the order, in writing, of the Engineer and a certificate in writing, of the Engineer showing compliance with such order and fixing the amount to be paid or deducted in respect thereof.

8 All the clauses of this contract shall apply to any changes, additions, deviations, or additional work, so ordered by the Engineeer, in like manner and to the same extent as to the works contracted for.

10. The Engineer shall be the sole judge of the work and material, in respect of both quality and quantity, and his decision on all questions in dispute with regard thereto or as to the meaning or intention of this contract and as to the meaning or interpretation of the plans, drawings and specifications shall be final, and no work under this contract shall be deemed to have been performed nor materials nor things provided so as to

1951

JOE'S & CO. LTD. v. THE KING

Graham D.J.

entitle the Contractor to payment therefor unless and until the Engineer is satisfied therewith, as evidenced by his certificate in writing, which certificate shall be a condition precedent to the right of the Contractor to be paid therefor.

17. His Majesty may, at any time, and without payment therefor, send and employ on, in and about the works other contractors and workmen, with such horses, machinery, tools, plant, equipment, materials, articles and things as the Engineer may deem necessary to do any work not comprised in this contract, and the Contractor shall afford to them all reasonable facilities, to the satisfaction of the Engineer, for doing such work, the work of the Contractor being interfered with as little as the Engineer may deem practicable . . .

56. This contract is made and entered into by the Contractor and His Majesty on the distinct understanding that the Contractor has, before execution, investigated and satisfied himself of everything and of every condition affecting the works to be executed and the labour and material to be provided, and that the execution of this contract by the Contractor is founded and based upon his own examination, knowledge, information and judgment, and not upon any statement, representation, or information made or given, or upon any information derived from any quantities, dimensions, tests, specifications, plans, maps or profiles made, given or furnished by His Majesty or any of His Officers, employees or agents; and that any such statement, representation or information, if so made, given or furnished, was made, given or furnished merely for the general information of bidders and is not in anywise warranted or guaranteed by or on behalf of His Majesty; and that no extra allowance will be made to the Contractor by His Majesty and the Contractor will make no claim against His Majesty for any loss or damage sustained in consequence of or by reason of any such statement, representation or information being incorrect or inaccurate, or on account of unforeseen difficulties of any kind.

Now as to the claims in detail.

1. *The filling in of mortised recesses in doors and the re-mortising to fit different types of hardware supplied by respondent.*

Under the terms of the contract, the respondent was to furnish the finish hardware, including door locks. The suppliant was to mortise the doors to permit these locks to be fitted therein. Apparently the suppliant assumed the respondent would furnish standard hardware, and without instructions proceeded to mortise the doors accordingly. When furnished with the locks, it was apparent that these would not fit the mortised recesses in the doors, and as a result, the suppliant had to fill in the recesses and re-mortise to fit the locks furnished by the respondent. This is clearly evidenced by the letter of Mr. Jacobucci put in as Exhibit E and dated July 7, 1949. It follows therefore,

that the extra work that had to be done was the result of the suppliant's failure to await instructions as he was required to do. This claim must fail.

2. *Cutting back of eaves on four houses.*

In the plans, the stairway from the first to the second floor calls for eleven risers of a fixed depth from the first floor to a landing on the stairs and for three further risers from the landing to the second floor. The landing was just above the location of a rear door from the kitchen, and the suppliant, in building the stairway, decided that if it were built according to plan it would not permit (in height) the installation of the door in the kitchen. Without consulting anyone representing the respondent, the suppliant added a riser to the eleven called for in the plan. As a result, the landing was raised by some 7½ inches. A door opened from the landing on to the upstairs balcony and it was found that the storm door thereon opening outwards would not open because it came in contact with the eaves. In order to take care of this problem, a portion of the eave was cut out, thus permitting room for the door to open. When this was drawn to the attention of Mr. Catto, he accepted the change but instructed that the eave on the other side of the house be cut out to the same extent to balance the appearance of the house. This was done and the claim made by the suppliant rests on these facts.

However, it was pointed out by Mr. Catto, that the better way to solve the original difficulty was to decrease the height of the door in the kitchen; this would permit the stairway to be built to plan and there would be no difficulty with the storm door off the landing. This was done in the remaining houses of that type.

In my opinion, this extra work and expense was occasioned by the suppliant's failing to consult and secure the approval, as required in the contract, of the respondent, before making a change in the plans. Apparently the engineer or foreman of the suppliant failed to take into proper account the results of inserting the extra riser and the raising of the landing floor. The suppliant therefore, was the author of his own difficulty and this claim cannot succeed.

1951

JOE'S & CO. LTD. v. THE KING

Graham D J.

3. *Cutting back of bulkheads on stairway to give head-room.* This change was made necessary by the lack of head-room on the stairs from the first to the seecond floor. Mr. Lyons noticed the difficulty when going over a "model house" with the suppliant's foreman and drew attention to it. At the hearing there was considerable discussion as to the cause of this deficiency of head-room. The suppliant says it resulted from an error in the plans, and the respondent that it was due to the unauthorized insertion of the extra riser in the stairs. The evidence is confusing on the latter point. I am of the opinion, that if the stairway was actually built from the same starting point on the first floor and the measurements of the risers and steps made as called for in the plans, and providing the landing was cut back or changed to permit the insertion of an extra riser, that this would not affect the head-room. If however, the landing was not altered and the slant of the stairway was made steeper to permit of the insertion of the riser then of course the angle of ascent would affect the head-room. However, Mr. Catto, on being advised of the difficulty, approved of cutting off of an angle of the floor of the upstairs linen closet which formed the bulkhead and this alteration provided the necessary head-room. The deficiency was discovered in the early stage of construction and the correction would have involved little labour and cost, much less, in my opinion, than claimed by the suppliant, both as to the number of houses affected and the cost of making the alteration.

Such a difficulty must often occur in building contracts of this nature, and I would assume the suppliant's engineer or foreman would have noticed it immediately and taken the proper steps to have it corrected. However, assuming there was an error in the plans and that as a result the alteration had to be made, the suppliant failed to carry out the provision of the contract in asserting such a claim. Clause 7 of the contract deals with "extra work" and payment therefor. Clauses 41 and 42 provides for the manner and the time in which such a claim must be made.

I find that the suppliant failed to comply with the provisions referred to and this claim is therefore barred.

These provisions I may say have application to all of the claims asserted by the suppliant and I propose to refer to them later in this judgment.

4. *Change in windows on five type B houses.*

This change was made with the approval of Mr. Catto to correct the difficulty of the stair landings in type B landings projecting over the kitchen window. The solution adopted was to cut down the size of the window in each kitchen. The error was discovered after the window frames had been inserted in two houses. The suppliant says he had ordered the frames for all of the houses although these had not been delivered. Just what extra cost was involved is not clear from the evidence. This claim, in my opinion, would be justified as an extra to the extent it imposed extra labour and cost on the suppliant. However, here again the suppliant is met by his failure to comply with the provisions of the contract in asserting this claim. My remarks with regard to item 3 are generally applicable to this claim and it too must fail.

5. *Cost of levelling basements.*

This claim has no merit. Under the contract, the suppliant is required to level the basements and the evidence establishes he did no more than he would be required to do in any contract of this nature.

The claims already dealt with differ from the other claims asserted by the suppliant in as much as they refer to specific items covered by the contract. The remaining claims and to some extent the last dealt with claim, item number 5, are alleged to have arisen through the wrongful acts or omissions of the respondent.

These alleged wrongful acts or omissions may be listed as follows:

1. The raising of the levels of the houses.

2. The failure of the respondent to fill in the areas surrounding the dwellings as soon as this should have been done.

3. The blasting of the sewer and water mains by the respondent during the time the suppliant's workmen were engaged on the work.

4. The employment of prison labour by the respondent.

1951

JOE'S & CO. LTD. v. THE KING

Graham D.J.

5. The bricklaying done by the respondent and the interference caused thereby to the workmen of the suppliant.

6. The failure of the respondent to back fill at the proper time up to the proper level to permit the suppliant to lay the sidewalks.

These acts and omissions, as alleged, are set out in detail in the suppliant's petition of right, and these details need not be repeated here. The suppliant says in effect, that none of them were contemplated at the time of entering into the contract, that they interfered with the suppliant's carrying out of its work and that they imposed on the suppliant added labour and material costs which should be borne by the respondent.

The suppliant is somewhat vague as to the legal basis of its claim. Counsel submitted that it rests in either damages or compensation. I can understand the difficulty with which counsel was faced in this matter. The principle chiefly relied upon is that enunciated in *Bush* v. *Whitehaven Trustees,* reported in the 4th ed. of Hudson on Building Contracts, vol. II, at p. 122. The principle referred to is set out in the headnote:

> Where the circumstances contemplated by a building contract for works are so changed as to make the special conditions of the contract inapplicable, the contractor may treat the contract as at an end and recover upon a *quantum meruit.*

Counsel for the suppliant cited a number of authorities to show that here and in England the decision in the Bush case has been and continues to be approved by the Courts. *Lyall* v. *Clark,* (1); *Boyd* v. *South Winnipeg Ltd.,* (2); *British Movietonews Limited* v. *London and District Cinemas, Limited* (3).

There is a question in my mind as to whether such a principle would be applicable to the Crown. Many statutory safeguards are provided against the Crown being faced with unauthorized liability. The provisions in the Public Works Act, ch. 166 (1927) R.S.C. and the Consolidated Revenue and Audit Act, ch. 178 of the same statutes are examples of these.

(1) (1933) 2 D.L.R. 737.
(2) (1917) 2 W.W.R. 489.
(3) (1950) 66 No. 2 T.L.R. 203.

Ritchie, J. in *Jones* v. *The Queen* (1), discusses a similar type of contract and the position of the Crown in relation thereto, and his remarks have some application here. It is apparent that difficulties would arise if public officials denied the authority without compliance with the safeguards to make contracts binding on the Crown, could by their laches bring about the same result. However, it is not necessary for me to decide this particular point and I do not attempt to do so in this judgment.

In the Bush case, the decision was based on a finding by a jury that the conditions of the contract had so completely changed by reason of the failure of the defendant to hand over the sites of the work as required as to make the special provisions of the contract inapplicable.

It was on that finding of fact that the Court of Appeal upheld the judgment below: that the plaintiff was entitled to consider the original contract at an end and to claim on a *quantum meruit* basis for the work performed.

Here the suppliant saw fit to rely on the contract throughout, to accept interim payments and finally, to accept a final settlement thereunder. At no time did the suppliant repudiate the contract, and at the hearing counsel made it clear that the suppliant had no intention of so doing. I think for this reason, if for no other, the suppliant fails to bring his petition within the principle laid down in the Bush case and thus become entitled to claim on a *quantum meruit*.

Furthermore, I am unable to find that the conditions under which the work was performed were so changed from those contemplated at the time of entering into the contract as to give rise to the application of the decision in the Bush case.

I have carefully considered the acts and omissions complained of and already listed herein, and in my opinion, these should have been anticipated by the suppliant at the time of entering into the contract. I have, to some extent, already dealt with the raising of the levels of the houses. When these were raised by mutual agreement the suppliant knew, or should have known, of the results that would flow therefrom; in fact, in his evidence, Mr. Jacobucci says that

(1) (1877) 7 S.C.R. 570 at 600.

1951

JOE'S & CO. LTD. v. THE KING

Graham D.J.

at the time of raising the levels he anticipated most of the results therefrom. The need of longer ramps, increased scaffolding, the difficulty of getting material into the houses, and the necessity of filling up to grade must all have been in the mind of the suppliant or its principals at the time the levels were settled. It is true that some of the filling up by the respondent was delayed by the lack of trucks available to move the material. This delay, however, did not constitute such a change as to disturb the contractual relationship of the parties.

Section 17 of the contract provides that the respondent may move materials and workmen on the site at any time. The construction of the sewer and water lines was to be done by the respondent. The suppliant was well aware of the presence of rock and that the excavation of the trenches would necessitate blasting operations by the respondent.

In my opinion too, the suppliant should have anticipated the employment of prison labour by the respondent in carrying out the work to be done by the respondent in and around the site. This comment applies equally to the bricklaying which the suppliant knew was to be done by the respondent.

The evidence is not too satisfactory as to the back filling necessary to permit the laying of the sidewalks. However, assuming that the respondent delayed the filling in, this was comparatively a minor inconvenience and would not disturb the application of the contract.

Finding as I do that the acts or omissions complained were or should have been in the contemplation of the suppliant at the time of signing the contract, it follows that the rights of the parties must be determined by the provisions of the contract. See remarks of Lamont, J. in *Lyall* v. *Clark* (*supra*) at p. 744.

Counsel for the suppliant criticizes the contract as harsh and one sided, submitting that the Court will, under certain circumstances relieve against the "tyranny" of the provisions. *Parkinson* v. *Commissioners of Works* (1); *British Movietonews Ltd.* v. *London and District Cinemas, Limited* (*supra*).

(1) (1949) 2 K.B. 632.

1951

JOE'S & CO. LTD. v. THE KING

Graham D.J.

I must say that I cannot agree with counsel that the judicial decisions referred to have application here. When it is recalled that the Dominion Government, as representing the Crown, has to enter into many contracts in all parts of Canada of a like nature, it is not surprising that the terms are stringent in order to protect the public treasury. I think the words of Ritchie, J. in *Jones* v. *The Queen* (*supra*) at p. 616 have application here:

> The contract may be of a stringent nature, but whether more so than the nature of the subject-matter, the magnitude of the undertaking and the large public interests involved required and the action of Parliament necessitated, may be extremely doubtful. It must be borne in mind that the commissioners and chief engineer, with whom the contractors had to deal, and in whom such large powers were, no doubt, vested, stand in a very different position from private parties or corporations contracting on their own behalf, or engineers employed by parties so situated. They were appointed by the Crown to manage, superintend and carry to completion a great Dominion undertaking in which they had no private or individual interest. Disinterested public officers, who stood indifferent as it were, between the Crown and the contractors, and who could have no interest in bearing hardly or unjustly on the contractors, and whose only interest could be honestly and faithfully to discharge their public duties. Very probably considerations of this character may have influenced the contractors in agreeing to be bound by stipulations so stringent; be this so or not, the parties voluntarily entered into the contract, and by it must they be bound. It is difficult to recognize any very great hardship, still less any wrong, in requiring parties to be bound by and fulfil contracts fairly entered into according to their plainly expressed terms and conditions.

In that decision, the learned judge discusses at some length contracts of a like nature and reviews decisions of the Courts both in England and the United States in regard thereto.

The officials of the Crown who were before me appeared without exception to be "disinterested public officers," and I doubt if any interpretation of the contract or its application made by these would be unduly harsh or unconscionable in so far as the suppliant was concerned.

If the suppliant, therefore, claims on a *quantum meruit* this must fail since the contract provides for the amounts to be paid to the suppliant. If the suppliant rests his claim in damages then it must be for some breach of the obligations imposed by the contract on the respondent. I can find no such breach and such a claim too, must fail. If, finally, it is for extra compensation, then I must hold that

1951

JOE'S & CO. LTD. v. THE KING

Graham D.J.

the parties are bound by the terms of the contract and there is no provision therein for any such extra compensation.

The suppliant's claim must therefore be dismissed with costs.

While, there is, I repeat, no legal liability resting on the respondent, I am of the opinion that the suppliant has some claim for compensation on moral grounds in regard to the following items:

1. Cutting back of bulkheads to give head-room on stairways;

2. Changes in kitchen windows;

3. The added cost occasioned the suppliant by the respondent's inability to fill in up to grade as quickly as anticipated, and,

4. The interference with the suppliant's workmen due to the blasting operations in excavating the sewer and water lines.

I therefore make the suggestion that the added labour and material costs occasioned by these, could reasonably be determined by the Chief Penitentiaries Engineer and the amount so found, paid *ex gratia* by the respondent to the suppliant.

I make the above recommendation because I am of the opinion that had the suppliant complied with the provisions of the contract in regard to asserting such claims in the proper manner and at the proper time, these might well have been allowed.

Judgment accordingly.

BETWEEN:

DURAND AND CIE. .....PLAINTIFF;

AND

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

Practice—Motion to set aside a default judgment and for an order permitting the defendant to defend—Exchequer Court Rule 127—Affidavit of merits stating facts showing substantial ground of defence necessary.

Held: That where a judgment by default is regularly obtained an affidavit of merits stating facts showing a substantial ground of defence is necessary; and when merits are shown and a satisfactory excuse for neglect given, the judgment may be set aside on terms.

1951

DURAND AND CIE. v. LA PATRIE PUBLISHING CO. LTD.

MOTION to set aside a default judgment granted on an *ex parte* application and for an order permitting the defendant to defend.

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

G. F. Henderson for the motion.

Redmond Quain, K.C. contra.

CAMERON J. now (August 28, 1951) delivered the following judgment:

This is a motion to set aside a default judgment granted on the *ex parte* application of the plaintiff on February 5, 1951, and for an order permitting the defendant to defend. On December 20, 1950, the plaintiff instituted infringement proceedings alleging that it was the owner of the copyright in the opera "Pelleas and Melisande" (by Debussy and Maeterlinck) and that the defendant, the owner of Radio Station CHLP, performed or caused to be broadcast over that station the said work in its entirety (or substantially so) by the playing of records, thereby infringing the rights of the plaintiff. The plaintiff claimed damages in the sum of $600 and costs.

The statement of claim was served on the defendant on January 4, 1951, by serving a copy thereof on O. L. Bourque, General Manager of the defendant corporation. The defendant not having filed any defence thereto, the plaintiff on February 5 noted the pleadings closed and on February 15 made an *ex parte* application for judgment under the provisions of Rule 124(*b*). The motion was granted with costs and with a reference to the Registrar to ascertain and report the amount of damages sustained by reason of said infringement.

The Registrar's appointment to proceed with the reference on March 12, 1951, was served upon the defendant, but on that date it was adjourned by consent to March 26 and then further adjourned to April 9. In the interval it appears that the defendant had retained a firm of solicitors and certain correspondence followed between that firm and the plaintiff's solicitors, all without prejudice. On April 5 the defendant's solicitors paid into Court the sum of $200, alleging that that sum was sufficient to satisfy

1951

DURAND AND CIE. v. LA PATRIE PUBLISHING CO. LTD.

Cameron J.

the plaintiff's claim. The plaintiff refused to accept that amount in satisfaction. On April 9 the defendant moved to further adjourn the reference and the Registrar granted the motion, adjourning the hearing until April 23.

The defendant then changed its solicitors and served notice thereof on April 20. On April 17 the defendant's new solicitors filed (and presumably served) a notice of motion to set aside the default judgment. This motion did not then come on for hearing due, apparently, to the desire of plaintiff's counsel to cross-examine certain parties whose affidavits were filed in support of the motion. That has now been done.

The application is made under Rule 127 which is as follows:

> 127. Any party may be relieved against any default under any of these rules, by the Court or a Judge, upon such terms as to costs or otherwise as such Court or Judge may think fit.

The motion is supported by the affidavits of (1) Samuel Rogers, dated May 31, Mr. Rogers being copyright counsel for the Canadian Association of Broadcasters, of which organization Station CHLP is a member; (2) Arthur Berthiaume, Manager of Station CHLP, dated April 13; (3) T. A. Evans, Secretary of the Canadian Association of Broadcasters, dated May 29; and (4) Roland Dubois, Chief Accountant of the defendant, dated April 13. The first three named have been cross-examined on their affidavits. No affidavits were filed in reply and for the purposes of this motion I shall accept the allegations in the affidavits as true.

Now it is well established that the failure to file a statement of defence within the time limited was unintentional and was occasioned solely by the sudden and protracted illness of Bourque, General Manager of the defendant company, upon whom the statement of claim was served. It appears from the affidavit of Berthiaume that on the very day when Bourque was so served, the latter advised him by telephone of such service, stating that he would attend to the matter; and that at Bourque's request Berthiaume at once forwarded to him his entire file in the matter. On the same day Bourque entered the hospital, it being understood that he was to undergo merely a "checkup" and would shortly return to his duties. As a

matter of fact, however, Bourque remained in the hospital until at least April 13. Berthiaume had left the matter entirely in Bourque's hands and it was not until February 22—when the defendant was served with the Registrar's notice to proceed with the reference—that Berthiaume had any knowledge that the matter had not been attended to. It was then found that Bourque, prior to going to the hospital, had placed the statement of claim and the entire file in connection therewith in a drawer in his desk. No other officer of the defendant corporation had any knowledge until February 22 that Bourque had been served with the statement of claim or that judgment had been signed. It should be noted that Berthiaume is an official of Station CHLP, that office being located in Montreal a very considerable distance from Bourque's office with the defendant corporation. Moreover, it is abundantly clear that the defendant at all times intended to resist any claim advanced by the plaintiff. Following the broadcast on March 12, 1950, there was considerable correspondence between the parties or their representatives and it clearly indicated that the defendant took the position that it had committed no infringement of the plaintiff's rights and would oppose any action which might be brought.

Under these circumstances the failure to defend was an unfortunate slip from the consequences of which the defendant, in my opinion, should be relieved. The only officer of the defendant who had knowledge of the proceedings and who had intended to attend to the matter was prevented by a protracted illness from doing so. The judgment itself was regularly obtained and in such a case it is an almost inflexible rule that an affidavit of merits stating facts showing a substantial ground of defence will be necessary (*Farden* v. *Richter* (1)); and when merits are shown and a satisfactory excuse for neglect given, the judgment may be set aside on terms (*Smiley* v. *Nault & Lawson* (2)). I am of the opinion that the affidavits filed by the defendant are sufficient to show a substantial ground of defence.

As I have said, Station CHLP is a member of the Canadian Association of Broadcasters and has a licence from the Composers, Authors and Publishers Association of

(1) (1889) 23 Q.B.D. 124. (2) (1924) 56 O.L.R. 240.

1951

DURAND AND CIE. v. LA PATRIE PUBLISHING CO. LTD.

Cameron J.

Canada (C.A.P.A.C.). Rogers' affidavit states that he has been advised by the managers of C.A.P.A.C. that the licence granted to Station CHLP includes the right to broadcast selections from the opera in question. C.A.P.A.C. has entered into certain arrangements (the exact nature of which has not been clearly established) with S.A.C.E.M., a performing rights society in France, somewhat similar to C.A.P.A.C.

This contract or arrangement between S.A.C.E.M. and C.A.P.A.C. is not before me, but I understand that S.A.C.E.M. thereby gave to C.A.P.A.C. certain rights to grant licences to reproduce in Canada those productions in which copyright was vested in S.A.C.E.M. It is the contention of the defendant that S.A.C.E.M., having copyright in the production in question, has assigned that right to C.A.P.A.C. and that the latter in turn has licensed Station CHLP to reproduce the same. As I have said above, Rogers states that he has been advised by the manager of C.A.P.A.C., and believes it to be true, that the licence so granted to Station CHLP includes the right to broadcast *selections* from the opera. If these allegations, therefore, are established, the defendant would appear to have a good defence on the merits. In the argument it was suggested that the broadcast on March 12, 1950, consisted of something more than "selections" from the opera. The material shows that three acts of the opera were omitted, but in the absence of any evidence as to the length of the opera itself I am unable to form any conclusion as to whether what was broadcast was more than "selections."

Counsel for the defendant also intimated that certain other defences would be raised, including the question as to whether any copyright in the opera now existed in Canada and the further question as to whether the plaintiff company had any title derived from the authors. The statement of claim merely states that the plaintiff is the owner of the copyright without indicating the source of its title. I do not think it is necessary at this stage to consider these matters. It is sufficient to say that in my opinion the defendant has satisfied me that in good faith it desires to defend the action, that this application is not for the purpose of delaying the plaintiff, and that the defences which it proposes to raise have merit and that there is a substantial case which the defendant desires to try.

In *Watt* v. *Barnett et al.* (1), Cockburn, C.J. said at p. 185:

> Before letting the defendant in to defend we must consider whether he has given us any grounds for thinking that he has a substantial case which he desires to try.

In that case Cockburn, C.J., while of the opinion that the case made by the defendant was not free from doubt, exercised the discretion conferred on him under the Rule and allowed the defendant to defend on terms. The Court of Appeal refused to set aside that order and although Jessel, M.R. was not himself satisfied that there was any defence on the merits, he declined to interfere with the opinion of the Court below which had taken a more favourable view of the matter (2).

Counsel for the plaintiff submitted that when the defendant had paid the sum of $200 into Court it had thereby taken a fresh step in the proceedings with knowledge that judgment had been signed against it, thereby "approbating" the judgment. As I have noted above, the plaintiff refused to accept that amount for settlement and, under the circumstances, I do not think that what took place was more than an offer of settlement which was rejected.

In the case of *Bartlam* v. *Evans* (3) a defendant, having had judgment entered against him in default of appearance, obtained from the plaintiff time in which to pay. He afterwards sought to have the judgment set aside on the ground that he had a defence to the claim. It was held that the Judge in Chambers had a discretion to set the judgment aside, and, in the circumstances, was right in doing so.

The discretion conferred on the Court or a Judge under Rule 127 is very broad and in all of the circumstances I propose to exercise that discretion in favour of the defendant notwithstanding the payment into Court by its former solicitors.

The motion to set aside the judgment and for leave to defend will therefore be granted, subject to the following terms:

(1) The defendant shall pay to the plaintiff within ten days after taxation all party and party costs of the plaintiff

(1) (1877-8) 3 Q.B.D. 183. (2) (1877-8) 3 Q.B.D. 366.
(3) (1937) 52 T.L.R. 689 H.L.

1951

DURAND AND CIE. v. LA PATRIE PUBLISHING CO. LTD.

Cameron J.

after the date of service of the statement of claim and up to and including the entry of the order to be made on this motion, including the motion for judgment and entry thereof, all costs occasioned by the reference including any adjournments thereof, the cross-examinations held on the defendant's affidavits used on the motion, and the costs of this motion. If not so paid the motion will be dismissed with costs.

(2) Upon payment of the said taxed costs as hereinbefore provided, the motion will be granted and the defendant within twenty-one days of such payment will have leave to file and serve its defence.

(3) The plaintiff is not to be required to furnish security for costs.

(4) The defendant may move for an order for payment out of the sum of $200 paid into Court at any time after the taxed costs of the plaintiff have been paid.

Judgment accordingly.

1951

Sept. 4

Sept. 22

BETWEEN:

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

AND

J. W. ALLEN NEILSON ..... RESPONDENT.

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97 as amended, ss. 2(m), 2(n), 3(1), 5(1) (c), 9(1) (a), Paras. A and AA of the First Schedule—Definitions of "income", "earned income" and "investment income"—Whether there is statutory authority for allowing a claim for personal exemption as a deduction in computing tax payable under Para. AA of the First Schedule of the Act—Appeal allowed.

Respondent had appealed to the Income Tax Appeal Board from an assessment dated June 1, 1949, in respect of one item of his income for the taxation year 1947. The appeal was dismissed and no further appeal was taken from that part of the Board's decision. The Board, however, *ex proprio motu*, being of the opinion that a taxpayer in the computation of "investment income" was entitled to deduct not only the then statutory exemption of $1,800, but also the amount of his personal exemption under s. 5(1) (in this case $750), reduced the assessment by the sum of $30, being 4 per cent of $750. From that part of the Board's decision the appellant appealed.

Held: That "earned income" as defined in s. 2(*m*) of the Income War Tax Act was solely defined for the purpose of then defining "investment income", and, for the purpose of this case, in general terms investment income means any income not defined in the Act as "earned income".

2. That in supplying these definitions Parliament was dividing up into two classes that which it had defined as "income" in s. 3(1) of the Income War Tax Act—namely, the annual profit or gain—a distinction being drawn between that part of the income which was earned and that which was unearned.

3. That after reviewing the history of the legislation it seems reasonable to assume that in setting a fixed exemption from investment income as has been done throughout, Parliament fixed upon an amount which might fairly represent for the time being an average and reasonable exemption available for all taxpayers; and that on those occasions when personal exemptions were available as an alternative deduction (as has been the case throughout except for the period of 1942-1948), the alternative was provided merely to meet the particular needs of a taxpayer who might have more than the average number of dependents. If that be so, the deductions of both fixed and personal exemptions would result in double exemptions for the same purpose. That was never intended and nothing can be found in the Income War Tax Act as it was in 1947, or at any time prior thereto, which warrants such a conclusion.

APPEAL from the decision of the Income Tax Appeal Board varying the assessment made by the appellant.

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

W. R. Jackett, K.C. and *A. L. DeWolf* for appellant.

No one 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:

This is an appeal by the Minister of National Revenue from a decision of the Income Tax Appeal Board dated July 3, 1950. The respondent herein had appealed from an assessment dated June 1, 1949, in respect of one item of his income for the taxation year 1947, but the Board disallowed his appeal insofar as that matter was concerned and no further appeal has been taken from that part of the Board's decision.

The Board, however, *ex proprio motu,* being of the opinion that a taxpayer in the computation of "investment income" was entitled to deduct not only the then statutory

1951

MINISTER OF NATIONAL REVENUE v. NEILSON

Cameron J.

exemption of $1,800, but also the amount of his personal exemptions under section 5(1) (in this case $750), reduced the assessment by the sum of $30, being 4 per cent of $750. From that part of the Board's decision the Minister of National Revenue now appeals. The amount involved is small, but I understand that the decision of the Board reverses the practice of the Department over many years. By virtue of the changes made in the Income Tax Act, the decision affects assessments for the taxation years 1947 and 1948 only.

The applicable sections of the Income War Tax Act, R.S.C. 1927, c. 97 as amended, were in 1947 as follows:

Sec. 9(1) There shall be assessed, levied and paid *upon the income* during the preceding year of every person, other than a corporation or joint stock company,

(*a*) residing or ordinarily resident in Canada at any time in such year; . . . a tax computed at the rates set forth in paragraph A and paragraph AA of the First Schedule to this Act.

Paragraph A of the First Schedule:

Rates of tax applicable to *income* of persons, other than corporations or joint stock companies under subsection one of section nine.

On the first $250 of *the income* or any portion thereof, 22 per centum per annum; or . . .

Paragraph AA of the First Schedule:

Rate of tax applicable to *investment income* of persons other than corporations and joint stock companies, under subsection one of section nine of this Act,

On investment income in excess of $1,800—four per centum.

Sec. 2(*m*)—defines earned income.

Sec. 2(*n*)—"Investment income" includes any income not defined herein as "earned income" and also any amount deemed by this Act to be a dividend.

"Income" was defined by section 3(1) of the Act and section 5(1) provided:

5(1) "Income" *as hereinbefore defined* shall for the purpose of this Act be subject to the following exemptions and deductions:

(*c*) . . . Seven hundred and fifty dollars in the case of each person not entitled to the aforesaid deduction of fifteen hundred dollars.

The Board's decision was, in part, as follows:

Obviously, the word "income" as used in the opening words of subsection (1) of section 9 refers only to the income arrived at after all the deductions and exemptions provided by subsection (1) of section 5 have been deducted. Subsection (1) of section 9 is the only section which provides for the imposition of the tax in question in this appeal, and the closing words of the subsection which refer to paragraphs A and AA of the First Schedule, refer only to the rates therein mentioned.

I am of the opinion that the word "income" and the words "investment income" as used in paragraphs A and AA above mentioned, mean in each case the income arrived at after deducting all of the exemptions and deductions mentioned in 5(1) of the Act.

Therefore, in determining the amount of his investment income on which a tax of 4 per cent is imposed, the appellant benefits of the statutory exemption provided for in 5(1) (c) as he does when he determines his net taxable income for the graduated tax.

It will be seen, therefore, that the Board was of the opinion that in computing the amount of taxable "investment income," a taxpayer was entitled to deduct all the deductions and exemptions mentioned in section 5(1) of the Act to the same extent as he undoubtedly was in computing the amount of his "income" which was taxed at the rate set out in paragraph A of the First Schedule. It is of some interest to note that in the calculation of tax under the T.1-General 1947 tax return form, the calculation of surtax on investment income is set up in a manner which does permit certain deductions provided for in section 5(1)—namely, charitable donations, gifts to the Crown and certain medical expenses; but the form excludes from deduction, in such calculation, "personal exemptions" (marital and dependents) which are also provided for in section 5(1). However, I am not here concerned with the fact that the Minister did in that tax form allow exemptions for medical expenses and charitable gifts, but only with the question as to there being any statutory authority for allowing a claim for personal exemptions as a deduction in computing the tax payable under paragraph AA of the First Schedule. That was the precise matter which was before the Board and I shall confine my attention to that phase of the matter.

With great respect I am unable to agree with the decision of the Board. My opinion is arrived at partly by the definition of "investment income," but in the main by a somewhat lengthy consideration of the history of the legislation in regard thereto since the surtax thereon was first levied.

Paragraph AA of the First Schedule not only fixes the rate of tax to be levied, but directs that the tax shall be on "investment income" and that must mean investment income as defined in the Act.

1951

MINISTER OF NATIONAL REVENUE v. NEILSON

Cameron J.

In my view, "earned income" was defined solely for the purpose of then defining "investment income," and, for the purpose of this case, it is sufficient to say that in general terms investment income is any income not defined in the Act as "earned income." It seems to me that in supplying these definitions Parliament was dividing up into two classes that which it had defined as "income" in section 3(1)—namely, the annual net profit or gain, a distinction being drawn between that part of the income which was earned and that which was unearned. In neither definition is anything said about personal exemptions. That particular matter is left to be dealt with in other parts of the Act or the Schedules. As will be noted later, Parliament in its investment income legislation has been careful to indicate that personal exemptions could not be deducted from investment income except as an alternative to the deduction of the fixed statutory exemption, or could not be deducted at all.

Before turning to the history of the legislation, it may be noted that in 1947 the subsection providing for personal exemptions formed part of section 5(1), the opening words of which were "income *as hereinbefore defined.*" Clearly, therefore, the personal exemptions could be deducted from the general tax on income as defined in section 3(1), but it is equally clear that on a strict interpretation of the section the deduction was applicable only to "income" and not to "investment income."

By c. 40, Statutes of 1935, there was first levied a tax on investment income. Earned income and investment income were defined by subsections (2) (*m*) and (*n*). A new subsection (4) was added to section 5 as follows:

> 5(4) The following income shall not be liable to the additional rates of tax on investment income, namely,
>
> (*a*) all income up to five thousand dollars; or
>
> (*b*) "earned income" up to but not exceeding fourteen thousand dollars; or
>
> (*c*) income equal in amount to the sum of the exemption and allowances for dependents to which the individual is actually entitled under the provisions of paragraphs (*c*), (*d*), (*e*) and (*i*) of subsection one and of subsection two of this section; whichever affords the greatest exemption to which the taxpayer is entitled.

That subsection seems to establish beyond question that Parliament did not consider that investment income meant "investment income" less the personal exemptions provided

in section 5(1). It did give a right to deduct personal exemptions, but only as an alternative to deducting the fixed exemption in (*a*) or the other exemption in (*b*). If a taxpayer chose the exemption of $5,000 he could not also deduct his personal exemptions.

It may be noted, also, that following the amendments in 1935 there was a marked distinction between paragraph A and paragraph AA of the First Schedule. In paragraph A the first rate is stated to be "on the first one thousand dollars of net income or any portion thereof *in excess of exemptions*, 3 per centum or . . ." In paragraph AA nothing is said about exemptions, the first rate being levied "on investment income included in any income exceeding $5,000 . . ."

By the amending Act of 1935 subsection (3) was added to section 9 as follows:

(3) The total income of each taxpayer other than a corporation or a joint stock company shall be compiled by having the earned income form the base, above which shall be placed the investment income, and according thereto the appropriate additional rates of tax on investment income as provided by paragraph AA of the First Schedule of this Act shall be applied.

The purpose of that subsection is explained in Dominion of Canada Tax Service, vol. 1, at 9-451, and need not here be considered. But it is important to note that the *total* income (not the income less exemptions) is comprised of "earned income" and "investment income." That subsection was still in the Act in 1947.

Further changes were made by c. 18, Statutes of 1941. Thereby "earned income" and "investment income" were re-defined, the latter being in the same form as it was in 1947 (supra). The new subsection (4) of section 5 was as follows:

(4) The following income shall not be liable to the additional rate of tax on investment income, namely:

(*a*) investment income up to fifteen hundred dollars; or

(*b*) investment income equal in amount to the sum of the exemptions to which the individual is entitled under the provisions of paragraphs (*c*), (*d*), (*e*) and (*i*) of subsection one and of subsection two of this section;

whichever amount is the greater.

1951

MINISTER OF NATIONAL REVENUE v. NEILSON

Cameron J.

A new paragraph AA was provided as follows:

AA. Rate of tax applicable to all persons other than corporations and joint stock companies, in respect of "investment income" as provided for in this Act.

On investment income in excess of the exemption provided therefor in subsection four of section five of this Act . . . 4 per centum.

By these amendments of 1941, therefore, there was dropped the former provision that all income over $14,000 was deemed to be investment income; and the surtax was levied on that which was, in fact, investment income. The exemption in this section was limited to the fixed sum of $1,500, *or* the total of the taxpayer's personal exemptions, whichever was greater. A taxpayer could not deduct both.

Further important amendments were made by c. 28, Statutes of 1942. Those parts of section 5(1) which had provided the personal exemptions were repealed and also section 5(4). Paragraphs A and AA of the First Schedule were repealed and new paragraphs substituted. Paragraph A was entitled "Rules for Computation of Income Tax under Subsection One of Section Nine." For the first time the general income tax was divided into normal tax and graduated tax and the rules set up under paragraph A contained the only provisions in regard to personal exemptions. They were therefore inapplicable to paragraph AA and from 1942 to 1946 personal exemptions were entirely excluded from the computation of investment income. For the first time the taxpayer was deprived of the alternative to deduct his personal exemptions and could deduct only the fixed amount provided by the new paragraph AA, which was as follows:

AA. Rate of tax applicable to all persons other than corporations and joint stock companies, in respect of "investment income" as provided for in this Act.

On investment income in excess of $1,500—four per centum.

The next amendments bearing on this problem were made by c. 55, Statutes of 1946, and were in effect from January 1, 1947. It seems to me that up to that date the legislation made it quite clear that investment income meant that part of the net annual profit or gain which was other than earned income, and not that, less the personal exemption. From 1935 to 1942 the right to

deduct personal exemptions existed only as an alternative to the other fixed exemptions and from 1942 to 1946 that right no longer existed.

By the 1946 amendments, substantial changes were made. The whole of the First Schedule, including the rules for computation of income tax in determining the normal and graduated tax, were dropped. The personal exemption sections were re-instated as subsections (*c*), (*d*) and (*e*) of section 5(1), thereby making them applicable to the general tax on income as they had been throughout. The opening words of paragraph AA as then re-enacted were as I have set out above and although the wording is somewhat different from what it was prior to the amendment, I do not think the change is here of any importance. The operational part of paragraph AA, however, remained precisely as it had been except that the fixed exemption was increased from $1,500 to $1,800. No provision was made for the alternative deduction of personal exemptions.

It seems to me, therefore, that by the 1946 amendment, Parliament intended to make no change in the computation of investment income except by slightly increasing the exemption. The replacement in section 5(1) of the subsections providing for personal exemptions was occasioned by the elimination of the rules formerly in paragraph A where the personal exemptions from the general income tax had previously been. Personal exemptions involve very substantial amounts and had it been the intention to go beyond anything that had previously been in effect and allow both the fixed exemptions and personal exemptions, that intention, I think, would have been clearly expressed.

It seems reasonable to assume that in setting a fixed exemption from investment income as has been done throughout, Parliament fixed upon an amount which might fairly represent for the time being an average and reasonable exemption available for all taxpayers; and that on those occasions when personal exemptions were available as an alternative deduction (as has been the case throughout except for the period of 1942-1948), the alternative was provided merely to meet the particular needs of a taxpayer who might have more than the average

1951

MINISTER OF NATIONAL REVENUE v. NEILSON

Cameron J.

number of dependents. If that be so, the deductions of both fixed and personal exemptions would result in double exemptions for the same purpose. I do not think that was ever intended and I can find nothing in the Income War Tax Act as it was in 1947, or at any time prior thereto, which warrants such a conclusion.

To complete the history of the legislation on this matter, it may be noted that for the taxation year 1949 and subsequent years, the Income Tax Act makes provision by section 31(3) whereby the taxpayer in computing the surtax on an investment income may deduct the greater of $2,400, *or* the aggregate of the deductions from income to which he is entitled under s. 25 (i.e. personal exemptions).

For these reasons the appeal of the Minister of National Revenue will be allowed, the decision of the Tax Appeal Board insofar as it varied the assessment of June 1, 1949, will be set aside, and that assessment affirmed.

At the time the motion was made to set down the appeal for hearing, the respondent herein indicated that he was not further interested. The order then made did not require service to be made upon him and consequently he was not represented at the hearing of the appeal. Under these circumstances, counsel for the appellant does not ask for costs and therefore no order will be made in regard thereto.

Judgment accordingly.

1950

Nov. 8, 23-24,

1951

Oct. 12

BETWEEN:

HENRY GOLDMAN .....APPELLANT;

AND

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

Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 59-69, 69A, 69B, 69C—Income Tax Act, S. of C. 1948, c. 52, ss. 89-95—Appeal from Income Tax Appeal Board a trial de novo—Onus on taxpayer appellant to establish incorrectness of assessment—Taxpayer appellant opens proceedings—Remuneration for services taxable.

The appellant was chairman of a protective committee for a certain class of shareholders of a company under reorganization and appointed B as counsel for the Committee. Under the plan of reorganization

there could be no compensation to members of committees as such but B agreed with the appellant to make him an allowance out of his counsel fees as remuneration for services and assigned part of his fees accordingly. A payment made to the appellant pursuant to the assignment was included in his assessment from which he appealed to the Income Tax Appeal Board which dismissed his appeal.

Held: That the appeal to this Court from a decision of the Income Tax Appeal Board, whether by the taxpayer or by the Minister, is a trial *de novo* of the issues involved, that the parties are not restricted to the issues either of fact or of law that were before the Board but are free to raise whatever issues they wish even if different from those raised before the Board and that it is the duty of the Court to hear and determine such issues without regard to the proceedings before the Board and without being affected by any findings made by it.

2. That where the taxpayer is the appellant the onus is on him to establish that the assessment to which he has objected is incorrect either in fact or in law.

3. That where the taxpayer is the appellant he should be called on to open the proceedings.

4. That on the evidence the sum in question in the appeal was paid to the appellant and received by him as remuneration for services and it was immaterial that it was made by someone other than the person for whom the services were rendered or whether it was made pursuant to an enforceable obligation or was made voluntarily.

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 Ottawa.

H. H. Stikeman and *A. L. Bissonette* for appellant.

R. S. W. Fordham K.C., *W. R. Jackett 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 (October 12, 1951) delivered the following judgment:

This appeal is from the decision of the Income Tax Appeal Board dismissing the appellant's appeal from his income tax assessment for 1947 whereby the sum of $7,000, which he had shown as a gift on his income tax return, was added as taxable income to the amount reported by him.

The appeal was brought under the amendments of the Income War Tax Act, R.S.C. 1927, chap. 97, relating to appeals from assessments enacted in 1946, Statutes of

1951

GOLDMAN v. MINISTER OF NATIONAL REVENUE

Thorson P.

Canada 1946, chap. 55, sec. 15, whereby Part VIII A and the Schedules referred to therein were added to the Act immediately after Part VIII and made applicable in respect of assessments of income of 1946 and subsequent years. Under this part a taxpayer who objected to an assessment had the right by section 69A to serve a notice of objection on the Minister and by section 69B to appeal to the Income Tax Appeal Board. Then section 69C gave a right of appeal to this Court to either the Minister or the taxpayer.

At the outset counsel for the appellant submitted that the hearing of an appeal to this Court from a decision of the Income Tax Appeal Board is a trial *de novo* of the issues involved. It is clear that prior to the establishment of the Board the appeal to this Court was an appeal from the assessment. The taxpayer had two opportunities for relief from it, namely, an appeal to the Minister and then, if he was dissatisfied with the Minister's decision, an appeal to this Court. Under section 59 he might serve a notice of appeal upon the Minister if he objected to the amount at which he was assessed or considered that he was not liable to taxation under the Act. He had thus a right of appeal on grounds of fact as well as of law. Section 59 required that the Minister upon receipt of the notice of appeal should duly consider the same and affirm or amend "the assessment appealed against" and notify the appellant of his decision. The sole issue was whether the assessment was correct. Then the sections following section 59 prescribed the procedure to be followed before the appellant could have his appeal to this Court heard. This appeal was frequently referred to as an appeal from the decision of the Minister but this description was incorrect. What was before the Court was the assessment, not the decision of the Minister. An examination of the Act makes this clear. Section 60 provided that if the appellant was dissatisfied with the Minister's decision he might mail to the Minister a notice of dissatisfaction stating that he desired his appeal to be set down for trial. The section thus contemplated that the appellant might carry his appeal beyond the Minister's decision. The only appeal thus far referred to was the appeal mentioned in the notice of appeal, namely, the appeal from the assessment. Section 61 provided for the giving of security for the costs of the appeal and section 62 required the Minister to reply to

the notice of dissatisfaction. The appeal was then ready to be launched in this Court. Section 63 required that within two months from the date of mailing the reply the Minister should cause to be transmitted to the Registrar of this Court typewritten copies of certain specified documents. These included the appellant's income tax return, the notice of appeal, the Minister's decision, the notice of dissatisfaction, the Minister's reply thereto and also the notice of "assessment appealed" and all other documents and papers relating to "the assessment under appeal". This shows that the appeal to this Court was an appeal from the assessment. Then section 66 gave this Court exclusive jurisdiction to hear and determine "all questions that may arise in connection with the assessment". That was the subject matter of the appeal to it. The Court was not concerned with the correctness of the Minister's decision but with the correctness of the assessment "under appeal". Finally, section 69 provided that if a notice of appeal was not served or a notice of dissatisfaction was not mailed within the time limited therefor the right of the taxpayer to appeal should cease and the assessment should be valid and binding notwithstanding any error, defect or omission therein or in any proceedings required by the Act. From this it is clear that in the absence of steps by way of appeal the assessment was binding. But, while the appeal to this Court was from the assessment and the issue before it was whether the assessment was correct, it was also provided by section 63(2) that after the filing of the documents referred to in section 63(1) the matter should "thereupon be deemed to be an action in the said Court ready for trial or hearing". I think it may fairly be assumed that the purpose of this provision was to give the appellant all the benefits that an action could afford for attacking the assessment, such as the production of documents, the examination for discovery of an officer of the Crown and the calling of witnesses.

Under this state of the law the proceedings before this Court were both an action and an appeal. Making the proceedings an action enabled the parties to place all the facts relating to the assessment before the Court but this did not prevent them from being an appeal from the assessment. There was a presumption of validity in its favor which might be rebutted by an appellant from it

1951

GOLDMAN v. MINISTER OF NATIONAL REVENUE

Thorson P.

but if the requisite steps by way of appeal were not taken it was binding. It was not incumbent upon the Minister to support the assessment. The onus was on the appellant to establish that it was incorrect. Consequently, it was always the appellant who was called upon to open the proceedings. The onus of proof that the assessment was incorrect in fact was on him: *Vide Dezura* v. *Minister of National Revenue* (1). The nature of this onus was clearly described by the Supreme Court of Canada in *Johnston* v. *Minister of National Revenue* (2). There Rand J., speaking also for the Chief Justice and Kerwin J., pointed out that notwithstanding the fact that the appeal to the Court was spoken of in section 63(2) as an action ready for trial or hearing the proceeding was an appeal from the taxation; that since the taxation was on the basis of certain facts and certain provisions of law either those facts or the application of the law was challenged; that every fact found by the Minister must be accepted unless questioned by the appellant; that if he intended to contest any fact on which the taxation rested he might bring evidence before the Court although it had not been before the Minister but the onus was on him to demolish the basic fact. It was also his view that there was no basic change in the proceedings where pleadings were directed and that pleadings could not shift the burden of showing error in the assessment from what it would be without them. It may, therefore, be taken as established that on an appeal to this Court under the law applicable to assessments for years prior to 1946 the assessment was presumed to be valid and the onus of establishing that it was incorrect was on the appellant. This was, perhaps, not a precise statement for while it was proper to say that the onus of proof that the assessment was incorrect in fact lay on the appellant it was not, strictly speaking, correct to say that the onus of showing that it was wrong in law lay on him, for once the facts were brought before the court the question whether in the light of such facts the appellant was subject to taxation under the Act was a question of law for the court to determine.

With the establishment of the Income Tax Appeal Board in 1946 there were several changes in the procedure for appealing from an assessment. Section 69B gave the tax-

(1) (1948) Ex. C.R. 10 at 15. (2) (1948) S.C.R. 486.

payer the right to appeal to the newly constituted Income Tax Appeal Board. This took the place of the appeal to the Minister under the former procedure. But before a taxpayer who objected to his assessment could appeal to the Board he had to serve on the Minister a notice of objection and the Minister had to reconsider the assessment and either vacate or confirm it or reassess and notify the taxpayer. If a notice of objection was not served within the required time the assessment was deemed valid. All matters in connection with the appeal to the Board were to be regulated by the Third Schedule which constituted the Board and regulated its procedure. The Board was a court of record and could require the attendance of witnesses and the production of documents. It had power to dismiss the appeal, make the assessment that should have been made or vacate it and refer it back to the Minister for reconsideration and assessment. On the disposition of the appeal the Registrar of the Board was required to forward a copy of the decision and the reasons therefor to the Minister and the appellant. The appeal to the Income Tax Appeal Board was an appeal from the assessment. Then section 69C provided for an appeal to this Court either by the taxpayer or by the Minister. All matters in connection with this appeal were to be regulated by the Fourth Schedule to the Act. In 1949 the Third and Fourth Schedules to the Income War Tax Act were repealed by section 52(4) of an Act to amend the Income War Tax Act and the Income Tax Act, Statutes of Canada 1949, 2nd Session, chap. 25, and section 52(1) of this amending Act provided that all references in the Income War Tax Act to the Third or Fourth Schedules of that Act should respectively be deemed to be references to Division I or Division J of Part I of the Income Tax Act. The present appeal was brought after the amending Act of 1949 came into effect so that even although the appeal was taken under the Income War Tax Act the procedure for it is governed by Division J, sections 89 and 95, of the Income Tax Act, Statutes of Canada 1948, chap. 52, as amended.

There are, I think, several reasons for accepting the submission of counsel for the appellant that the appeal to this Court from a decision of the Income Tax Appeal Board, whether by the taxpayer or the Minister, is a trial

1951

GOLDMAN v. MINISTER OF NATIONAL REVENUE

Thorson P.

de novo of the issues involved therein. While there are several descriptions of the proceedings as an appeal and while it is true that on the appeal the Registrar of the Income Tax Act Appeal Board is required by section 91(1) of the Income Tax Act to transmit to the Registrar of this Court "all papers filed with the Board on the appeal thereto together with a transcript of the record of the proceedings before the Board" there is no provision that the appeal must be based on such record. On the contrary, section 89(3) requires the appellant to set out in the notice of appeal a statement of the allegations of fact, the statutory provisions and reasons which he intends to submit in support of his appeal and section 90(1) calls upon the respondent to serve and file a reply to the notice of appeal admitting or denying the facts alleged and containing a statement of such further allegations of fact and of such statutory provisions and reasons as he intends to rely on. There is nothing in these provisions to restrict the parties to the allegations of fact made before the Board. Additional facts or even different facts may be alleged. Then section 91(2) provides that upon the filing of the material referred to in section 91(1) or 91A and of the reply required by section 90, "the matter shall be deemed to be an action in the court and, unless the Court otherwise orders ready for hearing". This section is almost identical with section 63(2) of the Income War Tax Act. Its purpose is to give the parties the benefits of the proceedings in an action to establish their respective allegations which would not be available in an ordinary appeal. There would be no purpose in these provisions if Parliament intended that the appeal should be heard on the basis of the record before the Income Tax Appeal Board. They contemplate that the issues as defined by the statement of facts and the reply should be tried by this Court according to the processes of an action in this Court. This necessitates a trial *de novo*. While this view lends itself to the possibility that the taxpayer or the Minister may make a different case or defence in this Court from that made before the Board and it may seem anomalous that Parliament should permit this there is nothing in the Act to bar it. The freedom of the Court to deal with the issues raised before it, without regard to the proceedings before the Board, is further indicated by the provision in section 91(3) that any fact

or statutory provision not set out in the notice of appeal or reply may be pleaded or referred to in such manner and upon such terms as the court may direct and by the power given to the court by section 91(4) of disposing of the appeal by dismissing it, vacating or varying the assessment or referring it back to the Minister.

All these considerations lead to the conclusion that the appeal to this Court from a decision of the Income Tax Appeal Board, whether by the taxpayer or by the Minister, is a trial *de novo* of the issues involved, that the parties are not restricted to the issues either of fact or of law that were before the Board but are free to raise whatever issues they wish even if different from those raised before the Board and that it is the duty of the Court to hear and determine such issues without regard to the proceedings before the Board and without being affected by any findings made by it.

I now come to the question of onus and who should be called upon to open the proceedings. The issue on the appeal, whether by the taxpayer or the Minister, is the same as it was under the former procedure, namely, the correctness of the assessment. Where the taxpayer is the appellant, the appeal is in substance, if not in form, an appeal against the assessment. Certainly, that is so when the taxpayer appeals directly to this Court instead of first appealing to the Income Tax Appeal Board as he may now do under section 55(2) of the Income Tax Act. There is, I think, no difference in substance where he has first appealed to the Income Tax Appeal Board for the Board in dismissing his appeal from the assessment has left it in the same condition as it was before with a continuing presumption of validity in its favour. The onus on the appellant taxpayer is thus precisely the same as it was under the former procedure, namely, to establish that the assessment to which he has objected is incorrect either in fact or in law. And the remarks on the subject of the onus under the former procedure are equally applicable here. When the taxpayer challenges the correctness in fact of the assessment the onus of proof that the assessment is erroneous in fact lies on him. But when the validity of the assessment is attacked in point of law it is not, strictly speaking, correct to say that the onus of establishing its

1951

GOLDMAN v. MINISTER OF NATIONAL REVENUE

Thorson P.

invalidity lies on the appellant. In such a case there is really no onus on either party, for once the facts have been established, the responsibility for determining the validity of the assessment as a matter of law is solely that of the court. It must decide the question according to the applicable law regardless of the submissions of the parties.

It follows from what I have said that where the taxpayer is the appellant he should be called on to open the proceedings. This was always the practice under the former procedure.

On the other hand, where the Minister is the appellant from the decision of the Income Tax Appeal Board it cannot be said that the appeal to this Court is an appeal from the assessment. There is this further difference, namely, that while the issue in the appeal is the correctness of the assessment, it is for the Minister to establish its correctness in fact and in law. The Board has power under section 83 of the Income Tax Act to vacate or vary the assessment or refer it back to the Minister for reconsideration and re-assessment. It is to be assumed that the Minister's appeal is from a decision by which the Board has exercised one of these powers. Consequently, the assessment has been found erroneous by a court of record and the Minister does not come to this Court with any presumption of its validity in his favour. Indeed, the reverse is true. Thus, subject to the same comments on the use of the term onus as those made previously, the onus is on the Minister to establish the correctness of the assessment. Likewise, it is the Minister who should be called upon to begin.

I now come to the facts. While there was a sharp divergence of evidence on some of them there was no dispute as to others. On February 15, 1944, the appellant became the chairman of a committee representing the 7 per cent preferred shareholders of the Abitibi Power and Paper Company Limited to protect their interests in the reorganization of the Company that was being negotiated by a committee appointed for the purpose by the Premier of Ontario and acting under the chairmanship of the Hon. F. J. Hughes, K.C. The appellant was authorized by his committee to engage counsel for the shareholders and engaged Mr. E. G. Black K.C. of Toronto who acted as

counsel for the committee and the 7 per cent preferred shareholders from February, 1944, to May, 1946. On January 3, 1945, Mr. Black was elected as a member of the committee but never acted in that capacity. On May 10, 1945, the Hughes committee submitted a plan of reorganization of the Company to the Premier of Ontario. Under paragraph 38(*e*) of this plan it was provided that the Company should pay or assume liability for the due payment of the costs and expenses of certain specified committees, of which the 7 per cent preferred shareholders' committee was one, and their respective counsel, "but not including any remuneration to the member of the said committees as such" and it was also stated that the amount of the costs and expenses in each case should be as agreed upon by the Bondholders' Protective Committee and the person entitled thereto or, in default of such agreement, as might be determined by the Supreme Court of Ontario. Mr. Black, after some negotiation, submitted his bill of costs at $75,000 and this was referred to Col. A. T. Hunter, K.C., the Assistant Master and Acting Taxing Officer of the Supreme Court of Ontario, for taxation. On the taxation Mr. Black stated that the amount asked for included not only his legal fees but also remuneration to the members of the Committee for their work. The taxing officer took the view that he was precluded by paragraph 38(*e*) of the plan of reorganization from allowing anything for remuneration of the members of the Committee and, on September 21, 1946, taxed Mr. Black's bill at $20,004.70. On October 22, 1946, Mr. Black wrote to the Abitibi Power & Paper Company stating that he was satisfied to have his account paid as follows, namely, $6,004.70 on or about November 1, 1946, $7,000 in January, 1947, and $7,000 in January, 1948, and assigned to the appellant the sum of $14,000 being the payments due to be made in 1947 and 1948. He gave a copy of this letter to the appellant. On November 19, 1946, the Company wrote to Mr. Black acknowledging receipt of his letter, enclosing a cheque in his favour for $6,004.70 and agreeing to make the payments to the appellant as assigned. The Company sent the appellant the first payment of $7,000 on January 2, 1947, and the second one on January 2, 1948.

We are here concerned with the sum of $7,000 received by the appellant in 1947. The nature of this amount in

1951

GOLDMAN v. MINISTER OF NATIONAL REVENUE

Thorson P.

his hands is the sole issue in this appeal. The appellant and Mr. Black gave quite different versions of the reason for the payment. On his income tax return for 1947 the appellant reported it as a gift from Mr. Black but on the hearing before me he attempted several explanations, namely, that Mr. Black had assigned the $14,000 to him to be spent on the development of certain mining claims, that Mr. Black had contributed the money to the development of the claims in consideration of what he had done for him, that Mr. Black had paid him the money to reimburse him for what he had already spent and for what was still necessary to be spent, and that he considered the payment as a gift to him for the development of his mining properties. Mr. Black denied that he had made the assignment as a contribution to the development of the appellant's mining claims and stated that there had never been any suggestion that he should contribute to the financing of the claims or put any money into them. He also said that he had never heard of any such suggestion until after the appellant had given evidence to that effect before the Income Tax Appeal Board and characterized the appellant's evidence that the $14,000 had been paid to reimburse him for past and future expenses in the development of his mining claims as an absolute fabrication. I agree with this characterization and reject the appellant's evidence on this point. The assignment from Mr. Black to the appellant was not a gift or contribution for the development of the appellant's mining claims or connected with them in any way.

Mr. Black's statement of the reason for the assignment was clear cut. I summarize his evidence as follows. When the appellant told him that he had recommended his name to the committee as its counsel and solicitor Mr. Black said that he would be glad to act. There was then no discussion of fees. Later, when the negotiations for the reorganization were nearing completion, at one of the joint meetings of all the committees with the Hughes Committee the appellant raised the question of remuneration for committees. Mr. Hughes said that it had been understood throughout that there would be no remuneration for committees as such but that counsel fees should be on a scale that the committee could get something. After this meeting Mr.

Black told the appellant that while he did not like this arrangement he was prepared to follow it out and see that the committee got something but nothing was then said about the amount. Later, in a conversation with Mr. J. Tory, the solicitor for the 6 per cent preferred shareholders committee, who had charge of certain details of the reorganization, the subject of fees came up and Mr. Black said that he would be satisfied with $5,000 for himself. Mr. Tory said that he would recommend $10,000 to make it $5,000 for the committee. The appellant criticized Mr. Black for the small amount asked and instructed him to make a demand for $50,000. At a meeting of the bondholders' Committee the most that they would recommend was $8,000. This would leave only $3,000 for the committee and was not acceptable to the appellant. Then Mr. Black at the instance of the appellant drew a bill for $75,000. This had to be taxed and the appellant sat beside Mr. Black on the taxation. Mr. Black explained what Mr. Hughes had said, outlined the steps that had been taken by the committee, pointed out that its efforts had resulted in obtaining for their shareholders approximately $2,000,000 beyond the amount of the original offer, urged that the appellant had fought hard for his shareholders and was entitled to something and made it clear that in putting forward his bill at $75,000 he was asking not only for remuneration for himself but also for something for the committee. After written arguments had been put in Col. Hunter issued his certificate on September 21, 1946, that Mr. Black's bill had been taxed at $20,004.70. The appellant was very pleased when Mr. Black told him the amount of the taxation and said that he was going to tell the committee that Mr. Black's fee should be $6,000 instead of $5,000. This change came from the appellant and Mr. Black was glad to accept it. There was then a question as to division of the remuneration so that it would not all be taxable in the one year and it was decided that it might be spread over three years. The appellant agreed with this plan. After the taxation the appellant came in to see Mr. Black practically every day but when he came in on October 22, 1946, his manner was very brusque and he said that he wanted something about his money, that he wanted it assigned to him. Mr. Black was annoyed about his manner, called in his secretary, dictated the letter of

1951

GOLDMAN v. MINISTER OF NATIONAL REVENUE

Thorson P.

assignment already referred to and gave it to him. Mr. Black said that the assignment was made to the appellant for the Committee. Shortly after the cheque for $6,004.70 came in the appellant came in to see Mr. Black and told him that in addition to the $14,000 he wanted $3,500 out of Mr. Black's $6,000 claiming that Mr. Black had agreed to divide his legal fees with him. Mr. Black told the appellant that there was nothing in the $6,000 for him. There was a sharp disagreement between them and from then on they were not on good terms. Mr. Black told the appellant to take all his papers out of his office and that he did not want to have anything further to do with his business.

The appellant swore that the money he received from Mr. Black had nothing to do with his work as a member of the committee. I do not accept his denial. On the contrary, I accept the evidence of Mr. Black that he made the assignment because of his promise to the appellant to give the committee a share of the fees to compensate the committee and, because he had told the appellant that he would be satisfied with $6,000 for himself, he gave him the surplus. The $14,000 was turned over to the appellant as remuneration for the committee. Mr. Black said that he was obligated to give the surplus over what he had agreed to take to the appellant. He never considered whether it was a legal obligation or not. If the appellant had sued him perhaps he would not have won. He never gave it a thought. He knew that the appellant was not going to sue him for the appellant was going to get what he had promised. It is clear from Mr. Black's evidence that he paid the $14,000 to the appellant as remuneration for the committee. I also find that the appellant knew that the $14,000 was paid to him for services rendered by the committee. It is also clear that the appellant considered that he was entitled to this amount himself as remuneration for his services. This appears from the appellant's own statements made prior to his appeal to the Income Tax Appeal Board. After he had failed to extract anything from Mr. Black out of the $6,000 which he had retained for himself he wrote several letters of complaint to Mr. Black without any mention of his dispute about the $6,000 and then, on April 8, 1948, he wrote to the Law Society of Upper Canada laying a complaint

against Mr. Black. In this letter, after referring to Mr. Black's legal services to the shareholders committee, he said:

> Mr. Black made a definite agreement that all "legal fees" which he might receive from such companies was to be divided equally between himself and the writer. All moneys received for the committee efforts was to be solely the property of the writer in addition to the fifty per cent of whatever were to be "legal fees".

It is clear from this letter that the appellant considered that Mr. Black's fee was divisible into two parts, namely, that which he had set for himself as his fee and which the appellant described as "legal fees", and that which was in excess of such fee and which the appellant describes as moneys received for the committee efforts. The appellant considered the latter part, being the $14,000, solely as his property. That he considered this amount as compensation to himself for his committee work is clear from the second letter which he wrote to the Law Society on April 23, 1948. Mr. Black had written to the Law Society in reply to the appellant's letter in the course of which he said that he had agreed with the appellant that he would make an allowance from his counsel fee to remunerate members of the committee, and a copy of this letter had been sent to the appellant. The appellant, after referring to this statement in Mr. Black's letter, said:

> I can state and you can check with Mr. John D. H. Tory, that Mr. Black (without consulting with me and knowing that our agreement called for an even split in legal fee) did quote to Mr. Tory that he set his legal fee at $5,000. That was at a time when compensation to me for committee work had not yet been decided. Please remember that Mr. Black had agreed all over that amount set as legal fee was to be mine alone and he was in no way to share any part. Mr. Black, therefore, was content to obtain $2,500 in full for all his services. The balance to me.

On the evidence, I find that the sum of $14,000 was paid to the appellant and received by him as remuneration for the services of the committee and kept by him as remuneration for his own services as chairman of the committee.

The question whether the sum thus received was taxable income in the appellant's hands is not free from difficulty. Counsel for him contended that the payment could not as a matter of law be regarded as remuneration for services, that such a possibility was precluded by paragraph 38(*e*) of the plan of reorganization and excluded from consideration in the reasons for judgment of the taxing officer, that

1951

GOLDMAN v. MINISTER OF NATIONAL REVENUE

Thorson P.

it could not be remuneration for services simply because Mr. Black so described it, that before a sum could be remuneration for services the rationship between the payer and the recipient had to be such that the services were rendered by the recipient to or for the payer and that there was no such relationship between Mr. Black and the appellant. Counsel, therefore, submitted that the sum was either an investment by Mr. Black or a voluntary gift to the appellant personal to him and not taxable in his hands. My finding that the assignment was not a gift or contribution for the development of the appellant's mining claims or connected with them in any way disposes of the first contention that the payment was an investment, but the other argument cannot be so categorically rejected. Counsel submitted that Mr. Black was under no legal obligation to make any payment to the appellant, that his promise to pay him everything over the sum of $5,000, and later $6,000, was not enforceable, that since there was no legal reason for the payment it must as a matter of law be regarded as a voluntary gift, that it was made to the appellant for reasons of friendship and personal relations, and was therefore personal to him and not taxable in his hands within the principle of such cases as *Cowan* v. *Seymour* (1) on which case counsel mainly relied. There the appellant acted as secretary of a company without remuneration from the date of its incorporation until his appointment as its liquidator. When the liquidation was completed there was a sum in hand, after discharge of all liabilities, which according to the company's memorandum of association was divisible amongst the ordinary shareholders. By a unanimous resolution they voted the sum in equal shares to the chairman of the company and to the appellant. The appellant contended that this payment was a voluntary gift, that his duties as secretary and liquidator had terminated before the gift was made and that it was not taxable. It was held by the Court of Appeal, reversing the judgment of Rowlatt J. in the court below, that the sum did not accrue to the appellant in respect of an office or employment of profit but was made after the employment was ended and was in the nature of a testimonial to him for what he had done and was not taxable.

(1) (1920) 1 K.B. 500.

Another case relied upon was that of *Reed* v. *Seymour* (1) where it was held that the award of the proceeds of a benefit match to a cricketer was not a profit accruing to him in respect of his office or employment but was a personal gift to him and not assessable to income tax.

In my opinion, the decisions referred to are not applicable to the present case. I do not agree that the payment to the appellant was in the nature of a present or testimonial to him or that Mr. Black gave him the money for any consideration of friendship or personal reasons. Mr. Black made the assignment pursuant to an agreement which he considered binding on himself and under which the appellant considered himself entitled. The appellant was anxious to receive remuneration for his services on the committee but because he could not, under the plan of reorganization, get any remuneration directly from the company, Mr. Black undertook to obtain it for him indirectly through the medium of his counsel fees. There can be no doubt that if the appellant had not pressed for remuneration for his services there would have been no agreement by Mr. Black to make him an allowance out of his counsel fees or to submit his account for taxation. The reality is that Mr. Black made himself a conduit pipe between the appellant and the company through which remuneration for services flowed to him. The finding that the money was paid and received as remuneration for services concludes the matter against the appellant's claim. It does not then matter what the source of the payment was or that it was made by someone other than the person for whom the services were rendered. Nor does it matter whether it was made pursuant to an enforceable obligation or was voluntary: *Vide Herbert* v. *McQuade* (2). The sum was a profit or gain from the appellant's activity on the committee and it came to him because of and for such activity and would not have come otherwise.

Under the circumstances, the sum was properly included in the appellant's assessment as an item of taxable income and his appeal must be dismissed with costs.

Judgment accordingly.

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(1) (1926-7) 11 T. C. 625.

(2) (1901) 4 T.C. 503.

1951

Oct. 15
Oct. 18

BETWEEN:

THOMAS CAMPBELL.....APPELLANT;

AND

MINISTER OF NATIONAL REVENUE RESPONDENT.

Revenue—Income—Income Tax—Appellant carrying on trade, business or calling for the purpose of making a profit—Appeal from judgment of Income Tax Appeal Board dismissed.

Held: That since the Court found on the evidence before it that the appellant was carrying on a trade, business or calling for the purpose of making profit the appeal from the judgment of the Income Tax Appeal Board is 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.

A. S. Gregory for appellant.

L. St. M. Dumoulin and *F. J. Cross* for respondent.

The facts and questions of law stated are found in the reasons for judgment reported and in the reasons for judgment of the Income Tax Appeal Board.

SIDNEY SMITH, D.J. now (October 18, 1951) delivered the following judgment:

It is my opinion on the evidence adduced before me, that the appellant was carrying on a trade, business or calling for the purpose of making profit, and that he did make profit during the years in question. My reasons for this conclusion of fact are substantially those of the learned Income Tax Appeal Board (1), from whose decision this appeal is brought. With respect, I am also in agreement with the principles of law set out in the Appeal Board's reasons.

There are, however, on the evidence now before me, a few variations that should be made in the decision of the Appeal Board. They are as follows:

1. For the year 1946 net profit of $8,700 should be added to the assessment.

(1) (1951) 3 Tax A.B.C. 315.

1951

CAMPBELL
v.
MINISTER OF NATIONAL REVENUE

Sidney Smith, D.J.

2. For the year 1947 the net profit that should be added to the assessment is $20,500 instead of $29,200 as found by the Board.

3. For the year 1948 the net profit of $33,000 as found by the Board, remains unchanged.

The matter will be remitted to the Minister of National Revenue for remedial action.

Subject to the foregoing the appeal is dismissed. I see no ground for depriving the respondent of any portion of his full costs.

Judgment accordingly.

No. 38424

1951

Oct. 17
Oct. 23

BETWEEN:

JOSEPH PHILLIPONI, Jr.....APPELLANT;

AND

MINISTER OF NATIONAL REVENUE.RESPONDENT.

Revenue—Income—Income tax—Income War Tax Act, R.S.C. 1927, c. 97—Onus on appellant to satisfy Court that increase in his net worth over and above income reported was due to betting activities as alleged by him—Failure to discharge onus—Appeal dismissed.

Held: That since the appellant failed to satisfy the Court that the increase in his net worth over and above the income reported was, as alleged by him, due to his betting activities, his appeal from the judgment of the Income Tax Appeal Board must be dismissed.

APPEAL from judgment of Income Tax Appeal Board.

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

A. S. Gregory for appellant.

L. St. M. Dumoulin and *F. J. Cross* for respondent.

The facts and questions of law raised are stated in the reasons for judgment and in the reasons for judgment of the Income Tax Appeal Board.

SIDNEY SMITH D.J. now (October 23, 1951) delivered the following judgment:

The appellant appeals from a decision of the Income Tax Appeal Board dismissing his appeal from the Minister of National Revenue on assessments for 1946 and 1947 income tax made under section 47 of the Income War Tax Act.

1951

PHILLIPONI v. MINISTER OF NATIONAL REVENUE

Sidney Smith, D.J.

The onus rests upon appellant. He has failed to satisfy me, on the evidence now adduced, that the increase in his net worth over and above the income he reported was, as alleged, due to betting activities. I felt I was not being told the whole story.

I respectfully adopt the concluding passage in the judgment of the Appeal Board in the present case. (1950) 2 Tax A.B.C. 279 at p. 283. It is as follows:

> However, there is still a stronger point which leads me to dismiss the appeal. I have said in other decisions, and I repeat, that I do not consider that an appellant appealing an assessment by the Minister under section 47 can meet the onus that is upon him by a general statement, unsupported by other acceptable evidence, that the increase in his net worth over and above the income reported is due to betting activities. Again a general statement to the effect that he thought he averaged a net gain of $10,000 a year in these activities is not in my opinion sufficient to meet the onus referred to. The Board has met such a plea on several occasions and it would appear to me to open wide the doors to tax evasion if such an unsupported statement were accepted as meeting and overriding the presumption of validity attributed to an assessment by the Minister.

The appeal is dismissed with costs.

Judgment accordingly.

1951

Oct. 19
Oct. 23

No. 40182

BETWEEN:

JOSEPH PHILLIPONI, Jr. .....APPELLANT;

AND

MINISTER OF NATIONAL REVENUE RESPONDENT.

SIDNEY SMITH D.J. now (October 23, 1951) delivered the following judgment:

The appeal from the Minister of National Revenue is dismissed with costs, for the reasons given in the other Philliponi case, viz. No. 38424.

Judgment accordingly.

BETWEEN: 1951

PATRICIA MARY MacDONALD.....SUPPLIANT; Apr. 12 & 13 June 14

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Petition of Right—Trespasser on government wharf—Onus on suppliant—Petition dismissed.

Suppliant's husband, a taxi driver, drove his taxi on to a wharf owned by the respondent and maintained solely for the purpose of assembling and loading lumber into vessels. No motors were allowed on the wharf. Later his body and four other bodies and the taxi cab were located in deep water at the edge of the wharf. Suppliant seeks to recover damages from the respondent for the death of her husband.

Held: That the taxi driver was a trespasser on the wharf.

2. That even if the taxi driver had been an invitee or a licensee there was no evidence of any trap or hidden danger maintained on the wharf, or of anything to mislead him; and under the weather conditions prevailing at the time the taxi driver carried on at his peril.

3. That the onus is on suppliant to show that her husband's death was not due to his own miscalculation and such onus cannot be satisfied by conjecture.

PETITION OF RIGHT to recover compensation for the death of petitioner's husband alleged to have been caused by negligence of respondent.

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

A. B. MacDonald and *Kemp Edmunds* for suppliant.

Dugald J. MacAlpine and *K. E. Eaton* for respondent.

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

SIDNEY SMITH, D.J. now (June 14, 1951) delivered the following judgment:

The suppliant sues for compensation for the death of her husband who was drowned by his taxi being driven off the government wharf at Port Alberni on a stormy night of quite exceptional severity. I cannot but feel the greatest sympathy for the unfortunate widow and her four young children, thus deprived of their breadwinner; but I cannot find that the available evidence shows that the Crown is legally responsible.

1951

MACDONALD v. THE KING

Sidney Smith, D.J.

The suppliant's misfortune is that the course of events is almost entirely a matter of conjecture. It seems that on a Saturday night, late in November, 1949, the suppliant's husband, a taxi owner-driver, to whom I shall refer as "MacDonald", disappeared with his taxi. There seems to have been no clue to his fate until it occurred to someone on the following day that he may have driven off the wharf. Grappling and sounding at the edge of the wharf on Monday discovered the taxi in about thirty feet of water. It was raised and five bodies were recovered, three in the taxi, MacDonald's and another's alongside. Of the five occupants of the taxi we know the identity of MacDonald and of one other, a crew-member from a fishing boat that had been docked at the wharf on the Saturday night. We have no particulars of the other three, and know nothing of their movements. The watch of the deceased had stopped at twenty to eight, and I hold that that was the hour on Saturday night, 26th November, 1949, when the tragedy occurred.

There was no eye-witness of anything. I am told that the deceased was a sober man and a careful driver. I am not at all sure that such evidence was admissible; it is in effect character evidence in a civil case, which I have always regarded as irrelevant. But, being in, I accept it without hesitation. It is right to say that there was no suggestion here of drinking or of anything in the slightest degree improper.

I am asked to find that the wharf was defective and dangerous on several counts. That at once raises the question, not only of fact, but of whether the Crown owed any duty to MacDonald to have the wharf otherwise. A striking omission in the petition of right is the failure to allege either that MacDonald was an invitee or a licensee on the wharf. That seems to me to make the petition demurrable on its face, but I do not wish to decide the case on technical grounds. What is much more serious is the absence of any evidence to show that MacDonald had any right on the wharf. Only incidentally did any evidence come out as to how the Government ran the wharf, and as to how far the public were allowed to go there. It did appear that the wharf was used entirely for the assembly and loading of lumber into vessels. The fishing boats really had no business there and merely happened

to have been sent thither by the harbour-master to be out of harm's way during the severe storm on the Saturday night.

The suppliant called the Government watchman on the wharf as her witness; and his evidence makes it clear that MacDonald was a trespasser on the wharf, and neither an invitee nor a licensee. The watchman testified that motors were not allowed on the wharf except in one special case, and that if he had seen the taxi he would have turned it back. There was a sign on the wharf "no admittance except on business". There were two entrances to the wharf, and the suppliant has argued that because only one entrance had this sign MacDonald was entitled to assume his right to enter at the other. I cannot accept this. A complete absence of signs would not have given him a right to enter where motors were not allowed.

The above I think is sufficient to decide this case, but it may be useful if I deal with the grounds on which suppliant says the Crown was at fault.

Even if motor-cars had been allowed on the wharf, I do not think any case of invitation could be made out. The purpose of MacDonald, I assume, was to pick up the crew-member aforesaid (which he did just after 7.30 p.m.) and to take him up-town. MacDonald therefore was on the wharf on his own business and for his own private profit. He had no connection with the Crown which had no interest in his presence. The fishing boats were not at the wharf on Crown business; they were sent there for their own safety. Even if members of the crew could be expected to go ashore, it could not be expected that they would bring taxis on the wharf, even if this had not been forbidden. However it is probably immaterial whether MacDonald, if not trespassing, would have been an invitee or a licensee; the difference only goes to the diligence required of the owner in discovering traps and hidden dangers.

Here I do not think there was anything like a trap. A trap is a hidden danger in something that on its face seems safe, so that a mistaken sense of security is induced. Here where all was dark and obscure by driving rain, it cannot be said that anything appeared safe; and I think a taxi carried on under such conditions at its peril. It is not

1951

MACDONALD v. THE KING

Sidney Smith, D J.

shown that there was anything to mislead the driver. The only attempt to show anything misleading was made by the witness Helmersen who said that when on the wharf, at the inquest, a number of days after this tragedy, he noticed that lumber was piled near and at least eight feet over the edge of the wharf, at right angles, with gaps that would easily admit a car, so that it could create the illusion that there was a passageway. I cannot regard evidence of the state of the wharf at this later date as of any value; and there is none as to its state on the Saturday. But even if it had been proved that the lumber was piled so on Saturday too, I do not think this would mean much. It was, on that particular wharf, a perfectly natural and legitimate way to pile lumber, and the fact that a newcomer could deceive himself into drawing a false inference from the piles, would not make the method culpable.

The next complaint was of the absence of a timber (known as a bull rail) at the edge of the wharf to act as a sort of bulwark. This is usual on wharves, but there was evidence that it was not usual on wharves such as this one. Apart from this evidence, I cannot regard the absence of this timber as constituting a trap. The idea that motor-cars are entitled to proceed on wharves at night, depending on such timbers to save them from driving into the sea, does not appeal to me. Certainly the absence of such a timber was not hidden, but was obvious to anyone who had his way properly lighted; and the taxi had only itself to blame for going where its lights did not suffice.

The next complaint is made that the wharf itself was not lighted. There were only two navigation lights and a small light in the cabin of the watchman on the wharf, none of which apparently illuminated the wharf at all. I cannot see that there was any obligation to have any lights; an obligation which, if it existed at all, would be the same the whole night through. It is not shown that the Crown had any reason to expect anyone to come there on its business at night, and any danger from want of lights was an open and obvious danger. The very absence of lights was an indication to the public that they were not wanted there.

Next it is complained that the watchman was so shut up in his quarters that he could not see and warn those

1951

MACDONALD v. THE KING

Sidney Smith D.J.

who came on the wharf. The answer to this is that he had no such function; he was there to look after the Crown's property.

As I have said, I think MacDonald was a trespasser. Even if he were a licensee or invitee, I think the evidence fails to make out any case for the suppliant. The situation is much like that in *Wakelin* v. *L. & S.W. Ry. Co.* (1), where it was held that a deceased man's dependants made out no case by showing that the man had been found dead at a railway crossing. Lord Halsbury asked

> . . . Is there anything to show that the train ran over the man rather than that the man ran against the train?

Here, equally, there is nothing to show that MacDonald's death was not due entirely to his own miscalculation. The onus is on the suppliant, and it cannot be satisfied by conjecture.

The case of *Whitehead* v. *Corporation of the City of North Vancouver* (2), has been referred to; but I do not think it helps me. The case turned on the verdict of a jury, and a jury sometimes makes findings on pretty flimsy evidence. But the case is distinguishable in several ways from the present. There the deceased man was clearly an invitee; for the defendant was catering to the motor-driving public, and the service it offered was one that required motor-cars to drive to the edge of the wharf and thence on board the ferries; so that the deceased's having driven to the edge and over did not require the same degree of explanation that it does here.

I cannot do otherwise than dismiss the petition. As I have said, I do so with regret. I make no order as to costs. Indeed I hope that it may be possible for the Crown to pay at least the disbursements of the suppliant. I feel that I myself added to these disbursements, perhaps unnecessarily, by ordering a transcript for my greater certainty when considering the evidence.

Judgment accordingly.

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(1) (1886) 12 A.C. 41.

(2) (1937) 53 B.C.R. 512.

1951

Oct. 15
Oct. 16

ONTARIO ADMIRALTY DISTRICT.

BETWEEN:

WILLIAM G. HALL..... .....PLAINTIFF;

AND

THE OWNERS OF THE SHIP ss. *QUEBEC*..... } DEFENDANTS.

Shipping—Practice—Motion to dismiss action—Courts of Admiralty Act, 1934, 24-25 Geo. V., c. 31, s. 18(3) (a) (ii) and s. 18(6)—"Goods" does not include a passenger's luggage—No jurisdiction to entertain action.

Held: That the term "goods" in the Courts of Admiralty Act, 1934, 24-25 Geo. V., c. 31, s. 18(3) (*a*) (ii) does not include a passenger's luggage and the Court has no jurisdiction to entertain an action for loss of such.

MOTION to dismiss action on ground that Court lacks jurisdiction to entertain it.

The motion was argued before the Honourable Mr. Justice Barlow, District Judge in Admiralty for the Ontario Admiralty District, at Toronto.

F. Gerity for the motion.

J. D. Johnston contra.

BARLOW D.J.A. now (October 16, 1951) delivered the following judgment:

A motion by the defendants for an order dismissing this action upon the ground that the Court is without jurisdiction to entertain the action.

The claim of the plaintiff as set out in the statement of claim is for damages for the loss of the luggage of the plaintiff, who was a passenger on the ss. *Quebec,* which luggage was destroyed by a fire which occurred on board the ss. *Quebec* on or about the 14th day of August, 1950, at Tadousac, Quebec. The writ of summons was issued on the 25th day of June, 1951. It was duly served. On the 3rd day of July, 1951, the defendants appeared "under protest" and reserved "all legal objections to the jurisdiction." The Registrar of the Court gave the following leave:—

This appearance is to stand unconditionally unless the defendants apply within ten days to set aside the writ or service thereof and obtain an order to that effect.

Upon the 13th day of July, 1951, the defendants moved for the relief asked for on this motion as set out above.

The Courts of Admiralty Act, 1934, being 24-25 George V., chapter 31, section 18(6) provides as follows:—

18. (6) The jurisdiction of the Court on its Admiralty side shall, so far as regards procedure and practice, be exercised in the manner provided by this Act or by general rules and orders, and where no special provision is contained in this Act or in general rules and orders with reference thereto any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it may now be exercised by the Court.

No special provision is made in the Admiralty Rules for entering an appearance under protest but it is the practice that has been followed for many years, both here and under the English Admiralty practice, and it has been retained under the above quoted section. See Mayers Admiralty Law and Practice, 1916, p. 225 and cases there cited. See also Roscoe Admiralty Practice, 5th ed. p. 284; *The Theta,* (1894) P. 280; *The Vivar,* (1876) 2 P. 29.

The motion is therefore properly before this Court.

Counsel for the defendants contends that the plaintiff's claim is not one that is properly within the jurisdiction of the Admiralty Court, on the ground that the luggage of a passenger does not come within the term "goods" as used in the Courts of Admiralty Act, 1934, 24-25 George V, Chapter 31. The only section of the Courts of Admiralty Act that can be applicable is Section 18(3) (*a*) (ii) as follows:

18. (3) (*a*) Any claim—

(ii) relating to the carriage of goods in a ship.

Does the word "goods" used in this subsection "relating to the carriage of goods in a ship" include a passenger's luggage? No bill of lading was issued. The luggage was only carried as incidental to the carriage of the passenger. The leading case is *The Queen* v. *The Judge of the City of London Court,* (1883) 12 Q.B.D. 115, which holds that passengers' luggage carried on board a ship is not "goods" as used in the County Courts Admiralty Act, Amendment Act, 1869, the particular section of which is worded as follows:

"or in relation to the carriage of goods in any ship."

1951
HALL
v.
THE SHIP
ss. *Quebec*
Barlow
D.J.A.

See also Mullins, Marine Insurance Digest, 120; *The Kensington* (1898) 88 Fed. Rep. 331 and on appeal (1899) 94 Fed. Rep. 885.

There was no bill of lading or a contract of carriage with respect to the said luggage, and it is clear to me that the same does not come within the term "goods" as used in the Admiralty Courts Act. It therefore follows that there is no jurisdiction within the Court to entertain the action.

It should be noted that the registry of the ss. *Quebec* was closed on the 27th day of December, 1950, the ship having been destroyed by fire.

An order will therefore go dismissing the action with costs.

Judgment accordingly.

1951
Sept. 28, 29
Oct. 1
Nov. 7

BETWEEN:

HIS MAJESTY THE KING.....PLAINTIFF;

AND

ALVIN M. DAVIS AND JAMES H. REID ..... } DEFENDANTS.

Expropriation—Value of land expropriated—Defendant not entitled to recover in expropriation action architect's fees incurred by him.

Held: That the defendant in an expropriation action is not entitled to recover from the Crown architect's fees incurred by him for plans for a building proposed to be erected on the land expropriated.

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

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

F. J. Newson K.C. and *K. E. Eaton* for plaintiff.

W. G. Morrow for defendant Davis.

No one for defendant Reid.

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

1951

THE KING
v.
DAVIS ET AL.

Hyndman D.J

HYNDMAN D.J. now (November 7, 1951) delivered the following judgment:

The Information herein, filed on the 20th day of July, 1951, discloses that the lands hereinafter described, were taken by His Majesty the King, in the right of Canada, under the provisions of the Expropriation Act, ch. 64, under the Revised Statutes of Canada, 1927, for the purpose of a public work of Canada by depositing of record, under the provisions of sect. 9 of the Expropriation Act, on the 12th day of October, 1949, a plan and description of such lands in the office of the Registrar of the North Alberta Land Registration District, in which district the lands are situate, whereby the said lands have become and now remain vested in His Majesty the King, in the right of Canada.

The said lands are described as follows:

The most southerly eight-six (86) feet in depth throughout of lot one (1) and a strip two (2) feet wide of lot two (2), extending eighty-six (86) feet from the southeast corner of said lot two (2) along the eastern boundary thereof, both said lots being in block two (2) in the townsite of Leduc plan T in the province of Alberta.

Lot three (3) in block two (2) in the townsite of Leduc plan T in the province of Alberta.

His Majesty the King offered to pay the sum of $4,875 by way of compensation for the said expropriated property which offer was refused.

At the date of the expropriation, the said lot 1 was registered in the name of the defendant, James H. Reid, in the said Land Titles Office. Reid had been registered owner of the lands, but taxes not having been paid, his title was forfeited to the municipality of Leduc, who thus became the owner. Subsequently, on the 11th January, 1946, but before title had been registered in the name of the Town, Alvin M. Davis offered to purchase lot 1 from the municipality, the offer being as follows:

I wish to tender a bid for the corner lot where the Royal Bank formerly stood. There will be a considerable amount of expense clearing away the debris before building can be commenced, therefore, I submit to you my offer of one hundred dollars ($100) for the clear title of this lot, upon completion of contract, which I will roughly outline hereunder:

I will put up a fully modern two-storey building, brick or stucco, approximately 46 ft. by 86 ft. suitable for offices for doctors, dentists and lawyers. I plan to commence work as soon as contracts can be let and material is available for completion. Hoping this will meet with your approval.

1951

THE KING
v.
DAVIS ET AL.

Hyndman D.J.

The Town of Leduc agreed to the above offer, and on the 8th June, 1948, issued the following building permit:

No. 131. Town of Leduc.

Permission is hereby granted A. M. Davis for the erection of a brick office building, size 37 ft. by 40 ft. on lots 1 and 2, plan T, Leduc, at an estimated cost of $20,000. This permit is issued on condition that work is done in compliance with the Town by-laws and subject to inspection and approval of Town officials.

Davis then proceeded to make preparations for building, but about this time the Department of Public Works, which was looking for post office accommodation, began to negotiate with Davis to possibly rent a portion of the building which he contemplated erecting, suitable for a post office. Considerable negotiations both orally and in writing, were carried on, and on the 25th June, 1948, one D. A. Freze, a District Resident Architect at Calgary, wrote Davis, in part as follows:

May I therefore request that you forward me a set of plans, together with a statement of the terms and conditions on which you are prepared to rent to us at the earliest date possible.

In connection with the post office accommodation, news items have appeared in Alberta papers recently which might lead you to believe that the Department were considering the erection of a public building at Leduc. Although $25,000 was provided in the estimate, I can assure you that it is not the intention of the Department of Public Works to proceed with this project. You may rest assured that if suitable accommodation is provided in your building it will be rented by the Department of Public Works for many years to come.

On the 21st July, 1948, Davis wrote to Freze as follows:

Please find enclosed sketch of proposed building which the architect will be working on this week and will be ready in ten days. If there is any suggestions or alterations you would like to make, contact Mr. Campbell-Hope at once. I hope to commence building about August 15. Kindly return enclosed sketches.

Plans were prepared by the said architect, for which he charged $250, which was paid by Davis on the 24th September, 1948. Nothing further was done with regard to the leasing of the property, and on the 3rd November, 1948, the District Resident Architect wrote to Davis as follows:

Re part of lot 1, lot 2, plan T, Leduc, Alberta.

The Department of Public Works are desirous of purchasing property in Leduc for the purpose of erecting a post office building. If you are willing to sell the above property to the Crown will you please let me know by return mail if possible,

(a) the lowest price for which you will sell the property,

(b) a statement that you are the sole owner of the property and that the same is unencumbered, or what mortgages are against the land. I believe an offer was made verbally some time ago by Mr. Freze for this lot. I also understand that there is an option on this property which however, will be dealt with later if the Department is interested in this site.

On the 20th May, 1949, the District Architect wrote Davis as follows:

Re: Leduc, Alberta, proposed public building.

This is to advise you that the Department contemplates commencing on the construction of a public building on the Main Street of Leduc in the early part of June. It is expected that it will be completed around the 1st of May, 1950. The Department will therefore be communicating with you regarding the property which you have offered for sale.

On the 18th June, 1949, Davis wrote the Public Works Department at Ottawa, as follows:

I have a piece of property in the town of Leduc, Alberta, which the Dominion Government wishes to purchase for a post office site. I posted a $1,000 bond guaranteeing to build on it before May 15 on the strength of a letter from the Public Works Department, Calgary, stating that they would commence building the early part of June. The town of Leduc granted me an extension of time until June 20. To date, the Public Works Department has done nothing, I therefore am compelled to start building immediately, unless the Town Council has some assurance that the Government is going to build. At present Leduc is putting in water and sewerage and hope to have gas this fall. Please reply by wire immediately.

According to Ex.J., Davis offered to sell the property for $8,000.

As stated above, the sale of the land to Davis from the municipality, was conditional on his erecting a substantial building, and the low price of $100 was due to this condition, but as Davis delayed carrying out his part of the arrangement, owing to the above negotiations, the Town threatened to cancel the agreement. So, on the 14th January, 1949, Davis executed a bond for $1,000 in favour of the municipality, conditional on his commencing to erect and carry to completion, or to arrange for some other person or persons to commence to erect and carry to completion, without delay or interruption, a fully modern two-storey brick or stucco building, approximately 80 ft. by 46 ft., which building was to be commenced by the 14th May, 1949. The building not having been commenced as stipulated, the bond of $1,000 was forfeited, and was paid by Davis, and although he might have lost title to the land, the municipality consented to give him a clear title in consideration of the payment of the $1,000.

1951

THE KING
v.
DAVIS ET AL.

Hyndman D.J.

He claims, in addition to compensation for the land, that he should also be recouped the fees which he paid the architect, namely, $250, and blames the attitude of the Crown for his failure to live up to his first agreement with the Town of Leduc. As to this claim, I am of the opinion that it is not such as can be related to the land, but is a collateral matter which can only be dealt with separately. The substance of the claim is really that owing to the conduct or attitude of the Crown's officials in leading Davis to believe that if he should erect a building the Government would lease it, which of course did not materialize, caused this expenditure which was fruitless to him.

[The learned judge here reviews the evidence of values and continues.]

There will therefore be judgment declaring that the property described in paragraph 2 of the Information is vested in His Majesty the King, in the right of Canada, as of the 12th October, 1949, 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 $6,020, together with interest at the rate of 5 per cent per annum from the 12th October, 1949, to this date, together with costs of the action.

Judgment accordingly.

1951

Sept. 25
Nov. 7

BETWEEN:

HIS MAJESTY THE KING.....PLAINTIFF;

AND

MARY ANN BERGER .....DEFENDANT.

Expropriation—Refusal to accept offer of Crown—Compensation money awarded by Court less than amount offered by Crown—Defendant not entitled to costs.

Held: That where the owner of property expropriated by the Crown is awarded by the Court a sum less than that offered by the Crown during the course of negotiation to purchase the property he is not entitled to recover his costs of the action from the Crown.

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

The action was tried before the Honourable Mr. Justice Hyndman, Deputy Judge of the Court, at Yorkton.

V. P. Deshaye and *K. E. Eaton* for plaintiff.

W. B. O'Regan K.C. and *D. A. McKenzie* for defendant.

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

HYNDMAN D.J. now (November 7, 1951) delivered the following judgment:

The information herein discloses that the lands hereinafter described were taken under the provisions and authority of the Expropriation Act, ch. 64, of the Revised Statutes of Canada, 1927, for the use of His Majesty the King, in the right of Canada, for the purposes of the Public Works of Canada by depositing of record on the 1st day of April, 1950, under provisions of sect. 9 thereof, a plan and description of such lands in the Land Titles Office for the Regina Land Registration District in the province of Saskatchewan, in which registration district the said lands are situated, whereby the said lands have become and now remain vested in His Majesty the King.

The lands so taken are described as follows:

All of lots 25 and 26 in block 16 in the village of Langenburg, province of Saskatchewan, according to a plan of record in the Lands Titles Office, for the Regina Land Registration District as No. 4266.

1951

THE KING v. BERGER

Hyndman D.J.

Up to the time of expropriation, the said defendant, Mary Ann Berger, was the registered owner in fee simple of the said lands.

His Majesty the King was willing to pay to the defendant or to whomsoever may be judged entitled thereto, the sum of $2,000 by way of compensation for the estate or interest of the defendant and of any other person in the said lands at the time of the taking thereof, and for any loss or damage that may be occasioned to the defendant by reason of the taking of the said lots.

The defendant refused to accept the sum of $2,000 and claimed the sum of $3,300 as proper compensation. This having been refused by the Crown, the present action resulted.

The village of Langenburg is located on both sides of the Canadian Pacific Railway, in the heart of a fine agricultural district in Saskatchewan, and has a population of about 600 people, having increased in the last ten years from about 350 people to its present population. It was agreed that it is a progressive and growing community and composed of enterprising citizens.

The principal street in the village is King William Avenue, which is part of the provincial highway and runs on the south of, and parallel and opposite to, the Canadian Pacific Railway and station. The leading businesses are situated on and along this street. On the same street the defendant is the owner and operator of the Imperial Hotel which she inherited from her deceased husband.

The lots in question in this action are in the same block across the lane, nearly, but not quite opposite the Imperial Hotel, and have been used by the defendant as a vegetable garden. There is situated thereon only, a small garage, which she has the privilege of removing at an estimated cost of about $75. The defendant contends that the garden is valuable to her for supplying vegetables to the hotel, and her family, and she estimated the value of the garden at about $150 per year, less taxes—$12; plowing—$2; seeding—$2.

The lots are somewhat low, especially lot 26. Before this portion of the property could be used to advantage, there would have to be considerable filling-in.

Each lot has 50 feet frontage and 120 feet in depth. The adjoining lots, 23 and 24, are owned by the Reliance Lumber Company, which is the only lumber company in Langenburg. In 1946, that company offered the defendant $500 for 20 feet of the easterly portion of lot 25, which offer was refused.

The evidence discloses that lot 25 is higher and more valuable than lot 26.

The lots in question front on what is known as Karl Avenue. Second Street runs north and south along the easterly boundary of block 16. On the opposite side of the street, on lot 5, block 19, there is a cold storage plant, and on lots 8 and 9, a garage. There are other small buildings on lots 1, 2 and 3, 7 and 10. On lot 22, in block 16, one Richard A. Popp, carries on an insurance and real estate business.

There is no question but that the principal street in the village is King William Avenue, business on which has grown and extended over the years, but it was submitted by the defence that there is now a trend down Second Street towards Karl Avenue, which tends to increase the value of the property in question. In my opinion, this feature of the case was somewhat exaggerated by the defendant's witnesses. I am unable to visualize Karl Avenue as a busy street for a long time to come, if ever.

The lots are assessed by the village at $170 each. However, I am not influenced by this assessment and consider it entirely out of line with the true value of the property.

A great deal of so called expert evidence was adduced with regard to the value of these lots, ranging from around $1,600 to $2,500. Comparisons were made between prices of lots on King William Avenue and Karl Avenue, the selling price of some of the lots on King William Avenue varying greatly, some having buildings thereon and others vacant land. My opinion, based on the evidence, is that property on King William Avenue is much superior in value to that on Karl Avenue, in the block in which the lots in question are situated. I do not think a proper comparison can be made.

1951

THE KING v. BERGER

Hyndman D.J.

During negotiations, which were carried on between representatives of His Majesty and the defendant, I find the following letters:

July 14, 1949, to Mrs. Berger from the Real Estate Advisor, Department of Public Works, and reads as follows:

Reference is made to your letter to the District Resident Architect at Saskatoon in which you offered for sale lots 25 and 26, block 16, in the village of Langenburg, for the sum of $2,000. Would you please advise if the amount of $2,000 would be accepted by you in full and final settlement of all claims.

An undated letter to the District Resident Architect, Saskatoon, reads as follows:

I, Mrs. Berger, agree to accept the sum of $2,000 for lots 25 and 26, block 16, in the village of Langenburg, for a site for a proposed federal building.

On July 25, the defendant wrote the said agent the following:

Re your letter of July 14, 1949, file 14543-1, re lots 25 and 26, block 16.

I am willing to accept the amount stated in your letter as final settlement.

If possible I would like to retain the east 25 feet of lot No. 25 as my son is anxious to erect an electric shop on this part of the property. Please let me know if this is possible.

In answer to the last mentioned letter, Mr. Cherry wrote on August 10, as follows:

This will acknowledge receipt of your letter of July 25, 1949, concerning lots 25 and 26, block 16, Langenburg, Saskatchewan. In reply we may say that the whole of lots 25 and 26 will be required. It will therefore not be possible for you to retain the east 25 feet of lot 25.

Negotiations seemed to have lagged following this, and subsequently, on July 26, 1950, the solicitor for the Department of Justice wrote to Mrs. Berger in part as follows:

As you have been advised, the sum of $2,500 has now been authorized to be paid to you for this property and I am positive, Mrs. Berger, that this offer will not be increased. As I previously pointed out to you, this property had already been sold by you for the sum of $2,000, and the Government of Canada increased the consideration to $2,000 when they actually were not required to do so, as the property has already been expropriated to His Majesty the King in the right of the Dominion of Canada. I would strongly recommend to you that you accept without further delay the offer of $2,500 because it is quite possible, in my opinion, that the Government may, if you continue to refuse to accept this latest offer of $2,500 exercise its rights under your original offer of $2,000, which is the offer that was accepted and pay you no more.

This offer not having been accepted action was proceeded with and was heard by me at the city of Yorkton.

1951

THE KING v. BERGER

Hyndman D.J.

I have given the evidence very careful consideration, and have come to the conclusion that the sum of $2,000 was a fair, and I might almost say, generous offer for the property expropriated, as the value to her, but I would add to that 10 per cent of the value on account of compulsory taking, and $75 cost of removing the shed.

The principles upon which claims of this character should be adjudicated have been laid down in many decisions of this Court, the Supreme Court of Canada and the Privy Council. It is the value to the owner, and not to the taker, which must be considered together with compensation in appropriate instances for disturbance or loss of business consequent in the compulsory taking, and a percentage usually not exceeding 10 per cent, though not a matter of right, for such compulsory taking. See *Diggon-Hibben Ltd.* v. *The King* (1); *Irving Oil Company* v. *The King,* (2); *Pastoral Finance Association* v. *The Minister,* (3); *Woods Manufacturing Company Limited* v. *The King,* (4).

There will therefore be judgment declaring that the property described in paragraph 2 of the Information is vested in His Majesty the King as from the 1st day of April, 1950; 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 $2,275, together with interest at the rate of 5 per cent per annum on $2,200 from 1 April 1950 to this date; but, I think, as the defendant foolishly refused the offer of $2,500 when she might reasonably have accepted same, there should be no costs of the action to either party.

Judgment accordingly.

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(1) (1949) S.C.R. 714.
(2) (1946) S.C.R. 551.
(3) (1914) A.C. 1083.
(4) (1951) S.C.R. 504.

1951

June 12 & 13
Sept. 12

BETWEEN:

FREDERICK ALLAN HAMILTON .....SUPPLIANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

Crown—Petition of right—Solicitor employed as an agent of the Minister of Justice—"Instructions to Agents" issued by the Department of Justice—Accounts for professional services rendered by an agent subject to taxation by Deputy Minister of Justice—The Consolidated Revenue and Audit Act, S. of C. 1930-1931, c. 27, s. 29(1)—Liability of a solicitor for his wrongful acts—Action dismissed—Counter-claim allowed.

Suppliant, a lawyer, was employed as an agent of the Minister of Justice in connection with various claims and proceedings. His accounts were sent to the Department of Justice but remained unpaid. Suppliant now claims $273.48 for his services. Alleging negligence on suppliant's part in searching the title to a certain farm property—search that he was instructed to make—and the delivery of a faulty certificate of title, the respondent by way of a counter-claim seeks to recover the loss or damage suffered by him as a consequence of suppliant's negligence.

Held: That the action must fail since suppliant's accounts were not taxed by the Deputy Minister of Justice as required by clauses 13, 14 and 15 in the "Instructions to agents" issued by the Department of Justice.

2. That the action must also fail because there was not an unencumbered balance available out of the amount authorized by Parliament for the particular service to pay the commitments under the alleged contracts or agreements within the meaning of s. 29 of the Consolidated Revenue and Audit Act, 21-22 Geo. V, c. 27.

3. That the suppliant was negligent in giving a certificate of title without having searched the title personally, but relied on the report of the registrar of deeds which report was not accurate.

PETITION OF RIGHT by suppliant to recover from the Crown the amount of his fees for services rendered.

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

The suppliant appeared in person.

E. F. Cragg for respondent.

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

1951

HAMILTON v. THE KING

ANGERS J. now (September 12, 1951) delivered the following judgment:

This is a petition of right whereby the suppliant claims from His Majesty the King the sum of $273.48 for services rendered, with interest and costs.

In his petition the suppliant alleges in substance:

he was employed to take proceedings on behalf of respondent against W. N. MacDonald and the Margaree Steamships Company Limited for $252, being charges for mooring of the barge *Norman Mac* to the government wharf at Leitches Creek, Nova Scotia, from August 1, 1946, to December 31, 1947, and for electrical energy supplied to the *S.S. Beaver* and for summer and winter berths for the seasons 1946 and 1947, in the sum of $167.

on or about July 14, 1948, he issued a writ in the county court of District No. 7 at Sydney, Nova Scotia, for $167, being the amount of the claim as subsequently reduced by the department, and he recovered a judgment on August 13, 1948, against said W. N. MacDonald and the Margaree Steamships Company Limited for $167 and $25.15 for costs;

on or about September 29, 1948, he issued an execution and delivered it to the sheriff for seizure of the defendant's goods and chattels;

the sheriff returned to him the sum of $198.39, being the amount recovered under judgment and he (the suppliant) remitted the said amount to the Department of National Revenue;

on or about January 15, 1949, he rendered an account for his services to the Department of National Revenue for $81 fees and $12.60 disbursements, making a total of $93.60; this account has not been paid;

on or about February 7, 1949, he was retained by the Enforcement Counsel of the Wartime Prices and Trade Board to take proceedings against one Celia Brooks (Brooks Store) for violations of the Wartime Prices and Trade Board regulations; on February 14, 1949, he laid an information against the said Celia Brooks and on the 25th of the same month the accused pleaded guilty;

1951

HAMILTON v. THE KING

Angers J

on or about February 25, 1949, he rendered an account for services in the said case to the Regional Director, Wartime Prices and Trade Board, at Halifax, for $39 fees and 88 cents disbursements, making a total of $39.88; the said bill has not been paid;

on or about April 27, 1949, he was instructed to lay an information against Rose Gallen for failure to file income tax returns for 1946 and 1947 and on May 3, 1949, he laid the said information; on May 12, 1949, the accused pleaded guilty before the magistrate and was fined $25 and costs; he remitted the fine and costs to the department;

on or about May 12, 1949, he rendered a bill to the Department of National Revenue for services rendered in the said case for $20; the said account has not been paid;

on or about April 27, 1949, he was instructed by the Department of National Revenue to lay an information against Louis Gallen for failure to file his income tax returns for 1946 and 1947; he laid the said information; on May 12, 1949, Louis Gallen appeared and pleaded guilty to the offence charged and was fined $25 and costs; he remitted the fine to the department;

on or about May 12, 1949, he rendered his bill to the Department of National Revenue for $20 for services rendered in the said case; this bill has not been paid;

on or about March 24, 1949, he was instructed by the Department of National Revenue to lay an information against Clarence P. Thompson for failure to file his income tax return for the years 1940 to 1946, inclusive; he laid the said information; on April 14, 1949, the accused appeared before the Magistrate and pleaded guilty to the offence and was fined $25 and costs; he remitted the fine to the Department of National Revenue.

on April 18, 1949, he rendered an account to the Department of National Revenue for $20 for services rendered in this matter; the said account has not been paid;

on or about March 29, 1949, he was instructed by the Department of National Revenue to lay an information against Daniel MacKenzie for failure to file his income tax returns for the years 1944 to 1946; he duly laid the said information; on April 19, 1949, the accused appeared before

the magistrate and entered a plea of guilty to the offence and was ordered to pay a fine of $25 and costs; he remitted the fine to the Department of National Revenue;

on April 20, 1949, he rendered his bill for services in the above matter for the sum of $20; the said bill has not been paid;

on or about March 24, 1949, he was instructed by the Department of National Revenue to lay an information against Charles E. Murphy for failure to file his income tax returns for the years 1941, 1944 and 1945; he duly laid the said information; on April 14, 1949, the accused appeared before the magistrate and pleaded guilty to the offence and was fined $20 and costs; he remitted the said fine to the Department of National Revenue;

on or about April 18, 1949, he rendered his account, amounting to $20, for services rendered in the above matter;

on or about March 24, 1949, he was instructed by the Department of National Revenue to lay an information against John F. MacNeil for failure to file his income tax returns for the years 1945 and 1946; he duly laid the said information; on April 14, 1949, the accused appeared before the magistrate and pleaded guilty; the magistrate imposed a fine of $25 and costs; the said fine was remitted to the Department of National Revenue;

on April 18, 1949, he rendered his account, amounting to $20, for services rendered in the above matter; the said account has not been paid;

on or about March 29, 1949, he was instructed by the Department of National Revenue to lay an information against James Vasilakis for failure to file his income tax returns for the year 1941; he duly laid the said information; on April 14, 1949, the accused appeared and pleaded guilty; the magistrate imposed a fine of $20 and costs; on April 18, 1949, he remitted the fine and costs to the Department of National Revenue;

on April 18, 1949, he remitted his bill, amounting to $20, for services rendered to the Department of National Revenue in the above matter; this account has not been paid;

1951

HAMILTON
v.
THE KING

Angers J.

the following amounts remain unpaid:

amount	due	under	paragraph	5	herein	.....	$ 93.60
"	"	"	"	8	"	.....	39.88
"	"	"	"	11	"	.....	20.00
"	"	"	"	14	"	.....	20.00
"	"	"	"	17	"	.....	20.00
"	"	"	"	20	"	.....	20.00
"	"	"	"	23	"	.....	20.00
"	"	"	"	25	"	.....	20.00
"	"	"	"	28	"	.....	20.00
						Total	$273.48

the Department of National Revenue above referred to is a department of the Government of Canada, established under the Department of National Revenue Act, R.S.C. 1927, chapter 34;

the Wartime Prices and Trade Board is a department of the Government of Canada established by Order in Council P.C. 2516.

In his statement of defence His Majesty the King pleads as follows:

he does not admit any of the allegations of the petition of right;

if said allegations are true he says that a term of the suppliant's employment as an agent of the Minister of Justice was that he was to be paid for professional services such amounts as the Deputy Minister of Justice might determine on taxation and that none of the accounts above referred to have been taxed;

if one or more contracts, agreements or undertakings were entered into as alleged in the petition of right, which is denied, they involved a charge on the Consolidated Revenue Fund and neither the Comptroller of the Treasury nor an officer of the Department of Finance designated by him and approved by the Treasury Board had, in any case, certified that there was a sufficient unencumbered balance available out of the amount authorized by Parliament for the particular service to pay the commitments under the alleged contracts, agreements or undertakings within the meaning of section 29 of the Consolidated Revenue and Audit Act, chapter 27 of the Statutes of Canada, 1931;

for these reasons the Deputy Attorney General of Canada, on behalf of His Majesty the King, prays that the petition of right be dismissed with costs.

In addition to his statement of defence the respondent filed a counterclaim in which he says substantially as follows:

by letter dated July 14, 1947, from H. S. Prince, the District Solicitor at Saint John, N.B., of the Department of Veterans' Affairs, to the suppliant, the latter was instructed, as agent of the Minister of Justice, to search the title to a certain farm property at Howie Centre, Nova Scotia, which one Stanley B. Steele, of Sydney, had agreed to sell to the Director of Veterans' Land Act; by this letter the suppliant was instructed to "proceed to search this title immediately" and forward his certificate in duplicate as soon as possible, so that the purchase might be completed without delay;

by a letter dated July 16, 1947, to the said Prince the suppliant acknowledged receipt of the letter previously referred to and advised that he would proceed with the search and advise him in due course;

by letter dated July 25 to the said Prince the suppliant advised that the title in the property was in order, subject to the description being submitted, and that, as soon as he received the description, he would forward a formal certificate;

by letter dated August 14 the suppliant forwarded to the said Prince duplicate copies of the deeds, affidavit of the vendor and certificate of title;

the certificate of title reads in part as follows:

All that certain lot, piece or parcel of land situate, lying and being at Howie Centre, in the County of Cape Breton, and more particularly bounded and described as follows:

(I do not deem it necessary to reproduce the description).

I hereby certify that the title to the above described property is free from encumbrances, except as set out below.

Dated at Sydney, in the County of Cape Breton, this 4th day of August, A.D. 1947.

F. ALLAN HAMILTON,
Agent for the Minister of Justice.

Encumbrances:

1. Municipal taxes to date.

1951

HAMILTON v. THE KING

Angers J.

the said Prince also received from suppliant the following documents:

Re: Deed Stanley B. Steel to the Director, the Veterans' Land Act, dated the 2nd day of August, A.D. 1947.

I hereby certify that the Director, The Veterans' Land Act, now has good title in fee simple to the property mentioned in the above deed, free from all encumbrances and/or easements whatsoever, including taxes to June 30, 1947.

Dated at Sydney, in the County of Cape Breton, this 26th day of August, A.D. 1947.

F. ALLAN HAMILTON,
Agent for the Minister of Justice.

on August 1, 1947, the said Steele gave to the Director of Veterans' Land Act a warranty deed to the said property and the purchase price of $300 was paid to the said Steele;

on August 25, 1947, the Director entered into a contract with Charles W. Steele, of Sydney, for the erection by Steele of a dwelling house on the said property for $5,850, the said house to be built for a veteran, Roy Sinclair Anthony, pursuant to an agreement between the veteran and the Director under the Veterans' Land Act, chapter 33 of the Statutes of Canada, 1942-43;

by letter dated October 8, 1947, the said Prince, on behalf of His Majesty, forwarded to the suppliant a cheque for $77.54, of which $38.61 was in payment for the services rendered by the suppliant in acquiring the land in question;

the Director subsequently learned, after construction of the said house had been commenced, that his title to the land was defective and that he had not received from Stanley B. Steele good title to the property, free from all encumbrances;

the land which was included in the conveyance to the Director from Stanley B. Steele, but to which the Director did not thereby secure good title, was expropriated on July 16, 1949, by depositing in the Registry Office at Sydney a plan and description of the land in accordance with The Expropriation Act R.S.C. 1927, chapter 64;

the suppliant, in breach of his duty:

(*a*) failed to search the title to the property at all;

(*b*) if he searched the title, he did not search it in the manner in which it should have been searched by a reasonable and competent solicitor;

(*c*) if he searched the title in the manner in which it should have been searched by a reasonable and competent solicitor, the report that he made to the Director was not a report that a reasonable and competent solicitor would have made;

by way of counter claim the Deputy Attorney General claims on behalf of His Majesty:

(*a*) an amount equal to the amount of compensation that is agreed upon or that is adjudged as compensation for the expropriated land;

(*b*) an amount equal to the amounts paid or payable by His Majesty by way of legal costs and expenses to secure good title to the land in question;

(*c*) such other relief as this Court may seem meet; and

(*d*) the costs of this counterclaim.

I deem it apposite to recapitulate the evidence briefly.

[Here the learned judge reviews the evidence and proceeds]:

It was submitted by suppliant that the petition of right was the proper procedure to adopt in the present case. This seems to me obvious; there was no other recourse at his disposal. The law in this connection is clear: Exchequer Court Act, section 37, the first paragraph whereof reads as follows:

> Any claim against the Crown may be prosecuted by petition of right, or may be referred to the Court by the head of the department in connection with the administration of which the claim arises.

See also the Petition of Right Act, R.S.C. 1927, chapter 158.

Counsel for respondent drew the attention of the Court to the fact that the Court has jurisdiction in matters of contract in virtue of section 18 of the Exchequer Court Act. This question was not challenged by suppliant. The decision of the Judicial Committee of the Privy Counsel in re *The Queen* v. *Doutre* (1), although referred to by counsel in relation to another aspect of the case, seems to me to dispose of the point.

The defence on the merits is twofold: 1° accounts of agents, before being paid, must be taxed by the Deputy

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

1951

HAMILTON v. THE KING

Angers J.

Minister of Justice; 2° there was not an unencumbered balance available out of the amount authorized by parliament for the particular service to pay the commitments under the alleged contracts or agreements within the meaning of section 29 of the Consolidated Revenue and Audit Act, 21-22 Geo. V, chapter 27. The first paragraph of section 29, which is the only one having some relevancy, is thus worded:

29. (1) No contract, agreement, or undertaking of any nature, involving a charge on the Consolidated Revenue Fund, shall be entered into, or have any force or effect, unless the Comptroller, or an officer of the Department of Finance designated by him and approved by the Treasury Board, shall have certified that there is a sufficient unencumbered balance available, out of the amount authorized by Parliament for the particular service, to pay any commitments under such contract, agreement or undertaking which would, under the provisions thereof, come in course of payment during the fiscal year in which such contract, agreement or undertaking is made or entered into.

With regard to the first ground of defence, reference may be had to the Instructions to agents, exhibits A and B. Clause 15 in exhibit A stipulates:

15. Accounts rendered for professional services will be examined by the Deputy Minister of Justice and will be subject to taxation and reduction at his discretion. His decision will be final and conclusive and not subject to appeal. This method of determining and fixing the amount of an agent's remuneration is the basis on which any business has been or may be entrusted to any agent.

No account which does not bear the following certificate will be considered,

> I hereby certify that I rendered the services indicated above and that this account truly shows the fees claimed, moneys disbursed and all moneys received from any sourcec whatever by me in connection with the subject matter of the account.
>
> Agent of the Minister of Justice

Clauses 13 and 14 in exhibit B, although differently worded, are to the same effect:

13. Accounts of agents for professional services are taxed by the Deputy Minister of Justice whose taxation is not appealable. This is the basis on which all work is entrusted to an agent.

14. All copies of an agent's account must bear the following certificate signed by the agent:

> I hereby certify that I rendered the services indicated above and that this account truly shows the nature of the services, the time occupied, the fees claimed, disbursements made and all moneys received by me in the matter.
>
> Agent of the Minister of Justice

Clauses 13, 14 and 15 are clear and categorical and, although liable to give rise to arbitrary decisions, they must be followed.

On this ground alone I believe that the action must fail.

The second reason set forth in the statement of defence is that there was not, out of the amount authorized by parliament for the particular service involved, a sufficient unencumbered balance available to pay any commitments under the said contract or agreement which would, under its provisions, come in course of payment during the fiscal year in which the contract or agreement is made. This reason is based on section 29 of the Consolidated Revenue and Audit Act, 21-22 Geo. V, chap. 27, hereinabove reproduced. For this additional reason I am of opinion that the suppliant is not entitled to the relief sought.

The suppliant was negligent in giving a certificate of title to the Director concerning the Stanley B. Steele property without having searched the title personally, but relied on the report of the registrar of deeds for the County of Cape Breton, John Roderick Gillies. Unfortunately, this report was not accurate.

The liability of a solicitor for his wrongful act or neglect of his duty to his client has been the subject of numerous decisions and various commentaries by authors. The doctrine that a solicitor, as any other person, is liable for his wrongful acts is generally recognized: *Mayne on damages*, 11th edition, 497; *Bullen and Leakes Precedents of pleadings*, 54; *Howell* v. *Young* (1); *Godefroy* v. *Jay* (2); *Hadley et al.* v. *Baxendale et al.* (3); *in re Dangar's Trusts* (4); *Hett* v. *Pun Pong* (5); *Blyth* v. *Fladgate* (6); *Gould* v. *Blanchard* (7); *Finkbeiner* v. *Yeo* (8); *Marriott* v. *Martin* (9); *Johnson* v. *Solicitor* (10). Mayne relates the doctrine clearly and I deem it apposite to quote a passage from his treatise (p. 497):

> Damages in actions against solicitors for neglect of their duty are governed by the same principles as those laid down in the case of sheriffs. The plaintiff is entitled to be placed in the same position as if the solicitor had done his duty. But he is entitled to no more. Therefore, where no diligence could have been effectual, as where the client had

(1) (1826) 108 Eng. Rep., 97.
(2) (1831) 131 Eng. Rep., 159.
(3) (1854) 156 Eng. Rep., 145.
(4) (1889) 41 Ch. D., 178.
(5) (1890) 18 S.C.R. 290.
(6) (1891) 1 Ch. D., 337.
(7) (1897) 29 N.S.R. 361.
(8) (1915) 9 W.W.R. 891.
(9) (1915) 21 D.L.R. 463.
(10) (1917) 36 D.L.R., 239.

1951

HAMILTON v. THE KING

Angers J.

no ground of action or defence, the solicitor cannot be liable for negligence in some step in the proceedings, unless it has caused loss independent of the necessary result of the suit, or other proceeding. It lies upon the defendant, however, to establish this defence affirmatively, and the fact that the plaintiff has suffered no actual injury is no bar to the action, if otherwise maintainable. He is still entitled to nominal damages for the breach of implied contract committed by him.

The authors and the jurisprudence distinguish the damages which may reasonably be considered as arising from a breach of contract and those which would not arise in the ordinary course of things but which may arise due to circumstances peculiar to the case. I do not think necessary to deal with this distinction, since the liability of the suppliant evidently arises from his failure to search the title.

I may say that the suppliant appeared to me to be honest, reliable and trustworthy; his demeanour in Court impressed me favourably. Notwithstanding this, I have no other alternative but to declare that the suppliant is not entitled to the relief sought by his petition.

The respondent will be entitled to his costs against the suppliant, if he deems fit to claim them.

There remains the counterclaim. Having reached the conclusion that the suppliant was guilty of negligence in the exercise of his duties, I must condemn him to pay to His Majesty the loss or damage suffered by him as a consequence of suppliant's negligence. Said loss or damage amounts to $1,276 as follows: $926 for the delay and the increased cost of construction of the Anthony house and $350, costs of the expropriation of the Coonan property, rendered inevitable by the faulty certificate of title delivered by suppliant.

As intimated by the suppliant, the respondent was incomprehensibly negligent in taking eighteen months to decide whether he would pay $350 for a small parcel of land or take a chance in a lawsuit. Undoubtedly His Majesty did not display much haste in the matter. I may note incidentally that this way of acting is rather customary on the part of the Crown. Be that as it may, I do not believe that the dilatoriness of His Majesty can relieve the suppliant of his responsibility.

1951

HAMILTON v. THE KING

Angers J.

There will be judgment against the suppliant maintaining the counterclaim for $1,276.

As in the main action, His Majesty the King will be entitled to his costs, if he sees fit to claim them.

Judgment accordingly.

1951

Oct. 15, 17, 18
Oct. 19

BETWEEN:

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

AND

NORTHERN EMPIRE THEATRES LIMITED ..... DEFENDANT.

Expropriation—Expropriation Act, R.S.C. 1927, c. 64, ss. 9, 23—Exchequer Court Act, R.S.C. 1927, c. 34, s. 47—Court may award less than amount of Crown's offer.

The plaintiff expropriated property in the settlement of South Porcupine. The action was taken to have the amount of compensation payable to the owner determined by the Court.

Held, that where the evidence in an expropriation case warrants an award of an amount less than that offered by the Information the Court is free to make such an award and is not bound by the terms of the offer.

2. That where the amount of the compensation to which the Court finds the defendant is entitled is less than the amount tendered by the Information the defendant is entitled to interest from the date of the expropriation only up to the date of the tender and the plaintiff is entitled to its costs subsequent to the service of the Information.

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

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

J. R. Langdon and *A. H. Laidlaw* for plaintiff.

S. C. Platus K.C. for defendant.

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

1951

THE KING
v.
NORTHERN EMPIRE THEATRES LIMITED

Thorson P.

On the conclusion of the trial the President (October 19, 1951) delivered the following judgment:

The Information exhibited herein shows that the lands described in paragraph 2 thereof were taken by His Majesty for the purpose of a public work under the Expropriation Act, R.S.C. 1927, chap. 64, and that the expropriation was completed by depositing a plan and description of the expropriated property in the office of Land Titles in and for the District of Cochrane in Ontario, in which the lands are situate, on October 16, 1950, pursuant to section 9 of the Act. Thereupon the lands became and are now vested in His Majesty and all the right, title or interest of the defendant therein or thereto was extinguished. Thereafter its claim was converted into a claim to the compensation money under section 23 of the Act which provided that it should stand in the stead of the expropriated property.

The parties have been unable to agree upon the amount of compensation money to which the defendant is entitled and these proceedings are taken for an adjudication thereon. By the Information the plaintiff offered the sum of $12,463, but the defendant by its statement of defence claimed $23,000.

The expropriated property is in the settlement of South Porcupine and consists of three and a half lots at the southwest corner of Main Street and Commercial Avenue, lots 3 and 4 facing on Main Street and lot 5 and the west half of lot 6 on Commercial Avenue. It also includes land that was formerly a lane at the rear of lots 3 and 4 and excludes a strip of land reserved for a lane from the south side of lot 4 and the rear of the east half of lot 5. Altogether it has a frontage of 75·9 feet on Main Street and 175·0 feet on Commercial Avenue. At the date of the expropriation it was all vacant land except the west half of lot 5 which had a small frame dwelling on it facing on Commercial Avenue which had been rented at $15 per month.

Mr. D. J. Mascioli, the managing director of the defendant, which operates moving picture theatres in Timmins, South Porcupine, Ansonville, New Liskeard and Sudbury, stated that the defendant acquired the lots in 1937 from Mr. Anthony Mascioli, a director of the defendant, who had bought them in his own name but on its behalf in

1936 from 3 separate owners, at a total cost of $11,910.74, of which $1,010 represented arrears of taxes from 1929 to 1935. Subsequently, arrangements for closing the lane at the rear of lots 3 and 4 and opening a new lane out of the south side of lot 4 and the rear of the east half of lot 5 were made with the Municipality of Tisdale, of which the settlement of South Porcupine is a part, which were concluded in 1944. Since then the defendant has held the property as a single unit. The property was acquired by the defendant for use in the future as a site for a moving picture theatre along more modern lines than the one which it now operates in South Porcupine when it should become necessary to do so and to ward off competition from any newcomer in the theatre business. It was a measure of foresight and protection. The defendant assembled the group of lots and the lane as a unit so that it would be able to build a theatre long enough for stores and a substantial lobby at the front and an adequate seating area behind it all on one floor so that it would not be necessary to build a balcony. Mr. Anthony Mascioli said that he could not remember what he had paid the individual owners of the lots, that the sum of $10,900 was the total cost of acquiring the lots including commissions, fees and charges, and that he thought that he had taken the affidavits of value on the transfers to the defendant in 1937. The values thus sworn to by him as an officer of the defendant were $5,000 for lots 3 and 4, $1,300 for lot 5 and $500 for the east half of lot 6, making a total of $6,800. This I take as the defendant's own valuation of the several lots in 1937 when it took them over from Anthony Mascioli. Nothing was ever done with the property prior to the date of the expropriation. No steps were taken towards building a theatre on it and Mr. Mascioli could not, of course, say when in the future the construction of a theatre would be likely, but he did say that the defendant's theatre in South Porcupine, built in 1933, was not adequate, that it had only a very small lobby and limited facilities for its patrons, that they were increasingly going to Timmins to the better theatres there, that the theatre business at South Porcupine had been falling off during the last 2 or 3 years and that these facts tended to accelerate the possibility of building a new theatre in South Porcupine in the near future which could

1951

THE KING
v.
NORTHERN EMPIRE THEATRES LIMITED

Thorson P.

have been within 2 or 3 years. The building would also have been hastened if there were a threat of competition, which was unlikely. An improvement in conditions was another contingency that would have brought the construction nearer to realization.

It is well settled that the owner of expropriated property is entitled to have its market value based on the most advantageous use to which the property is adapted or could reasonably be applied: *The King* v. *Manuel* (1), affirmed by the Supreme Court of Canada. The best statement of this principle, frequently enunciated in this Court, is contained in Nichols on Eminent Domain, 2nd Edition, 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.

The same author also points out, at page 664, that "the tribunal which determines the market value of real estate for the purpose of fixing compensation in eminent domain proceedings should take into consideration every element and indication of value which a prudent purchaser would consider". The Court must also, in accordance with the views expressed by Rand J. in the Supreme Court of Canada in *Diggon-Hibben Ltd.* v. *The King* (2), in addition to the elements and indications of value which a prudent purchaser would consider, take into account every factor of value involved in the concept of value to the owner whether it would affect the judgment of the purchaser or not. But it must not be forgotten that, while consideration must be given not only to the present use of the property but also to its potentialities and prospective advantages, it is only the present value, as at the date of the expropriation, of such potentialities and prospective advantages that falls to be determined: *The King* v. *Elgin Realty Company Limited* (3). And it should also be noted that the onus

(1) (1915) 15 Ex. C.R. 383. (2) (1949) S.C.R. 712.
(3) (1943) S.C.R. 49.

of proof of value in expropriation cases lies on the owner of the expropriated property.

There is no dispute as to some of the advantages possessed by the property. It is two blocks north of the corner of Main Street and Bruce Avenue, the principal intersection in the settlement, Bruce Avenue being its main business street. It is thus reasonably centrally located. Its location also derives some benefit from the fact that it is immediately opposite the new Tisdale Township Municipal Building. Moreover, it has the advantage of being at a corner and having a lane all along its south boundary. There is also the fact that the property, being all held in one unit, lends itself to development, such as for a theatre, that would not be possible on a narrower or shallower piece of land. In addition, the property is served with good roads and water and sewer facilities. All of these considerations are factors of value to be taken into account.

As is not uncommon in expropriation cases there was a sharp conflict of opinion between the experts for the defendant and those for the plaintiff. Evidence and valuations were given for the defendant by Mr. J. E. Sullivan and Mr. J. W. Spooner, both of Timmins, and for the plaintiff by Mr. L. Sauder, Mr. F. Mills, Mr. B. Levinson and Mr. F. A. Holmes, all of South Porcupine. While, generally speaking at any rate, all the experts agreed on the advantages I have referred to and said that they had taken them into account in their valuations there was a sharp disagreement on the uses to which the property could have been advantageously put. Mr. Sullivan thought that by reason of its nearness to the business section and its size it could have been used as a site for a hotel, a motel, a large corner store or an apartment house but that its most advantageous use would have been for a moving picture theatre and stores in conjunction with it. Mr. Spooner was of a similar opinion. He thought that its best use would have been for a modern theatre with stores but that it could also have been used for a mercantile building or a modern hotel. The witnesses for the plaintiff were all of one mind in their opinion that the site could not have been advantageously used for a hotel, a motel, an apartment block or a general store. Mr. Sauder said that the property was outside the business section of the

1951

THE KING
v.
NORTHERN EMPIRE THEATRES LIMITED

Thorson P.

settlement and not a good site for any business. The others took a similar view. Mr. Mills thought that the site was not suitable for a hotel, a motel, an apartment block or a general store and Mr. Levinson considered it a poor location for any of these purposes. These witnesses know the situation in South Porcupine thoroughly and I have no hesitation in accepting their opinion. I cannot imagine any prudent person embarking upon any of these suggested developments in view of existing conditions. Such uses of the property may be put to one side. The view taken by the Court of the expropriated property and its surroundings confirms this opinion. This leaves only the suitability of the property for the use for which it was acquired, the likelihood of its being put to such use in the future and its value, as at the date of the expropriation, in the light of the likelihood or otherwise of such use.

Aside from the suggestions by Mr. D. J. Mascioli that certain factors tended towards the acceleration of the construction of a new theatre the evidence against the likelihood of such construction in the near future was overwhelming. Mr. Sullivan for the defendant saw no immediate need of a new theatre but a possible need in the future in 10 or 15 years and no need at all if South Porcupine did not boom. Mr. Spooner did not venture any opinion on the subject. But the witnesses from South Porcupine were clear in their opinions. While Mr. Sauder agreed that the most advantageous use of the property would have been for a theatre, he could not see any demand for a new theatre in 1950 and could not see how another theatre would ever be a paying proposition. The theatre business in South Porcupine was not good for a number of reasons which he enumerated. Mr. Mills thought that the property might have possibilities as a theatre site in the future and that its best use would have been to keep it vacant until needed for a new theatre, but said that there was no need of another theatre in South Porcupine at the present time and could not see any need for the next five years or for 10 years unless there was further development. Mr. Levinson said that there was no need of a new theatre now or in the future, that the present theatre was adequate for South Porcupine and that it could not support another one. Mr. Holmes

was of the opinion that there was no need of a new theatre now or in the future. Under the circumstances, while I agree that the expropriated property would have been a suitable site for a moving picture theatre I think that the evidence is conclusive that the likelihood of its use for such purpose in the near future was very remote.

Before I consider the specific valuations of the experts I should review the evidence relating to general business conditions in South Porcupine and the state of the real estate market there and also refer to such evidence of sales as was given.

There was a difference of opinion as to business conditions in South Porcupine. There is no doubt that improvements have taken place there in recent years, such as the paving of streets and sidewalks, the improvement of highways, the extension of water and sewer facilities, the construction of a new municipal building and a new school, the erection of some new business buildings and the renovation of others and some extensions in the residential and business sections. The population of the settlment has grown from 3,112 in 1937 to 4,301 in 1950. But it cannot be said that business conditions in South Porcupine were good. This was admitted by Mr. Sullivan. The gold mining industry was having difficulties, miners were hard to get, mining costs were going up, there were occasional rumours of shutting down mines and the industry was continuously asking for higher prices for gold. Mr. Spooner was more optimistic. He said that the number of mines had increased and that they would continue in production for another 20 years and that South Porcupine was progressing. While Mr. Sauder thought that the mines in the South Porcupine area were good for another 30 years he could not see why South Porcupine would ever become much larger or that business in it would improve. It was too close to Timmins and its residents were increasingly going there for shopping and business purposes. Mr. Mills said that the condition of the gold mines was on the decline during the past 10 years, that this had an adverse effect on South Porcupine and that business conditions there were not good. Mr. Holmes thought that business had been bad there for the past 5 years and could not see any prospect of improvement. Mr. Levinson stated that business conditions had been

1951

THE KING v. NORTHERN EMPIRE THEATRES LIMITED

Thorson P.

very poor since 1942. In my opinion, the settlement is in a condition of uncertainty and living in the shadow of the future when the mines will in due course be depleted.

The evidence on the state of the real estate market in South Porcupine was also conflicting. Mr. Sullivan could not give any percentage of increase in land values in 1950 over 1937 but said that "probably land like that was 3 or 4 times its former value". He could not come closer than that. This was only a guess. On cross-examination he admitted that market values in the settlement were only fair and that the condition of the real estate market was quiet. Mr. Spooner expressed the opinion that property values in South Porcupine had increased by from 100 per cent to 150 per cent from 1937 to 1950 but admitted that they had been going down since 1946. The evidence of the plaintiff's witnesses was in sharp conflict. Mr. Sauder, who has lived in the settlement since 1911, said that there was no real estate market in 1950 especially for vacant land and that the situation had been the same for 4 or 5 years during which time there had been only 4 or 5 sales. In his opinion, the value of vacant land was not as high in 1950 as it had been in 1937. There had been a boom in 1937, which had started in 1936 and lasted a year or two, since which time there had been a slump in land values up to the present. I formed a favourable opinion of Mr. Sauder as he gave his evidence and am satisfied that he gave a true picture of real estate conditions in South Porcupine. Mr. Mills, whose knowledge of land values in the settlement is extensive, said that the demand for land was very low and on the downward grade since 1945 and was of the opinion that there had been very little change, if any, in land values in 1950 as compared with 1937. They were about the same. There had been no enhancement in values. He produced a graph showing a decline in the number of land transfers during the past few years. Mr. Levinson, who also impressed me favourably as a person who knew the situation as it really was, said that real estate conditions in South Porcupine in 1950 were very poor, that there had been an improvement in 1945, 1946 and 1947, but that after that there had been a recession and that, except on Bruce Avenue, vacant land in South Porcupine had decreased in value in 1950

as compared with 1937. There had been very little new construction, only 24 new units in the past 5 years. Mr. Holmes also stated that real estate conditions in South Porcupine had been terrible for 5 or 6 years and did not see any prospect of improvement.

There was very little evidence of actual sales of property in South Porcupine. Mr. Sullivan admitted that there were not many sales and only two sales were cited by Mr. Spooner. One of these was a sale of 56 feet on the south side of Bruce Avenue to Sam Bucovetsky Limited in 1947 for $8,500. Of this property 40 feet was used as the site of a new store and 16 feet was sold for $2,800. The second sale was of 50 feet on the north side of Bruce Avenue near the corner of Main Street to Mr. E. Grant in 1950 for $5,000. Particulars were given by Mr. Mills of a third sale of 100 feet with a 14 room building on it at the corner of Crawford Street and Bloor Avenue in 1949 or 1950 for $7,000.

I now come to the specific valuations made by the various experts. Mr. Sullivan valued the property at $1.60 per square foot for an area of 13,256 square feet making a total valuation of $21,209.60. Mr. Spooner built up his valuation in an elaborate manner. He took the sale to Sam Bucovetsky Limited as a base, assumed that the frontage of the expropriated property was equal in value to that of the Bucovetsky property, worked it out at $1.48 per foot for a depth of 100 feet, multiplied this by 75·9 feet, giving $11,233, added 38 per cent for the additional depth of the lots on Main Street by reason of the lots on Commercial Avenue, amounting to $4,268, added a further $3,000 for corner influence, making a total of $18,501. To this he added 25 per cent for what he called utility or plottage value, amounting to $4,625, and $1,000 for the building, making a total of $24,126. Then he took the sale of the Grant lot as a base, which worked out at $100 per foot, multiplied this by 75·9 feet, giving him $7,590, adding 38 per cent for depth, $2,884, and $3,000 for corner influence, making a total of $13,474. Then he assumed that the expropriated property had a value one-third greater than that of the Grant property, amounting to $4,491, making a total of $17,965, to which he added 25 per cent

1951

THE KING v. NORTHERN EMPIRE THEATRES LIMITED

Thorson P.

for plottage, amounting to $4,491, and $1,000 for the building, making a total of $23,456. The average of these two totals came to $23,791 from which he arrived at his valuation of $23,000. He said, after much hesitation, that he thought he could have sold the property in 1950 for $23,000. It struck me that he did not have much confidence in this opinion.

The valuations put forward by the experts for the plaintiff were in sharp contrast. Mr. Sauder valued the lots making up the expropriated property individually at a total of $3,400 and the building, which was in a dilapidated condition, at $1,152, making a total of $4,552. In his opinion, the market value of the property would be increased considerably if it was taken as one block of land and he put its value as a unit at twice the amount of the total of the values of the separate lots, namely, at $6,800, to which he added $1,152 for the building, making a total of $7,952. But, in his opinion, the highest amount that the property could have been sold for in October, 1950, was $6,000. Mr. Mills valued the lots individually at $3,405 and the building at $1,050, making a total of $4,455, and put a value of two and a half times that amount for its value as a unit, making a valuation of $11,137. He could not explain why he had done this, nor can I. It was his opinion that the highest amount for which the property could have been sold in 1950 was $5,000. Mr. Levinson valued the lots and building individually at a total of $3,200 to $3,300 which he increased by 50 per cent because of the property being in one unit, making his valuation come to $4,800 or $4,900. He did not think he could have sold the property in 1950 and doubted whether he could have got over $5,000 for it. Finally, Mr. Holmes put a valuation on the lots taken individually at a total of $3,765 and $750 for the building, making a total of $4,515, and added 100 per cent as their increased value as a unit, making his valuation come to $7,530. He thought it would have been difficult to sell the property in 1950 at a reasonable price.

I have no hesitation in rejecting the valuation made by Mr. Sullivan. In the first place, land in this part of the country is never sold on the basis of a price per square foot. Mr. Sullivan had never made such a sale or heard

of one. All sales are on the basis of a price per foot of frontage. Moreover, Mr. Sullivan had no basis at all for his valuation. He could not support it by any evidence of sales of comparable property. He had no record of any such sales and did not know of any. His valuation of the property should be dismissed as worthless. Likewise, I am of the view that Mr. Spooner's valuation was grossly excessive. There was a basic error in his assumption that the frontage of lots 3 and 4 of the expropriated property was equal in value to that of the Bucovetsky property or even that of the Grant property. These properties faced on the main business street of the settlement whereas the expropriated property was outside the business section. All the witnesses from South Porcupine were definitely of the view that each of the properties on Bruce Avenue was much more valuable per foot of frontage than lots 3 and 4 of the expropriated property and I agree with them. Then Mr. Spooner had no right to add both 38 per cent for depth and 25 per cent for plottage and his addition of $3,000 for corner influence was wholly arbitrary. In my judgment, the acceptance of Mr. Spooner's valuation or anything like it could not possibly be justified.

I greatly prefer the evidence and opinions of the witnesses for the plaintiff to those of Mr. Sullivan and Mr. Spooner. I have already mentioned that I was favorably impressed by Mr. Sauder and Mr. Levinson. As I listened to their evidence and that of Mr. Mills and Mr. Holmes the impression grew on me that these men really knew the situation in South Porcupine and were giving the Court a true account of it. In my judgment, their opinion of what the property could have been sold for in 1950, namely, $5,000 or at the most $6,000, ought to be accepted. There is one other factor to be considered. Counsel for the defendant stressed the difficulty of assembling lots into a unit that would be adequate in length and width as a site for a theatre and evidence was put forward that there was no other site. I find it difficult to accept this evidence that no other suitable site could be found. Mr. Sauder said that he could assemble a block of 125 feet frontage and 94 feet in depth with some buildings on it partly vacant that would have to be wrecked that would be just as good a site

1951

THE KING v. NORTHERN EMPIRE THEATRES LIMITED

Thorson P.

for a theatre as the expropriated property or better. And Mr. Holmes also thought that he could find a suitable location.

As I view the evidence that I consider credible, I find myself unable to arrive at an estimate of value equal to the amount of the plaintiff's offer of $12,463 contained in paragraph 4 of the Information and I am faced with the question whether I may make an adjudication in a sum less than the amount of such offer. I found myself in a similar situation in an expropriation case which I heard in Regina in 1943. There I had some doubt that I could make such an award and did not do so. On further consideration of the matter on my return to Ottawa I came to the conclusion that there was no bar to such a course if the evidence justified it. There are two ways in which the amount of compensation money to which the owner of expropriated property is entitled can be determined. One is by agreement and the other by adjudication and the two are exclusive of one another. Where proceedings are taken for an adjudication as is the case here it is the duty of the Court to follow the rules laid down by the Exchequer Court Act, R.S.C. 1927, chap. 34, for adjudicating upon claims. Under that head of the Act section 47 provides as follows:

> 47. The Court, in determining the amount to be paid to any claimant for any land or property taken for the purpose of any public work, or for injury done to any land or property, shall estimate or assess the value or amount thereof at the time when the land or property was taken or the injury complained of was occasioned.

As I read this section, it is the duty of the Court to estimate the value of the expropriated property as at the date of the expropriation and to make an award accordingly. This necessarily implies an adjudication based on evidence. It follows, I think, that an award of a larger amount than the Court thinks is warranted by the evidence would not be an adjudication based on the evidence. It was urged that the Court could not go below the amount of the offer by reason of the fact that in paragraph (*b*) of the prayer of the Information a declaration is sought that the sum of $12,463 is sufficient and just compensation but the answer to that is that paragraph (*c*) asks that it may

be declared "what amount is a sufficient and just compensation". This declaration is sought in case the prior one is not granted and I can see no reason why the amount declared to be sufficient and just should not just as possibly be less than the amount offered as more. Nor can the statement that the Crown is willing to pay a certain amount bind the Court. When the offer is not accepted the road is clear and there must be an adjudication by the Court without regard to its amount. I am, therefore, of the opinion that where the evidence in an expropriation case warrants an award of an amount less than that offered by the Information the Court is free to make such an award and is not bound by the terms of the offer.

In the present case, I have come to the conclusion that the amount of compensation money to which the defendant is entitled is less than the $12,463 offered by the Information but, in view of recent judgments of the Supreme Court of Canada, more than the amount of $6,000, which is all that the property could have been sold for, to cover factors of value to the owner in excess of realizable money value, such as the special purpose for which the defendant acquired the property. Since the amount of such value to the owner is a matter of uncertainty it would also seem that the case falls within the principle stated by Rand J. in *Diggon-Hibben Ltd.* v. *The King* (1) and calls for an allowance of 10 per cent for forcible taking, which I consider an unwarranted bonus that ought to be abolished.

In my opinion, the sum of $11,000 would be sufficient compensation to the defendant for the loss of the expropriated property and adequate to cover every factor of value that the property possesses, including its value to the owner and including the allowance of 10 per cent for forcible taking, and I make an award accordingly.

In view of the fact that the amount of compensation money to which the Court finds the defendant entitled is less than the amount tendered it by the Information the defendant is entitled to interest at the rate of 5 per cent per annum from the date of expropriation only to March 28, 1951, the date of the tender.

And for a similar reason the plaintiff is entitled as against the defendant to its costs subsequent to the service of the Information.

(1) (1949) S C R. 712.

1951

THE KING v. NORTHERN EMPIRE THEATRES LIMITED

Thorson P.

There will, therefore, be judgment declaring that the property described in paragraph 2 of the Information is vested in His Majesty the King as from October 16, 1950; 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 $11,000 with interest thereon at the rate of 5 per cent per annum from October 16, 1950, to March 28, 1951; and that the plaintiff is entitled to costs as indicated to be taxed in the usual way.

Judgment accordingly.

1951

Oct. 16
Nov. 9

BETWEEN:

HALLET AND CAREY (B.C.) LIMITED ..... } APPELLANT;

AND

MINISTER OF NATIONAL REVENUE, RESPONDENT.

Revenue—Excess Profits Tax—Excess Profits Tax Act 1940, s. 3—"Continuation of a previous business"—Appellant liable for excess profits tax even though previous definite business was formerly part of a business carried on in more than one province—Handling of additional line of produce by appellant does not alter fact that there is a continuation of the previous business—"Substantial interest" does not mean a majority or controlling interest—Appeal dismissed.

Held: That s. 3 of the Excess Profits Tax Act contemplates a previous definite business which is carried on by a new company and that it can make no difference for the purposes of the Act whether that previous definite business was formerly part of a greater business carried on in more than one province.

2. That the fact that the new company deals in lines of merchandise in addition to those dealt in by the previous company does not make it any the less a continuation of the previous business.

3. That "substantial interest" does not mean a controlling or majority interest.

APPEAL under the Excess Profits Tax Act.

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

A. S. Gregory for appellant.

R. V. Prenter 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 (November 9, 1951) delivered the following judgment:

The appellant was assessed under sec. 3 of the Excess Profits Tax Act for excess profits tax in respect of the taxation year ending 31st March, 1947, notwithstanding that this was its first year of operation. The Minister in giving his decision, from which this appeal is brought, held that the appellant was not entitled to the exemption set out in the proviso to said sec. 3, in that the appellant, being a new company, (*a*) continued the business formerly operated by Hallet and Carey Limited of Winnipeg, Manitoba; and (*b*) that the same person or persons has or have a substantial interest in both corporations. The appellant disputes both points.

Hallet and Carey (B.C.) Limited was incorporated under the British Columbia Companies Act on the 2nd July, 1946, and its first fiscal period ended on 31st March, 1947. The company was incorporated for the purpose of purchasing that part of the business of Hallet and Carey Limited of Winnipeg, which was being carried on in British Columbia. The appellant argues that since it did not purchase the whole business of Hallet and Carey Limited, but only that part carried on in British Columbia, it cannot be said that "the new business is . . . a continuation" of a previous business. I am unable to agree with this view, and think that there is nothing in the section to support it. I am unable to find that the business of Hallet and Carey (B.C.) Limited is not a continuation of the previous business in British Columbia carried on by Hallet and Carey Limited, through a branch office at Vancouver. It seems to me that the Act contemplates a previous definite business which is carried on by a new company, and that it can make no difference for the purposes of the Act whether that previous definite business was formerly part of a greater business carried on in more than one province. The emphasis is on the *continuation* of a *previous business.*

1951

HALLET AND CAREY (B.C.) LIMITED v. MINISTER OF NATIONAL REVENUE

Sidney Smith D.J.

A further point made was that the business of Hallet and Carey Limited carried on in British Columbia related to the buying, selling and exporting of wheat, barley, oats and rye, whereas the present business of appellant consists of dealing in other lines of merchandise in addition to the above. Nevertheless, the company's main business is what it took over from Hallet and Carey Limited, and I do not think the additional produce it now handles makes it any the less a continuation of the previous business. It is, in my view, substantially the same business, and not a substantially different business.

Lastly, appellant says that the same person or persons as shareholders of Hallet and Carey Limited had not and did not have at the time of commencement of the business of the appellant, a substantial interest in both corporations. I did not understand it to be contested that Mr. K. A. Powell had a substantial interest in the Winnipeg business. The argument was that he had not a substantial interest in appellant company, because he owned only 49 per cent of its shares. But I held the other day in *Manning Timber Products Limited* v. *Minister of National Revenue* (1) that this percentage of shares was a substantial interest, within the section.

The appeal must be dismissed with costs.

Judgment accordingly.

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(1) (1951) Ex. C.R. 338.

1951

Oct. 18
Nov. 9

BETWEEN:

LIONS GATE LUMBER COMPANY LIMITED ..... APPELLANT;

AND

MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Revenue—Excess Profits Tax—Excess Profits Tax Act, 1940, s. 15A, s. 1 of First Schedule—Combined capital of appellant and parent companies not substantially greater than capital employed by parent company—Appeal dismissed.

Held: That "capital employed in any year or fiscal period" as defined by s. 1 of the First Schedule to the Excess Profits Tax Act is different from capital employed "at the time of incorporation" and "Prior to incorporation" as set forth in s. 15A of the Act.

2. That since the appellant company acquired all but four dollars of its capital employed at date of incorporation from the working capital of its parent company the combined capital of the two companies was not substantially greater than that of the parent company prior to incorporation of appellant.

APPEAL under the Excess Profits Tax Act.

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

A. S. Gregory for appellant.

D. 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 (November 9, 1951) delivered the following judgment:

This is an appeal from the decision of the Minister of National Revenue, dated 12th June, 1950, affirming the assessments for excess profits tax in respect of the taxation years ended 31st March, 1946, 1947 and 1948, upon the ground that they were made in accordance with sec. 15A of the Excess Profits Tax Act in that the sum of the capital employed by the Appellant Company and by Allison Logging Company Limited (the parent company) at the time of incorporation of the Appellant Company was not substantially greater than the capital employed by Allison Logging Company Limited prior to the incorporation of Appellant.

1951

LIONS GATE LUMBER COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE

Sidney Smith D.J.

The date of incorporation of Appellant was 14th March, 1942, and on 24th February, 1943, the Allison Company obtained control of Appellant. Appellant contends that the time of its incorporation within sec. 15A is the latter date, while Respondent says it is the former. It is not necessary in the present case, as I see it, to reach a conclusion on this point.

But assuming that it was 24th February, 1943, then at that date the capital employed by Appellant Company was $49,604, of which $49,600 came from the working capital of the Allison Company, and $4 from outside sources. Therefore it seems to me that however one looks at this matter the combined capital of the two was not substantially greater than that of the Allison Company prior to incorporation of Appellant.

Appellant however points to sec. 1 of the First Schedule in the Act and says that the Allison capital must be considered as of 1st December, 1941, if computed in accordance with that section. But with respect, I do not see that the section has any relevance here. It defines "capital employed in any year or fiscal period", while sec. 15A is concerned with capital employed "at the time of incorporation" and "prior to incorporation". This seems to me to be quite a different thing.

I would dismiss the appeal with costs.

Judgment accordingly.

BETWEEN:

1951

Oct. 9
Nov. 16

MANNING TIMBER PRODUCTS LIMITED ..... APPELLANT;

AND

MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Revenue—Excess Profits Tax—Excess Profits Tax Act, 1940, s. 3—"Substantial interest" not a majority interest—Appeal dismissed.

Held: That "substantial interest" in s. 3 of the Excess Profits Tax Act, 1940, does not mean controlling or majority interest.

1951

MANNING TIMBER PRODUCTS LIMITED v. MINISTER OF NATIONAL REVENUE

APPEAL under the Excess Profits Tax Act.

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

D. M. Gordon, K.C. for appellant.

J. G. Ruttan 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 (November 16, 1951) delivered the following judgment:

This appeal is taken under Section 14 of the Excess Profits Tax Act, which makes Sections 40-87 of the Income War Tax Act apply to Excess Profits Tax. Sections 60-63 of the latter Act govern appeals. Appellant was assessed for 1947 tax under Section 3 of the Excess Profits Tax Act. Section 3 makes all corporations subject to tax; but the proviso thereto exempts from tax during their first year of operations companies that (1) Carry on a substantially new business with substantially new assets; or (2) Began business after the 26th June, 1944 (as the appellant did) *unless* the Company continued a previous business (as the appellant did) *and* some person or persons had a "substantial interest" both in the previous business and in the new business.

The appellant first began business in 1947 and so was exempt under the latter provision unless caught by both the exceptions to the exemption. Admittedly the appellant is caught by the exception dealing with continuous business, so the question is: Is it also made out that someone had a "substantial interest" both in its business and in the business that it continued?

The case set up by the Crown is that one Fred Manning and his wife held all the shares but one in Manning Lumber Mills Ltd., (whose business appellant continued) and that the Mannings and the Lumber Company held 49 per cent of the shares in the appellant company. Appellant concedes that the Mannings had a "substantial interest" in the old Company, but denies that the holders of 49 per cent in the new (appellant) company had a "substantial interest" in it within the meaning of the proviso to Section 3. Appellant says that whatever meaning would be given

1951

MANNING TIMBER PRODUCTS LIMITED v. MINISTER OF NATIONAL REVENUE

Sidney Smith D.J.

the term "substantial interest" if it had *no* context, the context here shows that in Section 3 "substantial interest" must mean "main interest" according to all established canons of construction, and by "main interest" appellant means controlling or majority interest, i.e., over 50 per cent of the shares.

I have given appellant's powerful argument my best consideration but I am simply unable to see that there is any context here which would enable me to construe "substantial" as "majority". I am fortified in this view by the following passage from the speech of Viscount Simon in *Palser* v. *Grinling* (1):

> What does "substantial portion" mean? It is plain that the phrase requires a comparison with the whole rent, and the whole rent means the entire contractual rent payable by the tenant in return for the occupation of the premises together with all the other covenants of the landlord. "Substantial" in this connection is not the same as "not unsubstantial", i.e., just enough to avoid the de minimis principle. One of the primary meanings of the word is equivalent to considerable, solid or big—It is in this sense that we speak of a substantial fortune, a substantial meal, a substantial man, a substantial argument or ground of defence. Applying the word in this sense, it must be left to the discretion of the Judge of fact to decide as best he can according to the circumstances in each case, the onus being on the landlord. If the judgment of the Court of Appeal in Palser's case were to be understood as fixing percentages as legal measure, that would be going beyond the powers of the judiciary. To say that everything over 20 per cent of the whole rent should be regarded as a substantial portion of that rent would be to play the part of a legislator. If Parliament thinks fit to amend the Statute by fixing percentages, Parliament will do so. Aristotle long ago pointed out that the degree of precision that is attainable depends on the subject matter. There is no reason for this Court to differ from the conclusion reached in these two cases that the portion was not substantial, but this conclusion is justified by the view taken on the facts, not by laying down percentages of general application.

If I were to accede to appellant's argument I would be doing precisely what Lord Simon says I must not do, viz., playing the part of a legislator.

It seems to me I have no alternative but to dismiss the appeal with costs.

Judgment accordingly.

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(1) (1948) 1 All E.R. 1 at 11.

1951

Sept 26
Nov. 7

BETWEEN:

MINISTER OF NATIONAL REVENUE, APPELLANT;

AND

STANLEY MUTUAL FIRE INSURANCE COMPANY ..... } RESPONDENT.

Revenue—Income—Income Tax—Income War Tax Act 1927, c. 97, s. 4 (g) —Mutual insurance company—Appellant not a mutual company in true sense—Appeal allowed.

Held: That respondent company is not entitled to exemption from income tax as provided by s. 4 (*g*) of the Income War Tax Act since it is not a mutual company in the true sense.

2. That since the reserve or surplus belongs to the company only it must be regarded as a profit or gain to it and not to its members.

3. That the respondent is not merely an agency or trustee for its members but is a separate corporation distinct from them.

APPEAL from the decision of the Income Tax Appeal Board.

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

D. E. Mundell, K.C. and *F. J. Cross* for appellant.

W. B. Francis, K.C. and *D. E. Gauley* for respondent.

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

HYNDMAN D.J. now (November 7, 1951) delivered the following judgment:

This is an appeal by the Crown from a judgment of the Tax Appeal Board (1). The case was heard before the chairman, the Honourable Mr. Justice Graham, and Mr. Monet and Mr. Fisher. The chairman and Mr. Monet held that the company being a mutual insurance company was not liable for the tax assessed against it, Mr. Fisher dissenting.

The facts are fully set forth in the very able reasons of the chairman, with whom Mr. Monet concurred, and for the record I deem it convenient to repeat the salient facts as found in the said judgment as follows:

The appellant is a provincial mutual company incorporated under the laws of the Province of New Brunswick and carries on the business of a fire insurancec company in the rural areas of that province. It

(1) (1950-51) 3 Tax A.B.C. 96.

1951

MINISTER OF NATIONAL REVENUE v. STANLEY MUTUAL FIRE INSURANCE COMPANY

Hyndman, D.J.

insures against loss by fire, lightning or explosion upon farm or other non-hazardous property under the premium note plan subject to the provisions of and regulations under the statutes of the Province of New Brunswick . . . the business is not wholly confined to the insurance of churches, schools or other religious, educational or charitable institutions and, therefore, does not come within the saving provision of section 4, paragraph (g), of the Income War Tax Act.

Under the laws of the Province of New Brunswick such a mutual company can have no shareholders but each person, partnership or corporation insured under a policy issued by such company shall be a member thereof.

The company operates under what is described as the premium note plan. Under such a plan a person taking out a policy of insurance gives a promissory note for the premium based on the tariff of rates fixed by the Board of Directors. At the time of giving the premium note, he makes a cash payment of a prescribed percentage of the total amount.

The member's liability is limited to the extent of the amount of the premium note signed by him. The statute provides that if the down payments received are more than sufficient to pay all losses and expenses during the continuance of the policy, then any surplus shall become part of the reserve fund. If, however, the company requires more money to meet losses or expenses it may make further assessments on each member, limited by the balance owing under his premium note. Again any surplus resulting therefrom shall become part of the reserve fund.

In addition to the first payment it is provided that the insurer shall make an annual assessment on the premium notes of not more than twenty-five per cent nor less than five per cent until the reserve fund reaches the sum of $500 for each $100,000 in force on the first $1,000,000 of risk carried and $3,000 on each additional $1,000,000 in force thereafter.

Section 249(2) of the Insurance Act, Chapter 44, R.S.N.B. 1937, provides that this reserve fund may be used to pay off such liabilities of the insurer as are not provided for out of ordinary receipts.

The Act further provides that the reserve fund shall be the property of "the insurer as a whole" and no member shall have a right to claim any share or interest therein in respect of any payment contributed by him towards it; nor shall such funds be applied or dealt with by the insurer or the Board other than in paying its creditors, except on the order of the Governor in Council.

Section 230(2) of the Act provides that "every application and policy shall bear the words 'mutual company—subject to pro rata distribution of assets and losses.'" These words must be printed or stamped in large type and in red ink at the head of the policy.

Neither the charter of the company nor the statutes pertaining to such a company make any specific provision for the distribution of any surplus in the event that the company is wound up. However, it will be noted that the Act declares the reserve fund to be the property of the "insurer as a whole" . . .

The New Brunswick Winding-up Act, Chapter 97, R.S.N.B. 1927, is made applicable under its provisions "to all companies heretofore or hereafter incorporated by the legislature or under the authority of any statute of this province". Section 19 reads as follows:

"If there is any surplus of the funds realized from the assets of the company, after the payment of all the creditors thereof in full, the same shall first be devoted to the adjustment of the rights of the contributories among themselves, and afterwards shall be distributed pro rata among the contributories."

"Contributory" as defined by the said Act means every person liable to contribute to the assets of a company in the event of the same being wound up and includes a creditor or stockholder of a company. (The Chairman observed: "There have been judicial decisions that would expand on some occasions the meaning of the word "contributory" to include a member. However, in the case under review a member of the appellant company is one who is insured against certain risks under a policy issued by the company. It is apparent, therefore, that in either case the word "contributory" would be limited to the members and policy holders at the time of the winding up of the company.")

The chairman further goes on to say:

The issue then in this appeal can be simply stated: Does the surplus over payment of losses and expenses of administration constitute profits subject to income tax under the provisions of the Income War Tax Act?

Such surplus in the case of the appellant can arise only from

(*a*) payment in of membership fees of $1 per member,

(*b*) initial payment of a percentage of premium notes,

(*c*) further assessments of an added percentage of amount still owing under premium notes, if deemed necessary, and

(*d*) special assessments of a percentage of amount of premium notes in order to build up reserve to at least a minimum amount required under the provisions of the statute.

There is one other source of revenue, and that is interest earned on the investment of funds lying in the reserve. It is admitted that such interest is income within the meaning of the Income War Tax Act and as such is taxable. This appeal is, therefore, concerned only with the revenue derived from membership fees and assessments.

The majority judgment of the Board held that the respondent company is a genuine mutual company and its operations bring it within the principles governing mutual companies with regard to taxation as laid down by the authorities hereinafter referred to, and that consequently it could not be held that there is any "profit" or "gain" or "income" within the ambit of the Income Tax Acts. Mr. Fisher on the other hand was of the opinion that the company was not a truly genuine mutual company and therefore any surplus after payment of losses and expenses was properly taxable.

I have studied most of the important decisions bearing on the subject of mutual concerns and find that, running through each one of them, is the fact or assumption that the contributories or members are also the owners of the

1951

MINISTER OF NATIONAL REVENUE v. STANLEY MUTUAL FIRE INSURANCE COMPANY

Hyndman, D.J.

surplus or reserve funds set up obviously for protection against future possible claims or liabilities; that there is complete identity between the contributory members and the participators, in other words genuine mutuality.

Up to the end of 1946 section 4(*g*) of the Income War Tax Act read as follows:

> 4. The following income shall not be liable to taxation hereunder.
>
> (*g*) the income of mutual corporations not having a capital represented by shares, no part of the income of which inures to the profit of any member thereof and of life insurance companies, except such amount as is credited to shareholders' account.

But in 1946 an amendment was enacted applicable to the 1947 income tax year and section 4(*g*) now reads as follows:

> 4. The following income shall not be liable to taxation hereunder.
>
> (*g*) the income of mutual corporations not having a capital represented by shares, no part of the income of which inures to the profit of any member thereof except mutual insurance companies that do not derive their premiums wholly from the insurance of churches, schools or other religious, educational or charitable institutions.

I am in agreement with the Chairman of the Board that in the case of a purely mutual concern the wording of the said amendment fails to accomplish its purpose for the reason that there can be no "profit" or "income" as defined by the Income Tax Act except, however, income such as interest on investments and returns from business carried on with persons outside the membership of the company.

The leading case relied on by the respondent herein is *New York Life Insurance Co.* v. *Styles* (1). Lord Herschell at p. 408 said:

> The chief part of the surplus shewn by the accounts to which I have referred is paid, or, as the company alleges, is returned to the policy-holders (that is, to members of the company) as bonuses. The remainder of the surplus is carried forward as funds in hand to the credit of the general body of the members of the company. These bonuses are not paid in cash, but the amount of the same is deducted from the next premium due or is added to the policy. The only question raised by the case is whether the surplus, so far as the same is derived from the premium income received from members of the company in respect of their policies, is a profit or a gain of the company liable to be assessed to income tax under Schedule D of the 16 & 17 Vict. c. 34.

(1) (1889) 14 A.C. 381.

Again, at p. 409 Lord Herschell goes on to say:

In the case before us certain persons have associated themselves together for the purpose of mutual assurance; that is to say, they contribute annually to a common fund, out of which payments are to be made in the event of death to the representatives of the persons thus associated together. These persons are alone the owners of the common fund, and they, and they alone, are entitled to the management of it. It is only in respect of his membership that any person is entitled to be assured a payment upon death.

Lord MacNaghten at p. 412 said:

I do not think that that decision compels your Lordships to hold in a case like the present, where the business is a mutual undertaking pure and simple, that persons who contribute in the first instance more that is wanted, and then get back the difference, are earning gains or profits, and so liable to income tax.

In *Jones* v. *South-West Lancashire Coal Owners' Association* (1), Viscount Cave, L.C., quoting from Lord Watson in the *Styles* case, said:

When a number of individuals agree to contribute funds for a common purpose, such as the payment of annuities, or of capital sums, to some or all of them, on the occurrence of events certain or uncertain, and stipulate that their contributions, so far as not required for that purpose, shall be repaid to them, I cannot conceive why they should be regarded as traders, or why contributions returned to them should be regarded as profits. That consideration appears to me to dispose of the present case. In my opinion, a member of the appellant company, when he pays a premium, makes a rateable contribution to a common fund, in which he and his co-partners are jointly interested, and which is divisible among them, at the times and under the conditions specified in their policies. He pays according to an estimate of the amount which will be required for the common benefit; if his contribution proves to be insufficient he must make good the deficiency; if it exceeds what is ultimately found to be requisite, the excess is returned to him.

Viscount Dunedin at p. 833 said:

The whole case for the Crown rests on the idea that because in a single year the premiums received exceed the sums paid in respect of the losses in that year the balance represents a profit. It represents no such thing. It is simply a sum of money which is carried forward in order that it may be available to meet excessive losses in a future year, or, if it is found in the end to be redundant, be returned to the shareholders either in the form of reduced premiums or of cash. The basis of the Crown's case seems to me to fail, apart from the fact that I agree that the present case is absolutely ruled by the case of *New York Life Insurance Co.* v. *Styles*.

In *Municipal Mutual Insurance Ltd.* v. *Hills* (2), Lord Warrington at p. 65 said:

Mutual insurance business is now perfectly well known. It consists essentially in the association of a number of persons who insure each

(1) (1927) A.C. 827 at 830. (2) (1932) 147 L.T.R 62.

1951

MINISTER OF NATIONAL REVENUE v. STANLEY MUTUAL FIRE INSURANCE COMPANY

Hyndman, D.J.

other against certain risks by contributing by way of premiums to a common fund to be used, together with further contributions if necessary, for the purpose of indemnifying any member or members who may have suffered injury in consequence of a risk insured against, any surplus being either carried forward or used to reduce future premiums *as the members may determine.*

Lord Macmillan at p. 67 said:

> The principle on which the surpluses arising in the conduct of a mutual insurance scheme are not taxable as profits is now well understood.

At p. 68 Lord Macmillan further stated:

> The cardinal requirement is that all the contributors to the common fund must be entitled to participate in the surplus and that all the participators in the surplus must be contributors to the common fund; in other words there must be complete identity between the contributors, and the participators. If this requirement is satisfied the particular form which the association takes is immaterial.

The decision in *M.N.R.* v. *Saskatchewan Cooperative Wheat Producers, Ltd.* (1), is clearly distinguishable from the present case inasmuch as it was there held that the corporation never became the owners of the reserve, but acted merely as trustees or agents of the farmers who contributed the grain, and for which they were given certificates of ownership. Furthermore, the company's books showed it was a debtor to the individual farmers who contributed to the reserve.

The real issue in this case, therefore, is whether or not the Stanley Company is, in fact and in essence, a genuine mutual company as defined by the leading authorities. It is true that the New Brunswick Act creating the company insists on it being called a "mutual company." But in my opinion so calling it does not of necessity make it such, at least in relation to legislation of the Dominion Government such as the Income Tax Acts. As I stated above, the essential features of mutual concerns is that the contributors to the funds must also be participators in the surplus. The very Act under which the company operates expressly and in clear language states that "the reserve funds shall be the property of the insurer as a whole and no member shall have a right to claim any share or interest therein in respect of any payment contributed by him towards it." It may be said that in the case of a winding up the then members would be entitled to their appropriate

(1) (1930) S.C.R. 402.

shares of any assets remaining after payment of all claims. That position, however, applies to any ordinary company or association.

It is also my view that there is a clear distinction between the "company" and the shareholders. It is not a case of the members together insuring the individual members against fire. The insurer is the "company" and not the body of the members. There is no provision for a reduction of premiums as the reserve increases as is the case in purely mutual concerns. The premiums are fixed or based upon the estimated or predicted losses and expenses each year and not in reference to the size of the reserve. As I see it, the very same conditions are taken into consideration in fixing premium rates as in the case of an ordinary fire insurance company. The reserve is built up, and properly so, for future use in the event of excessive losses and is expressly to be utilized for the payment of creditors. The members are liable only to the extent of the full amount of the premium notes and no further. It also provides that payments may be made on the order of the Governor in Council, but I think that is simply for extra protection against possible enterprises or investments which might be considered questionable or improvident. There is nothing in the legislation which provides or implies any payment to members or reduction of their premiums. If I am right in this view then it seems to me there is no real distinction between this so-called mutual company and any ordinary fire insurance company. It is merely a device or method to obtain cheaper insurance than can be got from the line companies. Beyond that I can see no substantial difference between them.

I think a fair question to ask is to whom does the reserve fund belong? Someone must own it. If by the Act under which the corporation was created, no member shall have a right to claim any share or interest therein in respect of any payment contributed by him towards it, and it can be used only to pay creditors, then it must follow that it belongs to the company only, and any mutuality disappears. Such surplus then, in my opinion, must be regarded as a profit or a gain to it and not to the members. It is not, therefore, a mutual company in the true sense and does not fall within any of the exemptions

1951

MINISTER OF NATIONAL REVENUE v. STANLEY MUTUAL FIRE INSURANCE COMPANY

Hyndman, D.J.

provided for in the Income War Tax Act, and consequently taxable. In my view, the company is not merely an agency or trustee for the members, but a separate corporation distinct therefrom.

I agree substantially with the reasoning of Mr. Fisher in his dissenting judgment, with the greatest deference to the very able reasoning of the learned Chairman of the Board.

For the above reasons, therefore, I would allow the appeal and confirm the assessments of the Minister. The appellant is entitled to costs if it insists upon same.

Judgment accordingly.

1951

Oct. 24-26
Nov. 23

BETWEEN:

MORRIS ROBERT PALMER and NATHAN PALMER carrying on business under the name of HULL PIPE AND MACHINERY CO. — SUPPLIANTS;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

Crown—Petition of Right—Action for damages for breach of covenant of peaceable enjoyment of leased premises and appropriation, use and destruction of property—Exchequer Court Act, R.S.C. 1927, c. 34, ss. 18, 19(b), 19(c)—Quebec Civil Code, Articles 1053, 1608, 1612, 1641, 1642, 1657—Public Works Act, R.S.C. 1927, c. 166, ss. 3(a), 39—Petition of right lies for breach of contract—Crown in right of Canada not affected by Civil Code of Quebec—Lease of expropriated property must be under authority of Governor in Council—Permissive occupancy of expropriated property by former owner or tenant a tenancy at will—Petition of right does not lie against Crown in right of Canada for tort except negligence.

The suppliants occupied premises in Hull which they used as a storage yard for scrap and other materials. They had been tenants of the City of Hull until the expropriation of the property by the Crown in March, 1947, and continued in occupation without an express lease, paying rent monthly first to the City and then to the Crown. The property was part of the site for the new National Printing Bureau. On August 30, 1949, the Department of Public Works served the suppliants with a notice to quit and deliver up possession on September 1, 1949. At that date Miron & Freres, a Montreal firm, had commenced the excavation of the site, under a contract with the Crown, and the premises occupied by the suppliants was part of

the land to be excavated. The suppliants made no effort to move any of their material and Miron & Freres, having obtained authority from the Chief Architect of the Department of Public Works to put the suppliants out of the way of the excavation, pushed the suppliants' scrap and other materials to one side of the premises with a bulldozer and when it fell into the hole created by the steamshovel as the excavation proceeded carried it away and dumped it into a nearby gully. The suppliants sought to recover damages for breach of covenant of peaceable enjoyment of the premises and appropriation, use and destruction of their property.

Held: That the Crown in right of Canada cannot be affected by a provision of the Civil Code of Quebec.

2. That a lease of expropriated property must be under the authority of the Governor in Council.

3. That where lands have been taken by His Majesty under the Expropriation Act and the former owner or tenant is permitted to remain in occupation of them without a lease made under the authority of the Governor in Council the occupancy of such former owner or tenant, whether rent is paid or not, is a tenancy at will.

4. That a tenancy at will is determinable at the will of either the landlord or the tenant by either party expressly or impliedly intimating to the other his wish that the tenancy should be put to an end.

5. That no petition of right lies against the Crown in right of Canada to recover damages for any tort or "faute" committed by an officer or servant of the Crown, even in the course of his duty or employment, except that of negligence.

6. That on the facts there was no merit in the suppliants' claim for damages for breach of contract.

7. That there was no wrongful conduct on the part of the Chief Architect in authorizing the contractor's engineer to get the suppliants out of the way of the excavation.

PETITION OF RIGHT to recover damages for breach of covenant of peaceable enjoyment of leased premises and appropriation, use and destruction of property.

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

R. Quain K.C. for suppliants.

A. Labbé K.C. and *J. Desrochers* for respondent.

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

THE PRESIDENT now (November 23, 1951) delivered the following judgment:

At the time of the events on which the suppliants, who were dealers in iron and metals, base their amended claim for $33,540 they were in occupation of the premises described in paragraph 6 of the petition of right, being part of lot 6 in Ward Three in the City of Hull. The premises

1951

PALMER v. THE KING

Thorson P.

were used by them as a yard for the storage of their stocks of various kinds of scrap metal and miscellaneous machinery, equipment and other material. Prior to March 19, 1947, they had been tenants of the City of Hull at a rental of $15 per month but on that date the property, together with other property, was taken by His Majesty under the Expropriation Act, R.S.C. 1927, chap. 64, for the purpose of a public work, namely, as a site for the new National Printing Bureau. The expropriation, of course, extinguished the rights of the City of Hull as owner and the suppliants as lessees of the property but the suppliants continued to pay rent to the City of Hull at the same rate as previously, the last of such payments being by a cheque for $15 payable to the order of the City of Hull—Building Committee, dated June 7, 1949, and marked "June Rent". On July 1, 1949, the suppliants sent the City of Hull—Housing Committee a cheque for $30, marked "Rent—June & July 1949", but this was returned to them by the secretary of the Committee on July 13, 1949, with the information that the property had been expropriated by His Majesty the King and the advice that any further dealings regarding it should be made directly with the present owner. On July 14, 1949, the suppliants wrote to the Committee again saying that they had not received any notice of change of ownership, sending a cheque for the July rent and asking for advice as to where future payments of rent were to be made. To this the secretary of the Committee replied on July 18, 1949, returning the cheque and informing the suppliants that future payments of rent should be made by cheque payable to the Receiver General of Canada and forwarded to Mr. Theo Lambert of 9 Fortier Street, Hull. Accordingly, the suppliants, on July 18, 1949, sent a cheque for $15 payable to the order of the Receiver General of Canada, dated July 18, 1949, and marked "July Rent", to Mr. Lambert who subsequently delivered it to the office of Mr. C. S. Boucher, the lease agent and collector of revenue in the Chief Architect's branch of the Department of Public Works. There the cheque was endorsed as follows:

> Pay to the Order of the Bank of Canada for credit of the Receiver General of Canada on account of the Department of Public Works.
>
> Leases and Accommodation,
> Chief Architect's Branch.

and duly deposited. On August 9, 1949, the suppliants sent a similar cheque to Mr. Lambert marked "August Rent" and on September 7, 1949, a similar one marked "Sept. Rent Blvd. Sacre Coeur". These cheques were delivered by Mr. Lambert to Mr. Boucher's office and endorsed and deposited in the same way as the cheque dated July 18, 1949. No acknowledgment of the receipt of any of the cheques was ever given to the suppliants and no written or parol lease of the premises was ever made. All that transpired between the parties was the sending of the cheques and their endorsement and deposit as aforesaid.

Prior to the date of any of these cheques a contract had been entered into between Miron & Freres, a company having its place of business at Montreal, and His Majesty, represented by the Minister of Public Works of Canada, for the excavation for the new National Printing Bureau. The specifications for the excavation were dated April 4, 1949, and the formal contract was dated November 5, 1949, but it was agreed that the contract was in effect at the time of the events hereinafter referred to and that Miron & Freres were operating under it. The premises occupied by the suppliants formed part of the land to be excavated under the contract and it was a term of it that all the excavation should be completed by or before September 29, 1949. While the precise date when Miron & Freres started the work of excavation is not established it is clear that by the end of August, 1949, they had been working at least about 10 days and were steadily approaching the suppliants' premises. All this was known to them.

On August 23, 1949, Mr. J. M. Somerville, Secretary of the Department of Public Works, under the seal of the Department, addressed a notice to the suppliant Morris Palmer to quit and deliver up possession of the premises on or before September 1, 1949, but this was not served until August 30, 1949, at 4.30 p.m. The next day, August 31, 1949, the said suppliant got in touch with his solicitor, Mr. H. Soloway of the firm of Mirsky, Soloway and Mirsky, and protested against the short period of the notice. Mr. Soloway telephoned Mr. Somerville to the effect that, in his opinion, the notice requiring his clients to vacate in two days was unreasonable. After he had pointed out that the notice, although dated on August 23, 1949, had

1951

PALMER v. THE KING

Thorson P.

not been served until August 30, 1949, Mr. Somerville agreed that 2 days seemed to be an unreasonable time within which to expect the suppliants to move. Mr. Soloway then pointed out that there was material and equipment on the premises and that the cost of moving would be considerable. He promised to try to get information as to the quantity of material, the cost of moving it and the time required for the purpose and communicate with Mr. Somerville in a day or two or as soon as he could and said that in the meantime they would leave everything as it was which Mr. Somerville said would be satisfactory. Mr. Soloway's letter of August 31, 1949, to Mr. Somerville confirmed the telephone conversation and said that his firm was going into the matter with their clients and would communicate with him within the course of a day or two and advise him of their position. Mr. Soloway did not communicate with Mr. Somerville until September 9, 1949. In the meantime, two events had happened. The suppliant Morris Palmer had consulted Hugh M. Grant Limited for an estimate of the cost of moving the material on the lot and had informed Mr. Soloway that Mr. Grant had estimated that there were from 800 to 1,000 tons of material on the premises and that it would cost approximately $5 per ton to move it. The second event was that some one representing Miron & Freres had broken down the fence around the property. When Mr. Soloway telephoned Mr. Somerville on September 9, 1949, he gave him the information about the material and cost of moving it, complained of the breakage of the fence and claimed compensation for the suppliants. Mr. Somerville said that he would take the matter up with Mr. C. G. Brault, the Chief Architect of the Department, and that the matter was to be left in abeyance until further communication. That compensation was claimed by Mr. Soloway before there was any damage to the suppliants' property apart from the breakage of the fence is plain from his letter of September 9, 1949, Mr. Somerville's letter of September 13, 1949, to Mirsky, Soloway & Mirsky written without prejudice and without any admission of liability for any payment whatsoever asking what compensation the suppliants would accept for immediate vacation of the

premises and Mr. Soloway's reply on September 14, 1949, setting forth the claim for $19,200 then made, which was after Miron & Freres had pushed through the fence a second time to make a roadway for their trucks but before they had done any substantial damage with their bulldozer.

I now come to the evidence relating to the damage to the suppliants' property done by Miron & Freres and shall deal first with the account given by the suppliant Morris R. Palmer. He said that on September 13, 1949, he got a call from one of his men that Miron & Freres were going through their property, bulldozing their material and taking it away, that he went to the yard, stood in front of the bulldozer, which one of the brothers of Miron & Freres was driving, put his hand up and told the driver that he could not come through, that the driver did not say anything but kept coming along with the bulldozer and knocked him over, that he jumped on the bulldozer and told the driver to come down and fight it out with him, that the driver refused to get off and his brother pulled him off, that the driver just kept on coming through and pushing the material into piles, some on the lot and some off and that all the material in the piles was then pushed back against the south fence of the property. Mr. Palmer then said that after that Miron & Freres started excavating with a steam shovel starting from the north and working south, that when the excavation reached where the material was piled up it fell into the hole being excavated by the shovel, was picked up by it along with the gravel and placed on large trucks operated by Miron & Freres, and then taken away by them to a dump nearby. The material thus dealt with consisted of sorted cast iron, scrap steel, scrap brass, re-inforcing rods, angle irons, structural beams, steel plate, some good machinery, two overhead cranes, a shear, a wooden building, a float and other material. The material was so mixed up with earth that it was not economical to sort it out. The fence surrounding the property was also pushed down and destroyed. By the time the excavation was completed all the material had been picked up by the shovel and taken away and there was nothing left.

The suppliant Nathan Palmer told substantially the same story. He said that about 10.45 p.m. on September 1, 1949, after a telephone call from an employee, he went to

1951

PALMER v. THE KING

Thorson P.

the yard and saw Miron & Freres' bulldozer there, that it had gone right through the fence at the east end of the yard, that on the following day his brother and he went to the yard and saw the bulldozer pushing their material off part of the lot. He confirmed what his brother had said about trying to stop the bulldozer and then said that after he had stopped his brother from trying to fight with the driver he asked the driver "What is the idea of pushing all the material into one heap?" to which he replied "I phoned the government and they gave me permission to remove everything on the premises". He said that he could not do anything and that the driver went on with the bulldozing pushing all the material up to the east end of the yard at the south side. The excavating came later starting from the north and west. According to Mr. Nathan Palmer, the bulldozer came on the scene again and pushed the material to where the steam shovel was working, it lifted the material up, loaded it on Miron & Freres' gravel loaders which took it away and dumped it into a gully or ravine nearby, and this continued until all the material was gone.

Both suppliants gave September 13, 1949, as the date of the bulldozing of the material by Miron & Freres. But I find that it happened at a later date. Mr. C. G. Brault, the Chief Architect of the Department of Public Works, was examined for discovery as an officer of the Crown and part of his examination was selected by counsel for the suppliants and put in as part of their case. In this part Mr. Brault, with an entry in his diary in mind, said that on September 12, 1949, Mr. Maher, the engineer for Miron & Freres, came to his office and told him that Palmer was still on the site and that he said to him "Well, wait a little while and see what happens", that Mr. Maher came to him again on various dates and said "Not only has he not left the premises but he is still piling stuff on the site, he is going to delay the contract", that one morning he phoned and said "What are we going to say?", that he told Mr. Maher to get the suppliant out of his way, saying "Try not to do any damage to his property, but if he interferes with your contract and you warned him, put him out of the way". Mr. Brault said further "The only reason I moved him out is that he was in the way of the excavation". Later in his examination, Mr. Brault said that the first

time he spoke to Mr. Maher was on September 12, 1949, and that Mr. Maher came in again on September 16, 1949, and said that the man was still on the site. This points to the bulldozing having been done not earlier than September 17, 1949. That the bulldozing did not happen on September 13 is confirmed by Mr. Soloway's letter of September 14, 1949, in which only a small claim is made for damages done on September 14, 1949, by bulldozing through the fence and property. This indicates that the pushing of the material into piles had not happened until later. This is confirmed by the fact that Mr. Soloway did not make a complaint of that damage until September 19, 1949, as appears from his letter of that date.

Counsel for the suppliants put forward three claims on their behalf, the first for damages for breach of an alleged obligation of the Crown to allow them peaceable enjoyment of the premises leased to them, the second for compensation for the wrongful taking and destruction of their property and the third for damages for injurious affection of it. No evidence of the quantum of damages alleged to have been sustained was adduced, it having been agreed that if it should be held that the suppliants are entitled to relief there would be a reference to the Registrar for an enquiry and report as to damages.

There is no basis for the third claim. To succeed in it the suppliants would have to bring themselves within section 19(*b*) of the Exchequer Court Act, R.S.C. 1927, chap. 34, which reads as follows:

> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—
>
> (*b*) Every claim against the Crown for damage to property injuriously affected by the construction of any public work;

This has no application where the whole of a person's property has been expropriated and he has no remaining property that can be injuriously affected. In my view, it has no bearing in a case such as this.

To succeed in either of the first two claims the suppliants must bring themselves within section 18 of the Exchequer Court Act as it stood at the time of the events complained of and prior to its amendment in 1949. It then read as follows:

> 18. The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any

1951

PALMER v. THE KING

Thorson P.

matter which might, in England, be subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown.

The first claim may be outlined as follows, namely, that by the sending of the cheques and their endorsement and deposit the suppliants became tenants of the premises under a monthly lease from the Crown, that such a lease imported a covenant by the Crown to allow them peaceable enjoyment of the promises, that as tenants under a monthly lease they were entitled to a month's notice to quit, that the notice served on them on August 30, 1949, was a nullity, that their eviction by having their material pushed off the premises and the premises excavated was a breach of the covenant of peaceable enjoyment and, therefore, a breach of contract for which a petition of right to recover damages lies under section 18 of the Exchequer Court Act.

There is no doubt that a petition of right to recover damages for breach of contract lay against the Crown in England. This was settled beyond dispute in *Thomas* v. *The Queen* (1). It also lies against the Crown in Canada: *Windsor and Annapolis Railway Co.* v. *The Queen et al* (2).

Before the suppliants can establish a breach of contract by the Crown they must show that there was a lease of the premises by the Crown to them and an obligation by the Crown to allow them to have peaceable enjoyment of the premises during the currency of such lease.

This raises an important question. What is the nature of the occupancy of expropriated property by its former owner or tenant after its expropriation by the Crown but before a valid express lease or other disposition of it has been made? It has been my view, since I became a member of this Court, that such an occupancy, being permissive only, was merely a tenancy at will, but I have not been able to find any decision directly on the point.

Counsel for the suppliant submitted that since the property is in the Province of Quebec the obligations and rights of the parties in respect of it must be determined by the law of Quebec and he relied on certain articles of the

(1) (1874) 10 Q.B. 31. (2) (1886) 11 A.C. 607.

Civil Code under the title relating to lease and hire as well as certain decisions in the Quebec courts. Without setting out in detail the articles of the Code to which he referred I shall summarize his argument. He assumed, in the first place, without reference to any article of the Code in support of his assumption, that the payment by the suppliants of the cheques for July, August and September rent and their endorsement and deposit by some one in Mr. Boucher's office constituted a lease of the premises by the Crown and then relied on the provision in Article 1612 that the lessor is obliged by the nature of the contract to give peaceable enjoyment of the thing leased during the continuance of the lease, and on Article 1641 which gives the lessee a right of action to recover damages for violation of the obligations arising from the lease, or from the relation of lessor and lessee. He also referred to Articles 1657 and 1642 in support of his submission that, since the term of the lease was uncertain but the rent was payable at a fixed amount per month, it must be considered a monthly lease and cited several decisions in the Quebec Courts that a month's notice was required in order to terminate a monthly tenancy. From this he argued that since the notice served on August 30, 1949, was not a month's notice it was a nullity and the suppliants could disregard it, that they had a right to remain on the premises until their lease was validly terminated, that the entry of Miron & Freres with the authorization of Mr. Brault and their actions constituted a wrongful eviction of the suppliants and a breach of the Crown's obligation to allow them peaceable enjoyment, and that this was a breach of contract for which they are entitled to damages.

Whether the suppliants have any legal right to relief on this claim is a matter that must be decided by the Court strictly according to the law. On the facts, the claim is without merit. They knew that their occupancy of the premises was a precarious one and that termination of it was imminent. Mr. Morris Palmer knew about the expropriation and its purpose a long time before August 30, 1949. My recollection is that he said that he did not know of it until some time in 1948, but, whether that is so or not, he certainly did know about it around June, 1949. The expropriation of property in the area for the new

1951

PALMER v. THE KING

Thorson P.

printing bureau was common knowledge but Mr. Palmer's knowledge was specific and particular. In June, 1949, a surveyor had broken down the fence and entered the premises to put survey posts down. When Mr. Palmer saw him he was told that the survey was for the printing bureau. Mr. Palmer also knew before August 30, 1949, that the excavation by Miron & Freres had started. They had then been working about 10 days. He could see that the excavation was marching in from the north and that the suppliants' premises would be wanted almost immediately. Yet the suppliants made no attempt to move. On the contrary, between July 1, 1949, and September 15, 1949, they put additional material on the lot. After Mr. Morris Palmer received the notice of August 30, 1949, he protested to his solicitor who obtained an extension of time. This was not an indefinite extension until the question of compensation was settled, as suggested by Mr. Soloway, but only a short one so that the suppliants would have a longer time within which to move. The suppliants then obtained an estimate from Mr. Grant of the cost of moving and then did nothing further. Mr. Morris Palmer admitted that before September 13, 1949, he had time to save part of the material and that it would not have taken much time to pull such things as the float away, but he made no attempt to save any of the material. He spoke to his lawyer about it who told him that he just had to "sit pat". In my opinion, it would not be unfair to conclude that when the suppliants ascertained the cost of moving the material they decided to do nothing about it, thinking that they had caught the Government in a technical failure to give them sufficient notice and that they might force a payment of compensation through the Government's need for immediate possession so that Miron & Freres could get on with their contract. After an enquiry as to what the suppliants' claim was and their exorbitant demand for $19,200 made in their solicitor's letter of September 14, 1949, the Department of Public Works declined to pay them anything.

Moreover, I am unable to agree with counsel's submission that the obligations and rights of the parties in respect of the premises were fixed by the Civil Code of Quebec. It cannot be so for the property belongs to the

Crown in right of Canada. Article 9 of the Code provides that no act of the legislature affects the rights or prerogatives of the Crown, unless they are included therein by special enactment. This must, of course, refer to the Crown in right of the Province of Quebec. *A fortiori* the Crown in right of Canada cannot be affected by a provision of the Civil Code of Quebec. It is a well established principle that it is beyond the competence of any provincial legislature to impose an obligation on the Crown in right of Canada or confer a cause of action against it. It follows that Article 1612 of the Civil Code of Quebec cannot impose an obligation on the Crown in right of Canada to give peaceable enjoyment to an occupant of its property. Nor can Article 1641 give such occupant any cause of action against the Crown in right of Canada. Only Parliament has jurisdiction to impose any such obligation or confer any such cause of action and it has not done so. On the contrary, as counsel for the respondent pointed out, Parliament has settled the manner in which leases of property that has been expropriated may lawfully be made. He referred to section 3(*a*) of the Public Works Act, R.S.C. 1927, chap. 166, which defines "public work" as meaning and including any work or property under the control of the Minister of Public Works and then to section 39 which provides:

> 39. Notwithstanding anything in this Act, or in any other Act contained, any public work not required for public purposes may be sold or leased, under the authority of the Governor in Council; and the proceeds of such sale or lease shall be accounted for as public moneys: Provided that such public work shall be so sold or leased by tender or at auction after public advertisement, unless it is otherwise authorized by the Governor in Council.

On the strength of this enactment counsel argued that while, under section 9 of the Act, the Minister of Public Works has certain powers of management of public works, which includes property expropriated for a public purpose, such as the property in question, the disposition of such property by sale or lease must be under the authority of the Governor in Council, that such authority is an essential requirement imposed by Parliament for the issue of a valid lease, and that since there was no such authority in the present case there could not be a valid lease of the premises

1951

PALMER v. THE KING

Thorson P.

to the suppliants. I agree. This is basically the same principle as that applied in *St. Ann's Island Shooting and Fishing Club Ltd.* v. *The King* (1) and in *The King* v. *Cowichan Agricultural Society* (2) where it was held that a lease of surrendered Indian lands was void because it had been made without the direction of the Governor in Council, as section 51 of the Indian Act required, notwithstanding the fact that the rent specified by the lease had been paid and accepted ever since 1912.

I am also of the opinion that, even on the facts, it should not be held that a lease of the premises from the Crown to the suppliants was implied in the endorsement and deposit of the cheques for the July, August and September rents. The practice of the Department of Public Works in leasing lands, which Mr. Boucher outlined in detail from the application for a lease to its final execution, is against such implication. The suppliants never applied for a lease and it is plain that if they had done so their application would not have been approved in view of the fact that the property was part of the site for the new printing bureau and would soon be required for it. And it would be unreasonable to impute to the Crown an intention to lease the lands to the suppliants for a defined term from the fact that the suppliants paid the rents to Mr. Lambert and he brought them to Mr. Boucher's office. Mr. Lambert had simply been asked to collect the rents from the properties that had been expropriated in the Hull district at the same rate as the tenants had paid the former owners, and when Mr. Boucher received the suppliants' cheques he had no knowledge of when the property would be required and there was no report of the payments to the Deputy Minister or the Minister before their endorsement and deposit. The fact is that it was standard practice in the Department to permit a former owner or tenant to remain in occupation of the expropriated property until a formal lease was executed and it has been the policy of the Department in recent years not to execute a lease until after the compensation money has been paid. The proper inference to be drawn in the case of the suppliants is that their occupancy of the premises was merely permissive

(1) (1950) Ex. C.R. 185; (1950) S.C.R. 211.

(2) (1950) Ex. C.R. 448.

until the land was required for the purpose for which it was expropriated. Under the circumstances, counsel for the respondent contended that when the property was expropriated on March 19, 1947, the suppliants' interest in it as tenants of the City of Hull was wholly extinguished leaving them only with a claim for compensation, which is not made in this case, that thereafter they remained in possession without paying any rent to the Crown, which was the owner of the property, but continued to pay rent to the City of Hull, that the payment of the rent for July, August and September was never brought to the attention of the Minister or Deputy Minister and could not constitute an implied lease, that the Leases and Accommodation Division of the Department of Public Works had no authority to make a lease and that the endorsement and deposit of the cheques could not take the place of the authority of the Governor in Council. In my view, these contentions are all sound. It follows that the suppliants did not have a monthly lease of the premises.

What then was the nature of their occupancy? I am satisfied that it was not a tenancy on sufferance since that implies an occupancy without the consent of the Crown, which was not the case. Moreover, such a tenancy implies laches on the part of the owner and, since the Crown cannot be guilty of laches, there cannot be a tenancy on sufferance against the Crown: *vide* Co. Litt. 57 *b*; Woodfall's Law of Landlord and Tenant, 24th Edition, page 286 and 20 Hals. (2nd Edition), page 122.

This leaves only a tenancy at will. Counsel for the respondent contended that the suppliants were really only "squatters" on the premises but with this I do not agree. They had permission to occupy the premises without any term being fixed, but that is all that they had. That is a tenancy at will: *Doe d. Hull* v. *Wood* (1). And, of course, a tenancy at will is determinable at the will of either the landlord or the tenant by either party expressly or impliedly intimating to the other his wish that the tenancy should be put to an end: 20 Hals. (2nd Edition), page 120.

The precarious nature of a permissive occupancy such as that of the suppliants, falling short of the "occupation par simple tolérance", referred to in Article 1608 of the

(1) (1864) 14 M. & W. 681 at 685.

1951

PALMER v. THE KING

Thorson P.

Civil Code, is recognized in the Province of Quebec. For example in *Cité de Montréal* v. *Poulin* (1) it was held that a tenant whose lease was terminated by expiration of the term stated in the lease and who, notwithstanding notice of expropriation one year before the expropriation, continued to occupy the premises from day to day with the permission of the landlord, who in view of the proposed expropriation had refused to continue the lease, had only a precarious occupation which could be put an end to at any day. Vide also *Marleau* v. *Cedars Rapid Manufacturing and Power Company* (2) and *Gravel* v. *Cité de Montréal* (3) where it was held that mere permission to occupy could not be regarded as equivalent to a written lease or even a verbal one.

I find, therefore, that where lands have been taken by His Majesty under the Expropriation Act and the former owner or tenant is permitted to remain in occupation of them without a lease made under the authority of the Governor in Council the occupancy of such former owner or tenant, whether rent is paid or not, is a tenancy at will.

This finding disposes of the suppliants' first claim. Since their occupancy of the premises was a tenancy at will the notice to quit and deliver up possession served on August 30, 1949, was a valid determination of it. Consequently there was no breach of any covenant of peaceable enjoyment, even if such a covenant could have been implied, and no breach of contract on which to found a petition of right.

I now come to the suppliants' second claim. It is alleged in the petition that the respondent appropriated and used, destroyed and caused to be destroyed property of the suppliants on their premises by employing bulldozers to plow under their entire inventory as well as certain fixtures and immovable property. There is no evidence to support the allegation of appropriation and use. The suppliants' property was never taken or used by the respondent. It was simply pushed out of the way of the excavation by Miron & Freres and then taken away by them and dumped into a nearby ravine or gully. It never at any time came into the possession of the Crown. This leaves only the

(1) (1904) Q.R. 26 S.C.R. 367.
(2) (1918) 24 R N. n.s. 1.
(3) (1898) 4 R. de J. 143.

allegation that the respondent destroyed and caused to be destroyed the suppliants' property. There is a serious defect in this pleading in that the destruction of the goods is ascribed to His Majesty which, strictly speaking, would warrant a finding against the suppliants since it could not be held that His Majesty had committed a wrongful act. But I shall deal with the claim as if it had been alleged that the conduct complained of had been done by an officer or servant of the Crown in the course of his duty or employment.

There are several answers to the suppliants' claim. The first is that if any wrongful act was done to the suppliants' property it was not done by any officer or servant of the Crown but by Miron & Freres, a firm of independent contractors, for whose wrongful conduct, if there was any, the Crown is not liable. The suppliants have commenced an action against Miron & Freres and the question whether there was any wrongful conduct on their part is to be determined in that action.

This Court has only to ascertain whether there was any wrongful act on the part of an officer or servant of the Crown in the course of his duty or employment and, if so, whether a petition of right would lie against the Crown in respect of it. I assume that the officer of the Crown whose conduct is the subject of the suppliants' complaint, although not specified in the pleadings, is Mr. C. G. Brault, the Chief Architect in the Department of Public Works. I find no wrongful conduct on his part. There is no doubt that he instructed Mr. Maher, the engineer of Miron & Freres, to get the suppliants out of the way of the excavation. He frankly admitted that he had given such instructions. He said that he had been informed that Mr. Palmer had been properly notified to vacate, which was the case, and that when Mr. Maher first came to his office to tell him that Palmer was still on the site he told him to "wait a little while and see what happens" and that it was only after Mr. Maher had called him again on various dates that he instructed Mr. Maher to push him off the site, to ge him out of their way. I have already referred to his specific directions, "Try not to do any damage to his property, but if he interferes with your contract and you warned him, put him out of the way". He explained that

1951

PALMER v. THE KING

Thorson P.

it was his duty to give these instructions since otherwise the Crown would have been penalized for delaying the contract with Miron & Freres. It is plain from Mr. Brault's actions, as well as from Mr. Somerville's extention of time, that it was only after it became apparent that the suppliants had no intention of moving their property off the premises or giving up possession of them that Mr. Brault gave his instructions. That the suppliants intended to block Miron & Freres is shown by Mr. Morris Palmer's statement that prior to September 13, 1949, his brother and he took turns at night with the view of not letting Miron & Freres pass through their property. Under all the circumstances, I find that there was nothing unlawful in Mr. Brault's instructions.

But even if Mr. Brault's conduct could not be justified and his instructions to Miron & Freres' engineer were unlawful and constituted a wrongful interference with the suppliants' property so that he could himself have been successfully sued for trespass, or other tort, the suppliants could not, under the existing state of the law, have any redress from the Crown, for it is settled law that no petition of right lies against the Crown in right of Canada to recover damages for any tort, or "faute", to use the language of Article 1053 of the Civil Code of Quebec, committed by an officer or servant of the Crown, even in the course of his duty or employment, except that of negligence, for which a claim may be made under section 19(*c*) of the Exchequer Court Act.

This immunity of the Crown from responsibility for civil wrongs committed by its officers or servants was an inheritance from the law of England as it stood prior to the Crown Proceedings Act, 1947. The question whether a petition of right would lie to recover damages for a tort was first argued in *Viscount Canterbury* v. *Attorney General* (1). There the suppliant claimed damages for injury to property suffered by him through a fire alleged to be due to certain servants of the Crown. In the course of his judgment denying the claim Lord Lyndhurst L.C. said, at page 321:

> It is admitted that, for the personal negligence of the Sovereign, neither this nor any other proceeding can be maintained. Upon what

(1) (1843) 1 Ph. 306.

ground, then, can it be supported for the acts of the agent or servant? If the master or employer is answerable upon the principle that *qui facit per alium, facit per se*, this would not apply to the Sovereign, who cannot be required to answer for his own personal acts. If it be said that the master is answerable for the negligence of his servant, because it may be considered to have arisen from his own misconduct or negligence in selecting or retaining a careless servant, that principle cannot apply to the Sovereign, to whom negligence or misconduct cannot be imputed, and for which, if they occur in fact, the law affords no remedy.

The matter was next discussed in *Tobin* v. *The Queen* (1). There the commander of one of the Queen's ships employed in the suppression of the slave trade on the coast of Africa seized a schooner belonging to the suppliant, which he suspected of being engaged in slave traffic, and, it being inconvenient to take her to a port for condemnation in a Vice-Admiralty court, caused her to be burnt. It was held by Erle C.J., in a judgment exhaustively reviewing the authorities, that a petition of right will not lie to recover compensation for a wrongful act done by a servant of the Crown in the supposed performance of his duty, nor to recover unliquidated damages for a trespass, the remedy for the wrong, if any, being against the person who did it. The law was finally settled in *Feather* v. *The Queen* (2). There a petition of right was taken for damages for the alleged unauthorized use of the suppliant's patent by the Crown. While the case was decided against the suppliant on another point, the court was invited to pronounce an opinion on the subject under review. After a thorough argument the court declined to dissent from the decision in *Tobin* v. *The Queen* (*supra*), and Cockburn C.J. gave the following comprehensive statement of the reasons why the Crown could not be held responsible for a tort, at page 295:

Not only is there no precedent for a petition of right being entertained in respect of a wrong in the legal sense of the term, but, if the matter is considered with reference to principle, it becomes apparent that the proceeding by petition of right cannot be resorted to by the subject in the case of a tort. For it must be borne in mind that the petition of right, unlike a petition addressed to the grace and favour of the Sovereign, is founded on the violation of some right in respect of which, but for the immunity from all process with which the law surrounds the person of the Sovereign, a suit at law or equity could be maintained. The petition must therefore shew on the face of it some ground of complaint which, but for the inability of the subject to sue the Sovereign, might be made the subject of a judicial proceeding. Now, apart altogether

(1) (1864) 16 C.B. (N.S.) 309. (2) (1865) 6 B. & S. 257.

1951

PALMER v. THE KING

Thorson P.

from the question of procedure, a petition of right in respect of a wrong, in the legal sense of the term, shews no right to legal redress against the Sovereign. For the maxim that the King can do no wrong applies to personal as well as to political wrongs; and not only to wrongs done personally by the Sovereign, if such a thing can be supposed to be possible, but to injuries done by a subject by the authority of the Sovereign. For, from the maxim that the King cannot do wrong it follows, as a necessary consequence, that the King cannot authorize wrong. For to authorize a wrong to be done is to do a wrong; inasmuch as the wrongful act, when done, becomes, in law, the act of him who directed or authorized it to be done. It follows that a petition of right which complains of a tortious act done by the Crown, or by a public servant by the authority of the Crown, discloses no matter of complaint which can entitle the petitioner to redress. As in the eye of the law no such wrong can be done, so, in law, no right to redress can arise; and the petition, therefore, which rests on such a foundation falls at once to the ground.

This has always been accepted as a correct statement of the law of England on the subject as it then was. It was also recognized by the Supreme Court of Canada as applicable in Canada: *The Queen* v. *McFarlane* (1); *The Queen* v. *McLeod* (2).

The doctrine of governmental irresponsibility for the wrongdoing of public servants implicit in the decision in *Feather* v. *The Queen* (*supra*) persisted in England until its abandonment by the Crown Proceedings Act, 1947. In Canada it was substantially modified by a succession of enactments imposing a liability on the Crown for the negligence of its officers or servants while acting within the scope of their duties or employment, at first of a very limited nature but later greatly enlarged, ending in section 19(*c*) of the Exchequer Court Act, as amended in 1938. But apart from this modification in respect of the tort of negligence the doctrine is still part of the law affecting the Crown in right of Canada.

The doctrine that "the proceeding by petition of right cannot be resorted to by the subject in the case of a tort" runs counter to the modern doctrine of the employer's liability for the torts of his servants, and has been the subject of adverse comment by students of the law and others. The eminent English legal historian, Professor W. S. Holdsworth, in his great work, A History of English Law, traced the development of the modern doctrine of employer's liability (Vol. VIII, pp. 472-479) and the history of remedies against the Crown (Vol. IX, pp. 4-45).

(1) (1882) 7 Can. S.C.R. 216. (2) (1883) 8 Can. S.C.R. 1.

He expressed the opinion that the one respect in which the courts had given inadequate recognition to the principle that the subject should have a remedy against the Crown where he had a remedy against a fellow subject was in their treatment of petitions of right and he considered that an obvious failure of justice had arisen from the rule that the modern doctrine of the employer's liability for the torts of his servants was not applicable to the Crown. He attributed the rule to failure on the part of the judges who formulated it to understand properly the true basis of the employer's liability. It does not rest on any theory of *respondeat superior* based on an implied undertaking by the master to answer for the wrongs of his servant, or an express or implied authority given by the master to the servant, or the fiction that the wrong of the servant is the wrong of the master and should be imputed to him under the maxim *qui facit per alium, facit per se,* or fault on the part of the master in the choice of his servant, as appears from the reasoning of the judges, but on grounds of public policy and the imposition by law of a duty "analogous to the duties imposed with various degrees of stringency on the owners of things which are or may be sources of danger to others", as Sir Frederick Pollock put it in his Essays in Jurisprudence and Ethics, page 128. If this basis for the doctrine of employer's liability had been appreciated by the judges as it is now understood it would have been possible to give the subject a remedy against the Crown without doing any violence to the rule that "the King can do no wrong" and would have carried to its logical conclusion the view that although the King was not suable in his own Courts by a subject, he was, nevertheless, since he was the fountain head of justice, "morally bound to do the same justice to his subjects as they could be compelled to do to one another". There would then have been no true reason why a petition of right should not lie to recover damages for a tort. But while it is permissible to point out the fallacies in the reasoning that led to the decision in *Feather* v. *The Queen* (*supra*) and the resulting doctrine of governmental irresponsibility for the wrong-doing of public servants and to agree with such students of the law as Professor Holdsworth that it gave rise to an

1951

PALMER v. THE KING

Thorson P.

obvious failure of justice, the fact remains that the law is settled and it is not open to any court to change it. Only Parliament can do so.

This Court must, therefore, hold that even if Mr. Brault's conduct had been wrongful so that he would himself have been liable for it, which I do not find it to be, the Crown, under the law as it stands, would not have been responsible for it.

Since none of the suppliants' claims can be sustained there must be judgment that the suppliants are not entitled to any of the relief sought by them and that the respondent is entitled to costs.

Judgment accordingly.

INDEX

APPROPRIATION—*War Measures Act, R.S.C. 1927, c. 206—The Compensation (Defence) Act, 1940, 4 Geo. VI, c. 28—Compensation payable for ships appropriated—"Value to the owner"—Matters to be considered in determining value to the owner.*—Under the War Measures Act, R.S.C. 1927, c. 206 respondent appropriated four vessels owned by the claimant or by companies in which the claimant owned all the issued capital stock. By agreement between the parties certain compensation was paid to the claimant at the time of acquisition of the vessels by respondent without prejudice to the claimant to regard such payment as not being full compensation. The matter now comes before the Court by way of reference by the Minister of Justice to have adjudicated the proper compensation payable to the claimant. *Held:* that in ascertaining value in cases of compulsory taking the cost of the acquired property is not conclusive but should be considered. 2. That claimant is entitled to some allowance for services rendered by him during the construction of the vessels by way of inspection, supervision, the purchase of engines and equipment and for securing priorities in obtaining necessary

WORDS AND PHRASES.